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UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA

Report of the Panel

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LIST OF ABBREVIATIONS

AAA	Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act
AI	Avian influenza
ALOP	Appropriate Level of Protection
APHIS	Animal and Plant Health Inspection Service
CCA	Central Competent Authority
CFR	Code of Federal Regulations
China	People's Republic of China
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
FSIS	Food Safety and Inspection Service
HPAI	Highly Pathogenic Avian Influenza
JES	Joint Explanatory Statement
OIE	World Organisation for Animal Health (Office International des Epizooties)
PPIA	Poultry Products Inspection Act
SPS	Sanitary and Phytosanitary
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
US	United States
USC	United States Code
USDA	United States Department of Agriculture
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

I. INTRODUCTION

1.1 On 17 April 2009, the People's Republic of China ("China") requested consultations with the United States 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 1994* ("GATT 1994") and Article 19 of the *Agreement on Agriculture* concerning measures taken by the United States affecting the importation of poultry products from China. In addition, in its consultations request, China indicated that, if it were demonstrated that any such measure is an SPS measure, China also requested consultations with the United States pursuant to Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*SPS Agreement*").[1] China and the United States held consultations on 15 May 2009. However, no mutually agreed solution was found.

1.2 On 23 June 2009, China requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 19 of the *Agreement on Agriculture*, and Article 11 of the *SPS Agreement*.[2]

1.3 At its meeting on 31 July 2009, the DSB established a panel pursuant to the request of China in document WT/DS392/2, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS392/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 16 September 2009, China requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU.

1.6 On 23 September 2009, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Ole Lundby

Members: Mr Felipe Lopeandía
Mr Mohammad Saeed

1.7 Brazil, the European Union[3], Guatemala, Korea, Chinese Taipei and Turkey reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel held its first substantive meeting with the parties on 15 and 16 December 2009. The session with the third parties was held on 16 December 2009. The second substantive meeting was held on 9 and 10 March 2010.

1.9 On 1 October 2009, the United States submitted a request for a preliminary ruling pursuant to paragraph 11 of the Panel's working procedures on whether China had requested consultations on its

[1] *See also* further clarification at footnote 1 to China's Panel Request, WT/DS392/2.
[2] WT/DS392/2, para. 3.
[3] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Communities.

SPS claims. In its oral statement at the first substantive meeting of the Panel with the parties, China also requested a preliminary ruling from the Panel on whether Section 743 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act ("AAA") of 2010 was within the Panel's terms of reference. In a letter of 18 December 2009, the Panel informed the parties that it would not issue a separate decision on the two requests for a preliminary ruling on jurisdiction, but rather would defer its ruling on both requests until issuance of its Report. In response to the Panel's letter, China informed the Panel in a letter dated 7 January 2010 (Exhibit CN-51) that it would not pursue a claim that Section 743 was inconsistent with the United States' WTO obligations in this dispute, but reserved its right to challenge Section 743 in separate dispute settlement proceedings.

1.10 On 3 May 2010, the Panel issued the descriptive part of its Panel Report to the parties. The Panel issued its interim report to the parties on 14 June 2010. The Panel issued its final report to the parties on 26 July 2010.

II. FACTUAL ASPECTS

A. BACKGROUND

2.1 This dispute concerns China's pursuit of access to the US market for poultry. According to China, the possibility to access the US market was cut off by legislation passed by the United States Congress ("US Congress") which, restricted the ability of the United States Department of Agriculture ("USDA") and its agency, the Food Safety and Inspection Service ("FSIS") to use funds allocated by the US Congress for the purpose of establishing or implementing a rule permitting the importation of poultry products from China into the United States.[4]

B. THE MEASURE AT ISSUE

2.2 The measure at issue in this dispute is Section 727 of the AAA of 2009[5] which reads:

> "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[6]

2.3 Section 727 was accompanied by a Joint Explanatory Statement ("JES") which provides the following:

> "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 laws. 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 for action to the 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

[4] The US Congress enacts annual appropriation bills which provide funding for the agencies and programmes previously authorized. The US Congress can determine the terms and conditions under which an appropriation may be used. Provisions in appropriations acts may be intended to prevent or restrict federal agencies from taking certain rulemaking or regulatory actions. *See* Exhibits US-2 and 4.

[5] China has stated that it was only challenging Section 727 of the AAA 2009. *See* China's response to Panel's question 12, and the letter China sent to the Panel on 7 January 2010.

[6] Section 727, AAA of 2009 (Exhibit CN-1).

> certify to export to the U.S. The plan also should include the systemic 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 from China 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."[7]

2.4 As a matter of United States law, a JES serves to explain the purpose of a given provision in an appropriations bill.[8] Section 727 expired on 30 September 2009.

C. THE UNITED STATES' REGIME FOR THE IMPORTATION OF POULTRY

2.5 On 28 August 1957, the US Congress adopted the Poultry Products Inspection Act ("PPIA"), which is set forth in Title 21 of the United States Code ("USC").[9] This statute has been subsequently amended on numerous occasions. In the PPIA, the US Congress sets out the general legal framework governing all aspects of trade in poultry products, both imported and domestically produced.[10] Because poultry, among other food products, falls within the competency of the USDA[11], the US Congress delegated to the Secretary of Agriculture ("the Secretary") the duty to set out detailed rules and regulations relating to the inspection of poultry and poultry products.[12] The Secretary promulgated regulations[13] establishing the conditions under which poultry products are allowed to be imported in the United States[14] which are contained in the US Code of Federal Regulations ("CFR").[15]

2.6 The Secretary has established an "equivalence" based regime for gaining permission to import poultry into the United States. The FSIS, which is an agency of the USDA, implements and enforces the regulations on poultry importation.[16] The FSIS authorizes the importation of poultry products into the United States on a country-by-country basis.[17] Countries wishing to export poultry products to the United States have to first request a determination of eligibility by the FSIS. The FSIS will then

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[7] JES, Division A of AAA of 2009, p. 82. (Exhibit CN-33).

[8] Congressional Research Service, *Conference Reports and Joint Explanatory Statements*, 1 December 2004. p. 7. Exhibit US-58.

[9] United States' first written submission, para. 23.

[10] PPIA, 21 USC § 463. Rules and Regulations. (a) Storage and handling of poultry products; violation of regulations: The Secretary may by regulations prescribe conditions under which poultry products capable of use as human food, shall be stored or otherwise handled by any persona engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited. (Exhibit CN-4).

[11] PPIA, 21 USC § 463 (a)-(c) (Exhibit CN-4).

[12] PPIA, 21 USC § 463 (b) (Exhibit CN-4).

[13] PPIA, 21 USC §§ 463 and 466 (Exhibit CN-4).

[14] 9 CFR § 381.196 (Exhibit CN-6).

[15] The CFR is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the US Government (United States' first written submission, para. 23, footnote 26).

[16] The Animal and Plant Health Inspection Service ("APHIS") is also a USDA agency which has some authority over the importation of poultry into the United States. APHIS is responsible for preventing the introduction and dissemination of animal diseases, including poultry diseases, into the United States. With respect to poultry imports, APHIS's main responsibility is to inspect particular shipments of poultry as they arrive at the border to ensure that they meet APHIS's requirements to prevent the introduction of disease into the United States.

[17] PPIA, 21 USC §466 (Exhibit CN-4), implemented through the rules detailed in 9 CFR § 381.196 (Exhibit CN-6).

establish whether an applicant's poultry inspection system is equivalent to that of the United States in order to allow the importation of its poultry products.[18]

2.7 If the FSIS determines that an applicant country's poultry inspection system is equivalent to that of the United States, it publishes rules allowing the importation of poultry products from that country in the Federal Register. Subsequent to that initial determination, the FSIS also does annual reviews to determine if approved countries' poultry safety standards continue to be equivalent to those of the United States. The FSIS also re-inspects imported products to ensure that they meet the United States' poultry safety standards. The procedures followed by the FSIS in order to determine the equivalence between the countries' poultry inspection systems are explained in detail below.

2.8 The equivalence process starts by an applicant country making a request for eligibility to export poultry products to the United States.[19] After the equivalence request has been submitted, the FSIS will evaluate the equivalence of the applicant country's poultry inspection system. If the FSIS determines that the applicant country's system is equivalent, the applicant country must certify establishments as fit to export. After the applicant country commences exporting, the FSIS conducts ongoing equivalence verifications. The process includes:

(1) *Initial equivalence determination:* In this first stage the FSIS determines whether the poultry inspection system of the applicant country is equivalent to the inspection system of the United States own poultry safety measures.[20] If FSIS makes a preliminary determination that the systems are equivalent, it publishes a proposed rule in the Federal Register. If, after reviewing the comments it receives, FSIS makes a final determination that the country's system is equivalent, the FSIS publishes a final rule in the Federal Register and adds the applicant to the list in the CFR of countries eligible to export poultry products to the United States.[21]

(2) *Certification of establishments*: During this second stage, the eligible applicant country must certify individual establishments as fit to export to the United States; and,

(3) *Ongoing equivalence verification*: In this third stage, the eligible applicant country submits to an ongoing (typically annual) equivalence process to maintain eligibility to export to the United States.[22]

2.9 These three stages are discussed in greater detail below.

1. First Stage: Initial equivalence determination

2.10 As explained above, in this initial stage, the FSIS investigates whether the poultry inspection system of the applicant country is equivalent to that of the United States.[23] This first stage is triggered by the request of an exporting country to obtain authorization to export poultry products to the

[18] 9 CFR § 381.196 (Exhibit CN-6).
[19] 9 CFR § 381.196(a)(2)(iii) (Exhibit CN-6).
[20] 9 CFR § 381.196(a)(2)(i)-(ii) (Exhibit CN-6) and USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems* (Exhibit CN-7), p. 10.
[21] USDA/FSIS *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 10 (Exhibit CN-7).
[22] 9 CFR § 381.196(a)(2)(iii) and USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p.10-14 (Exhibit CN-7). Both the initial equivalence determination and the ongoing equivalence verification require the active involvement of numerous FSIS employees.
[23] 9 CFR §381.196 (Exhibit CN-6) and USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 10 (Exhibit CN-7).

United States. The application has to include copies of all the laws and regulations on which its own poultry inspection system is based.[24]

2.11 Once eligibility for importation of poultry is requested, an initial equivalency evaluation is conducted[25] including three sequential steps: (a) a document review, (b) an on-site audit, and (c) the publication of the proposed and final rules in the Federal Register and the country's addition to the list in the CFR.

(a) Document review

2.12 The first step in the initial equivalence stage is the evaluation of the applicant country's laws, regulations and other written information related to the applicant's poultry inspection system. As indicated above, further to the application for authorization to import, the applicant country is asked to provide the FSIS with copies of the laws and regulations on which its poultry inspection system is based. Once this stage is successfully concluded, the FSIS moves onto the second stage of the process, the on-site audit.

(b) On-site audit

2.13 During the on-site audit, a team of FSIS experts verify that the applicant's regulatory system has satisfactorily implemented all the laws, regulations, and other inspection or certification requirements that the FSIS had found to be equivalent during the document review step.[26]

(c) Publication in the Federal Register

2.14 The third step is the publication of the final rule allowing the importation of poultry products from certified establishments in the applicant country. After both the document review and the on-site audit steps have been satisfactorily completed, the FSIS publishes a draft rule in the Federal Register that announces the results of the first two steps and proposes to add the applicant country to the list of eligible exporters in the CFR. Upon receipt and consideration of public comments, the FSIS makes a final decision about equivalence based upon all available information and, if favourable, publishes a final rule in the Federal Register announcing the applicant country's eligibility.[27]

2. Second Stage: Certification of establishments for export by the eligible exporting country

2.15 Once the initial equivalence determination stage has been completed, the applicant country must conduct inspections of establishments wishing to export to the United States.[28] Only those establishments that are determined by the applicant country's authorities to fully meet the entire equivalent sanitary requirements may be certified to export to the United States.[29] The applicant country authorities must ensure ongoing compliance with the equivalent sanitary requirements, especially with respect to establishments that are exporting to the United States.[30] The applicant

[24] 9 CFR § 381.196(a)(iii) (Exhibit CN-6).
[25] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 10 (Exhibit CN-7).
[26] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, pp. 11-12 (Exhibit CN-7).
[27] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 12 (Exhibit CN-7).
[28] 9 CFR § 381.196 (a)(3) (Exhibit CN-6).
[29] 9 CFR § 381.196 (a)(3) (Exhibit CN-6).
[30] 9 CFR § 381.196 (a)(2)(iv)(A)–(C), 9 CFR § 381.196 (a)(3) (Exhibit CN-6).

country notifies the FSIS of the certification by transmitting a certification list according to the form specified in the CFR.[31] This certification must be renewed annually.[32]

3. Third Stage: Ongoing equivalence verification

2.16 The regulations require that ongoing reviews be conducted by the FSIS.[33] The purpose of the ongoing equivalence verification is to maintain eligibility for exportation.[34] Like an initial equivalence determination, the ongoing equivalence verification is conducted in three stages:[35] (i) a recurring document analysis, (ii) further on-site audits, and (iii) continuous port-of-entry re-inspections of poultry products shipped to the United States from the eligible exporting country.[36]

D. CHINA'S REQUEST FOR EQUIVALENCE

2.17 China requested an initial equivalence determination to export poultry products to the United States on 20 April 2004.[37] Further to this request, the FSIS conducted an initial equivalence audit, the objective of which was to "evaluate the performance of China's Central Competent Authority ('CCA') with respect to controls over the slaughter and processing establishments proposed for certification by the CCA as eligible to export poultry products to the United States."[38] The final report concerning this audit was issued on 17 May 2005.[39] The report found a number of deficiencies in some processing and slaughter plants[40], and as a consequence, the FSIS sent a letter to China proposing a follow-up equivalence audit to check whether the deficiencies identified in the slaughter system during the December 2004 audit had been corrected.[41] The FSIS conducted the second initial equivalence audit on China's poultry slaughter inspection system in July and August 2005, and on 4 November 2005 issued its Final Report.[42]

2.18 On the basis of the Report of the first on-site audit, on 23 November 2005, the FSIS proposed to amend the Federal Poultry Products Inspection regulations[43] to add China to the list of countries eligible to export processed poultry products to the United States, provided that the poultry products processed in certified establishments in China came from poultry slaughtered in the United States or certified establishments in other countries eligible to export poultry to the United States.[44]

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[31] 9 CFR § 381.196 (a)(3) (Exhibit CN-6).
[32] 9 CFR § 381.196 (a)(2)(iii) (Exhibit CN-6).
[33] 9 CFR § 381.196 (a)(2)(iii) (Exhibit CN-6).
[34] 9 CFR § 381.196 (a)(3) (Exhibit CN-6).
[35] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 15 (Exhibit CN-7).
[36] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 14 (Exhibit CN-7).
[37] United States' first written submission, para. 33.
[38] Final Report of an Initial Equivalence Audit carried out in China covering China's Poultry Inspection System, 1 – 17 December 2004, p. 4 (Exhibit CN-13).
[39] Exhibit CN-13.
[40] In one laboratory test, FSIS found that sampling and handling procedures could have led to cross-contamination. Deficiencies were also found in three establishments concerning preoperational, operational and other sanitation deficiencies. Further, it was found that the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) did not have adequate control and supervision over the establishments. *See* Final Report of an Initial Equivalence Audit carried out in China covering China's Poultry Inspection System, pp. 7, 9 and 11. Exhibit CN-13.
[41] Letter sent from FSIS to China (Exhibit US-7).
[42] Exhibit CN-16.
[43] These regulations refer to the United States' CFR.
[44] Exhibit CN-14.

2.19 On 24 April 2006, the FSIS published notification in the Federal Register that it would be adding China to the list in the CFR of countries eligible to export processed poultry products not slaughtered in China as described above. As noted above, China also applied for equivalence with respect to its inspection system for slaughtered poultry. The April Federal Register Notice only covered processed poultry and did not propose allowing the importation of poultry slaughtered in China.[45]

2.20 Two weeks after publication of the Federal Register Notice, on 9 May 2006, the FSIS sent China a letter outlining the remaining two steps that had to be completed before China could export processed poultry products to the United States.[46] According to this letter, China needed to: (i) submit to the FSIS a list of establishments certified by the Chinese inspection services as satisfying the requirements for exporting processed poultry products to the United States, and (ii) submit product labels by certified establishments in China for review by the Labelling Consumer Protection Staff of the FSIS.[47]

2.21 In June 2006, based in part on previous on-site audit of the slaughtered poultry operations in China, the FSIS made a preliminary determination that China's poultry inspection system for domestically slaughtered poultry was equivalent to United States standards.[48] Notwithstanding, the FSIS did not publish a draft rule in the Federal Register requesting public comments on China's slaughtered poultry operations or announcing the results of the document review and the on-site audit.

2.22 At this point, the FSIS had thus determined that China's poultry production system was equivalent to that of the United States for processed poultry products from the United States or another country that the FSIS had determined was equivalent to the United States. At the same time, FSIS had determined that China's inspection system for slaughtered poultry was preliminarily equivalent pending further evaluation through the rulemaking process.

2.23 On 20 December 2007, the FSIS sent a letter to China requesting the annual certification of establishments eligible to export processed meat or poultry products to the United States.[49] Six days later, on 26 December 2007, the Consolidated Appropriations Act of 2008 entered into force.[50]

2.24 This Act contained the AAA of 2008 which provided the funds for the USDA and its agencies, such as the FSIS, to execute their activities.[51] In particular, Section 733 of the AAA of 2008 restricted the use of funds to establish or implement any rule allowing poultry products from China to be imported into the United States.[52] Section 733 which expired on 30 September 2008, is *not* a measure at issue in this dispute.[53]

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[45] Exhibit CN-14.
[46] Exhibit US-20.
[47] 9 May 2006. Exhibit US-20.
[48] USDA, Office of Inspector General Northeast Region. Audit Report: Follow up Review of Food and Safety Inspection Service's Controls Over Imported Meat and Poultry Products, August 2008. p. 14. Exhibit CN-17.
[49] Exhibit CN-19.
[50] Exhibit CN-8.
[51] House Report 110-258, 24 July 2007. p. 54 (Exhibit US-42).
[52] Section 733 provides: "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."
[53] China's response to Panel question No. 17.

2.25 The funding restriction established by Section 733 was maintained by Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009.[54]

2.26 Nearly two years after the United States' first request, on 12 March 2008[55], China sent the list of certified establishments to the FSIS.[56] On 23 July 2008, the FSIS published the list of countries eligible to export poultry products to the United States. China was included as eligible to export processed poultry products. For certain countries, indicated with shading in the table, eligibility was suspended for animal health reasons (directing readers to see country specific notes) or pending equivalence re-verification. The country specific note for China states that "FY 2008 appropriation legislation bars FSIS from spending funds on import of poultry from China."[57]

2.27 On 28 February 2009, China's National People's Congress Standing Committee enacted a new food safety law.[58]

2.28 On 11 March 2009, the US Congress enacted the Omnibus Appropriations Act.[59] This Act contained the AAA of 2009. Section 727 of the AAA of 2009, which is the measure being challenged by China in this dispute, shared the same wording of Section 733 and thus restricted the use of funds to establish or implement any rule allowing poultry products from China to be imported into the United States.

2.29 Upon its expiry at the end of the 2008-2009 Fiscal Year on 30 September 2009, the funding restriction instituted by Section 727 was continued by Division B of the Legislative Branch Appropriations Act (Continuing Appropriations Resolution) of 2010.[60] Division B also expired once the AAA of 2010 entered into force on 21 October 2009.[61] This new AAA of 2010 included Section 743 a measure that also relates to funding of FSIS activities relating to China's application for equivalency of its poultry inspection system. In particular, Section 743 allows that funding to establish or implement a rule permitting the importation of poultry products from China can be restored if the Secretary complies with certain conditions set forth in that provision. As noted above, China has decided not to pursue a claim with respect to Section 743 in this dispute.[62]

2.30 As noted in paragraph 2.3 above, Section 727 was accompanied by a JES which listed two actions that the US Congress expected the FSIS to take. In particular, the JES urged the USDA to submit a report to the Committees on the implications of the recent changes to China's food safety law within one year. The JES also "directed" the USDA to submit a plan for action to the Committees to guarantee the safety of poultry products from China and stated that the plan should be made public on the FSIS web site upon its completion.

2.31 With respect to how it complied with the requests in the JES, the United States noted that two months after the passage of Section 727, the FSIS had sent a letter to the Chinese authorities requesting "information to understand the nature and implication of revisions in food safety laws, regulations, and inspection and control procedures enacted since 2006."[63] At the first substantive

[54] Exhibit CN-9.
[55] 9 May 2006. Exhibit US-20.
[56] Exhibit CN-20.
[57] Exhibit CN-21.
[58] Exhibit US-40.
[59] Exhibit CN-1.
[60] Exhibit CN-2.
[61] Exhibit CN-3.
[62] On 7 January 2010, China sent a letter to the Panel indicating that it would not argue the WTO inconsistency of Section 743 of the AAA 2010 and reserved its rights to do so in separate dispute settlement proceedings.
[63] Exhibit US-44.

meeting of the Panel with the parties, China indicated that it did not respond to this letter because it had already initiated dispute settlement proceedings at the WTO.

2.32 Additionally, the United States informed the Panel that the USDA had sent a document to the US Congress which it argues is the action plan called for in the JES. The one-page document, which is undated and not on official USDA letterhead, is entitled "FSIS Action Plan for Creation of Congressionally-Mandated China Poultry Inspection System Reports".[64] According to this document, the FSIS had to review the changes to the Chinese food safety law, and develop a plan of action to guarantee the safety of poultry products from China.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 China requests the Panel to find that Section 727 is inconsistent with:

(i) Article I:1 of the GATT 1994, because it fails to extend the advantage of the opportunity to export to the United States immediately and unconditionally to like poultry products from China[65];

(ii) Article XI:1 of the GATT 1994, because it imposes import restrictions that limit competitive opportunities for poultry products from China[66];

(iii) Article 4.2 of the *Agreement on Agriculture*, because it imposes a quantitative restriction on poultry products from China[67];

(iv) Article 2.3 of the *SPS Agreement*[68], because it arbitrarily and unjustifiably discriminates against China[69];

(v) Article 5.5 of the *SPS Agreement*, because the higher level of sanitary protection applied to China is arbitrary and unjustifiable, resulting in discrimination[70];

(vi) Article 5.1 and 5.2 of the *SPS Agreement*, because it is not based on a risk assessment within the meaning of Article 5.1 that takes into account the factors in Article 5.2[71];

(vii) Article 2.2 of the *SPS Agreement*, because it is not maintained based on scientific evidence[72];

(viii) Article 5.6 of the *SPS Agreement*, because it is inconsistent with the obligation that SPS measures not be unduly trade-restrictive[73]; and

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[64] Exhibit US-43.
[65] China's first written submission, para. 191, China's second written submission, para. 114.
[66] China's first written submission, para. 191, China's second written submission, para. 114.
[67] China's first written submission, para. 191, China's second written submission, para. 114.
[68] China first requested findings on its SPS claims "to the extent that the measure constituted a sanitary and phytosanitary measure within the meaning of the *SPS Agreement*", *See* China's first written submission, para. 192. Further to its first oral statement, on the grounds that it had been demonstrated that Section 727 is an SPS measure within the meaning of the *SPS Agreement*, China removed that qualification from its requests for findings regarding the *SPS Agreement* in further submissions.
[69] China's first written submission, para. 192, China's second written submission, para. 114.
[70] China's first written submission, para. 192, China's second written submission, para. 114.
[71] China's first written submission, para. 192, China's second written submission, para. 114.
[72] China's first written submission, para. 192, China's second written submission, para. 114.
[73] China's first written submission, para. 192, China's second written submission, para. 114.

(ix) Article 8 of the *SPS Agreement*, because the delay resulting from its application is unjustifiable, or undue.[74]

3.2 Given that Section 727 has expired, China further requests the Panel to issue a recommendation that the United States does not revert to language similar to that in Section 727 in its future legislation.[75]

3.3 The United States requests that the Panel rejects China's claims in its entirety.[76]

IV. ARGUMENTS OF THE PARTIES

A. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

1. Introduction

4.1 A series of US measures over the past three years have grossly violated China's most fundamental rights under the GATT 1994, i.e. the rights to most-favoured nation treatment and to trade without quantitative restrictions. The result of these measures is that the US rules and procedures regulating the import of poultry products are applied to every WTO Member *except* China. The United States has enacted these measures despite the fact that Chinese poultry is eligible for export to a number of WTO Members with high levels of sanitary and phytosanitary protection, such as Japan, Korea, and the European Communities, and was found by the United States authorities, in April 2006, as deserving inclusion among an elite list of countries *eligible to export poultry to the US*.

4.2 China emphasises that it has not initiated this dispute to *force* the United States to import its poultry products. However, in preventing China from even being *considered* under the normal approval rules and procedures, the United States is arbitrarily discriminating against Chinese poultry and violating a number of its obligations under WTO rules.

2. The measures at issue

(a) Section 727 of the Agriculture Appropriations Act 2009

4.3 The first set of measures challenged in this dispute is Section 727 of the *Agriculture Appropriations Act 2009* and any replacement measures, subsequent closely-related measures or future closely-related measures. Among such measures are the 2010 Continuing Appropriations Resolution, and Section 743 of the *Agriculture Appropriations Act 2010*. As Section 743 had not yet been signed into law at the time China submitted its First Written Submission, China does not fully address it in this submission, but is of the initial view that Section 743 violates the same WTO provisions as Section 727 and the moratorium. China reserves the right to more fully challenge, in later submissions, the compliance of Section 743 with the United States' WTO obligations.

4.4 Section 727 is contained in an appropriations act that allocated 'funds' for fiscal year 2009 (1 October 2008 – 30 September 2009). It prohibits appropriated funds from being used to establish or implement a rule allowing poultry products to be imported from China.[77]

4.5 A 'rule' is first used to formally establish a given country's eligibility to export poultry products to the United States.[78] Rules then also provide the basis for the procedures used to

[74] China's first written submission, para. 192, China's second written submission, para. 114.
[75] China's closing oral statement at the second substantive meeting, para. 7.
[76] United States' first written submission, para. 165, United States' second written submission, para. 125.
[77] Section 727, *Agriculture Appropriations Act 2009* (Exhibit CN-1).

implement and maintain eligibility. They are established and implemented by the *sole* government department competent to establish or implement rules relating to the importation of poultry – the US Department of Agriculture (USDA) and its subordinate food safety agency, the Food Safety Inspection Service (FSIS). As Section 727 means that no funds can be expended by the *sole* executive branch department responsible for creating and implementing these rules on poultry imports from China, Section 727 limits the competitive opportunities for Chinese poultry products and effectively restricts imports of Chinese poultry products to zero.

4.6 Yet, at the same time, the USDA and FSIS *can* expend funds to implement existing rules and establish new rules permitting the import of poultry from all other WTO Members. It is this arbitrary and blatant discrimination against China as compared to other WTO Members (and US poultry producers) that violates a number of WTO provisions.

(b) Ongoing moratorium on the establishment or implementation of authorization for the importation of poultry products from China

4.7 The second measure at issue is the ongoing moratorium on: (a) the *consideration* of applications for approval, (b) the *granting* of approval, and (c) the *implementation* of approval, for the import of poultry products from China under the US system for regulating the importation of poultry products. The moratorium was initiated following the enactment of Section 733 of the *Agriculture Appropriations Act 2008* and has been maintained by several successive measures. It has operated on a multi-year basis in much the same way as Section 727 has operated during the 2009 fiscal year. Thus, the practical effect of the moratorium is to limit China's competitive opportunities for Chinese poultry products, and to restrict imports of Chinese poultry products to zero, as compliance with the rules is a legal pre-requisite for the importation of poultry products into the United States. As the ongoing moratorium denies *only* China the right to benefit from the opportunity to export poultry products to the United States, the moratorium is inconsistent with a number of WTO provisions.

3. US regulations and procedures applicable to the authorization of poultry products

(a) US regulations and procedures

4.8 The *Poultry Products Inspection Act* (PPIA) constitutes the legislative basis for the import and inspection procedures relating to the import of poultry products into the United States. Under the PPIA, the Secretary of Agriculture is authorized to make rules to implement the PPIA.[79] These rules are detailed in section 381.196 of Title 9 of the *Code of Federal Regulations* (CFR), and are enforced by FSIS.

4.9 In accordance with 9 CFR § 381.196, eligibility to export poultry products to the United States requires completing three sequential steps. *First*, in a 3 – 5 year procedure known as an "initial equivalence determination", the FSIS investigates whether the food safety measures of the exporting country are *equivalent* to those employed by the United States.[80] The FSIS investigation includes a document review stage and on-site audits. If equivalence is confirmed, this step culminates in the establishment of a rule in the CFR stating that the country is eligible to export poultry products to the United States. *Second*, the eligible exporting country must certify individual establishments as fit to export to the United States. *Finally*, the third step involves a procedure known as "ongoing

[78] This occurs following an extensive, 3-5 year equivalence determination that establishes whether an exporting country's poultry regulatory procedures are *equivalent* to US poultry regulatory procedures. *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems* (Exhibit CN-7).

[79] All imported poultry products are within the jurisdiction of the USDA. See the PPIA (Exhibit CN-4).

[80] *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 12 (Exhibit CN-7).

equivalence verification" whereby the eligible exporting country submits to an ongoing program to *maintain* eligibility to export to the United States. Like the initial equivalence determination, it involves document reviews and on-site audits; it also involves port-of-entry re-inspection of goods at the US border by FSIS.

(b) Application of procedures before and after the moratorium

(i) China

4.10 China completed its first initial equivalence determination in April 2006. FSIS then established a rule placing China on the list of eligible importing countries for processed poultry products. This rule related only to poultry slaughtered elsewhere and processed in China, as the equivalence determination did not extend to Chinese *slaughter* inspection systems. However, the measures at issue prevent the FSIS from using any funds to implement this rule, and thus no action has been taken by FSIS on its ongoing equivalence procedures.

4.11 A second initial equivalence determination concerning poultry *slaughtered* in China was ongoing when the moratorium began in 2007. Reviews and audits had been completed, and FSIS concluded that China's poultry slaughter inspection system *was* equivalent to the US system. However, FSIS never issued a proposed rule due to the measures at issue.

(ii) All other WTO Members

4.12 While China's progress through its initial equivalence determination on slaughtered poultry was halted, FSIS imposed no similar moratorium for other WTO Members. There are nearly 20 *other* Members currently in various stages of their equivalence determinations. Furthermore, there are nine *other* countries and territories currently authorized to export poultry products to the United States.[81] FSIS has remained very active with respect those countries, including, *e.g.* conducting audits in eligible exporting countries.

4. Legal analysis and argument

4.13 The United States' refusal to apply its normal FSIS approval procedures for imported poultry products with respect to China, while continuing to consider, grant, and implement authorization to import poultry products from other WTO Members, constitutes arbitrary and unjustifiable discrimination. Section 727 and the ongoing moratorium, which form the basis for the non-application of normal approval procedures, eliminate any competitive opportunities for China's poultry products in the United States. These measures, including the replacement measures, subsequent closely-related measures, and future closely-related measures, violate a number of WTO provisions.

(a) Section 727 and the moratorium each violate Article I:1 of GATT 1994

4.14 By denying only Chinese poultry products the opportunity to be exported to the United States (through blocking Chinese access to FSIS procedures), the measures at issue fail to accord poultry products originating in China immediately and *unconditionally* the *advantages* accorded to *like* poultry *products* originating in all other Members. Consequently, they violate GATT Article I:1.

4.15 *Advantage*: Poultry products from all WTO members have the competitive opportunity to be exported to the United States (the advantage), if produced under an equivalent food safety system and if that finding is maintained by ongoing FSIS procedures – *except* Chinese poultry products. This is a denial of an advantage within the meaning of Article I:1.

[81] Australia, Canada, Chile, France, Great Britain, Hong Kong, Israel, Mexico, and New Zealand.

4.16 *Like Product*: Section 727 and the moratorium apply exclusively to poultry products imported from China – i.e. they apply an origin-based product distinction. A hypothetical like product analysis is appropriate for measures that impose an origin-based distinction.[82]

4.17 *Unconditionally*: Section 727 and the moratorium apply their conditions solely to Chinese poultry products, removing Chinese poultry from any chance to access the US market. Section 727 and the moratorium thus do not operate on an MFN basis, and do not unconditionally accord advantages to the like products of all WTO Members, in violation of Article I:1.

(b) Section 727 and the moratorium each violate Article XI:1 of GATT 1994

4.18 GATT Article XI:1 requires Members to eliminate any 'prohibitions' or 'restrictions' on the importation of any product from any other Member. Section 727 and the moratorium each violate Article XI:1 because they impose restrictions on importation that negatively impact the competitive opportunities for poultry products from China. Each measure also violates Article XI:1 by instituting *de facto* prohibitions on imports of poultry from China.

4.19 While other WTO Members may seek and obtain authorization under FSIS rules in order to export poultry products to the United States, China cannot, as a result of the measures at issue. FSIS authorization is a necessary precondition for the importation of any poultry products into the United States. Thus, the measures at issue each eliminate China's competitive opportunities in the US poultry market, constituting "restrictions" on Chinese imports within Article XI:1. Also, to the extent that the practical impact of the measures is an import ban on Chinese poultry products, the measures each institute import prohibitions in violation of Article XI:1, by precluding the possibility of gaining the necessary FSIS authorization, therefore restricting the importation of such products from China to zero.

(c) Section 727 and the moratorium each violate Article 4.2 of the *Agreement on Agriculture*

4.20 Article 4.2 of the *Agreement on Agriculture* prohibits Members from instituting quantitative restrictions on agricultural products including poultry products. Section 727 and the moratorium are both inconsistent with Article 4.2 of the *Agreement on Agriculture* because the measures result in the maintenance of quantitative restrictions on the importation of poultry products from China. The measures at issue each prohibit the application of FSIS approval procedures to China, making it impossible for China to obtain the authorization that is required in order to export poultry products. Thus, the volume of Chinese poultry products that may be imported is set at zero, and the practical impact is the maintenance of restrictions equivalent to an import ban, a violation of Article 4.2.

(d) Claims under the *Agreement on the Application of Sanitary and Phytosanitary Measures*

4.21 China understands that the United States has not notified the measures at issue to the WTO, as it would have been expected to do under Article 7 of the *SPS Agreement* if it considered them SPS measures. Nevertheless, to the extent that the measures may be considered to be sanitary and phytosanitary (SPS) measures within the *SPS Agreement*, China advances the following arguments.

(i) To the extent they are SPS measures, the measures are inconsistent with Article 2.3 of the SPS Agreement

4.22 Article 2.3 of the *SPS Agreement* prohibits Members from arbitrarily or unjustifiably discriminating between Members where identical or similar conditions prevail. As Section 727 and

[82] Panel Report, *Colombia – Ports of Entry*, para. 7.356; Appellate Body Report, *Canada – Periodicals*, pp. 20-21.

the moratorium discriminate between China and all other WTO Members without justification, Section 727 and the moratorium violate Article 2.3.

4.23 There is a three-part test to establish a violation of Article 2.3. *First*, the measure discriminates between the territory of the Member imposing the measure and that of another Member, or between two other Members. In this case, the measures at issue restrict *only* China from seeking and obtaining authorization to export poultry products to the United States – clear discrimination against China. *Second*, the discrimination is arbitrary or unjustifiable. In this case, there is no scientific evidence, risk assessment, or other justification for treating Chinese poultry products differently from those of other WTO Members.

4.24 *Third*, identical or similar conditions prevail in the territory of the Members compared[83], i.e. China and all other poultry-exporting WTO Members. A key "condition" that is "identical" is the scope and effectiveness of FSIS procedures, as applied to poultry products from all WTO Members. These rules are capable of determining whether poultry products from any Member are safe for importation into the United States. There is nothing unique to China with respect to the functioning and effectiveness of these rules. Thus, the measures at issue arbitrarily and unjustifiably discriminate against China in violation of Article 2.3.

(ii) To the extent they are SPS measures, the measures are inconsistent with Article 5.5 of the SPS Agreement

4.25 Article 5.5 of the *SPS Agreement* prohibits Members from applying different levels of sanitary protection to comparable situations. The higher level of SPS protection applied by the United States to China, reflected in Section 727 and the moratorium, is arbitrary and unjustifiable and results in discrimination, in violation of Article 5.5.

4.26 There are three cumulative conditions that must be met in order to establish a violation of Article 5.5. *First*, the Member applies different levels of protection in different situations. In this case, the 'different situations' are (a) the importation of poultry products from China, to which the United States applies restrictions resulting in an import ban; and (b) the importation of poultry products from all other WTO Members, to which the United States applies the FSIS equivalence procedures, reflective of a lower level of SPS protection. *Second*, the levels of protection show arbitrary or unjustifiable differences in their treatment of different situations. The application of such a high level of sanitary protection to China *alone* is arbitrary and unjustifiable. China could have the world's best food safety system, but the measures at issue would still operate to exclude Chinese poultry products from the consideration, granting, or implementation of authorization to export to the United States. Thus, the distinction in levels of sanitary protection is arbitrary and unjustifiable. *Third*, these arbitrary or unjustifiable differences lead to discrimination or a disguised restriction on trade. Because the United States applies FSIS equivalence procedures to every other WTO Member while applying restrictions resulting in an import ban to China, the difference in sanitary protection results in "discrimination", fulfilling the third cumulative element and establishing a violation of Article 5.5.[84]

(iii) To the extent they are SPS measures, the measures are inconsistent with Article 5.1 and 5.2 of the SPS Agreement

4.27 Article 5.1 requires Members to ensure that any SPS measures are based on a risk assessment, and Article 5.2 sets out the criteria which Members must take into account when conducting said risk assessment. There is no publicly-available documentation indicating that Section 727 and the

[83] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[84] Appellate Body Report, *EC – Hormones*, paras. 214-215.

moratorium are based on *any* risk assessment addressing Chinese poultry, let alone a risk assessment within the meaning of Article 5.1 and 5.2. Furthermore, available evidence suggests that the measures at issue would not be supported by the likely conclusions of a risk assessment conducted pursuant to Article 5.1 and 5.2. Indeed, the USDA had concluded in 2006, prior to the moratorium, that Chinese poultry products are safe for importation. In addition, since December 2007, Chinese poultry has been exported to other Members applying high levels of SPS protection, including the EC, Japan and Korea.

(iv) To the extent they are SPS measures, the measures are inconsistent with Article 2.2 of the SPS Agreement

4.28 Article 2.2 requires that Members ensure that SPS measures are maintained on the basis of sufficient scientific evidence. As Section 727 and the moratorium are maintained without *any* scientific basis, the measures violate Article 2.2. The Appellate Body has interpreted Article 2.2 to require "a rational and objective relationship between the SPS measure and the scientific evidence".[85] Nothing in the texts or legislative contexts of the measures, or in publicly-available documentation, indicates that the measures at issue were enacted on the basis of *any* scientific evidence, let alone evidence sufficient to meet the standards of Article 2.2 of the *SPS Agreement.*

(v) To the extent they are SPS measures, the measures are inconsistent with Article 5.6 of the SPS Agreement

4.29 Article 5.6 requires that SPS measures are not more trade-restrictive than necessary. The measures at issue are inconsistent with the obligation in Article 5.6, as they are *significantly* more trade-restrictive than necessary. The footnote to Article 5.6 clarifies that a measure is more trade-restrictive than required if: *First*, there is another measure reasonably available to the Member imposing the SPS measure. In this case, the alternative measure is the FSIS equivalence procedures. It is technically and economically feasible, as it is applied on a regular basis to all other WTO Members. *Second*, the alternative measure achieves the Member's appropriate level of SPS protection. The FSIS procedures clearly meet the US' "appropriate level of protection" for poultry imports as the US applies it to all WTO Members except for China. *Third*, the alternative measure is significantly less restrictive to trade than the contested measure.[86] The application of the FSIS procedures would be significantly less trade-restrictive than the measures at issue, as it would provide the *possibility* of obtaining authorization to export to the US instead of a restriction automatically resulting in an import ban. As the alternative measure meets all three criteria, the measures at issue violate Article 5.6.

(vi) To the extent they are SPS measures, the measures are inconsistent with Article 8 of the SPS Agreement

4.30 Article 8 requires that Members observe the provisions of Annex C when applying control, inspection, and approval procedures. The United States, in unduly delaying the application of the FSIS procedures to Chinese poultry imports by instituting Section 727 and the moratorium, has violated Article 8 of the *SPS Agreement*. Annex C(1)(a) obliges Members to "undertake and complete" the procedures for assessing compliance with an SPS requirement "without undue delay" or "*with no unjustifiable loss of time*".[87] Section 727 and the moratorium unduly delay the application of the normal FSIS procedures to China. The delay cannot be justified on any ground, constituting a violation of Article 8.

[85] Appellate Body Report, *EC – Hormones*, paras. 180, 193.
[86] This approach was affirmed by the Appellate Body in *Australia – Salmon*, para. 194.
[87] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. Emphasis added.

5. The US Preliminary Ruling Request must fail, as consultations pursuant to the *SPS Agreement* were requested and held

4.31 In its Preliminary Ruling Request, the United States contends that any claims made by China pursuant to the *SPS Agreement* are outside the scope of the Panel's terms of reference, as the claims were presented in the alternative/conditionally. However, China's consultations request specifically invoked Article 11 and devoted fully 303 of the 989 words of the request to claims under the *SPS Agreement*. Alternative claims are also "very common in WTO dispute settlement".[88] Furthermore, had China's claims under the *SPS Agreement* been raised without presenting them in the alternative/conditionally, it could have been used as an admission against China's interests. Any efforts by the United States to place China in that untenable position must fail, as must any reading that would render *over 30%* of this critical document entirely meaningless.

4.32 Furthermore, nowhere in its preliminary ruling request does the United States allege that its due process rights have been impacted by China's consultations request and in fact, the United States seems to acknowledge that its request has nothing to do with due process rights.[89] Given that a key purpose of a consultations request is that a responding member "is fully informed about [the complainant's] intention" (providing for due process)[90], this is a notable admission.

(a) China's consultations request clearly invoked Article 11 of the *SPS Agreement*

4.33 Consultations in this dispute were, in fact, requested pursuant to Article 11 of the *SPS Agreement*. The core of the US argument appears to relate to China's use of the phrase "if it were demonstrated that any such measure is an SPS measure". However, that phrase simply shows that China was contemplating a "bilateral diplomatic dialogue" to better delineate the dispute. Also, under Article 4.2 of the DSU, "sympathetic consideration" must be given to "*any* representations" made by China – *including* those framed as alternative arguments.

4.34 Contrasting the requirements of Article 4.4 of the DSU (on consultations requests) with the heightened requirements of Article 6.2 (on panel requests) also shows China has fully met its obligations under Article 4.4 states that a consultations request "shall give ... *an indication* of the legal basis for the complaint". In contrast, 6.2 states that a panel request must "provide a brief summary of the legal basis of the complaint *sufficient to present the problem clearly*". The heightened burden for panel requests reflects the understanding that the legal bases of a claim often evolve during consultations. The Article 4.4 requirement to provide an "*indication*" (a "hint, suggestion"[91]) was clearly met, as by devoting *over 30%* of the document to SPS claims, there is no doubt that China provided the United States with the requisite "hint" that the *SPS Agreement* was at issue in consultations.

(b) Pursuant to its consultations request, China actually consulted regarding the *SPS Agreement*, and in a manner fully consistent with Article 4 of the DSU

4.35 China *actually* consulted on the *SPS Agreement*. China provided the United States with over 40 questions to be answered during consultation, including at least 8 that sought to clarify whether the measures at issue were considered SPS measures by the United States.[92] The panel in *Korea* –

[88] Panel Report, *Korea – Commercial Vessels*, para. 7.2 at subparagraph 29.
[89] US Preliminary Ruling Request, para. 17.
[90] Panel Report, *Chile – Price Band System*, para. 7.120.
[91] Lesley Brown, (ed.), *The New Shorter Oxford English Dictionary*, Clarendon Press, 1993, Vol. 1, p. 1348.
[92] (Exhibit CN-39).

Commercial Vessels accepted questions posed in consultations as "alone ... sufficient for us to conclude that the parties consulted on the entirety of the measure".[93]

4.36 Furthermore, the US assertion that its representatives explained during consultations that the United States "was not consulting pursuant to Article 11 of the *SPS Agreement*"[94] is irrelevant to the Panel's terms of reference. A responding party can not unilaterally control the jurisdiction of a panel. Indeed, Article 4.3 of the DSU provides that where a respondent refuses consultations a complainant may proceed *more quickly* to a panel. It does *not* indicate that a refusal somehow makes it impossible for the complainant to establish a panel with terms of reference that encompass measures stated in their consultations requests.

4.37 For the foregoing reasons, China requests the Panel to reject the US preliminary ruling request and determine that China's claims under the *SPS Agreement* are properly within the Panel's jurisdiction.

B. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

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

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

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

4.41 The United States disagrees with most of the factual and legal assertions in China's first written submission and has two over-arching comments. First, China's submission repeatedly asserts that "This is a case about arbitrary discrimination." China, however, is well aware of its own problems of food safety enforcement, and of the food safety rationale for the temporary restriction imposed by Section 727. Yet, China's submission addresses none of these issues – indeed, it

[93] Panel Report, *Korea – Commercial Vessels*, para 7.2, at subparagraph 11.
[94] US Preliminary Ruling Request, para. 9.

misleadingly implies that Section 727 was adopted only for "budgetary" reasons. Thus, despite its repeated assertions of "arbitrary discrimination," China's submission fails to explain why any alleged discrimination resulting from Section 727 was arbitrary or unjustifiable. Instead, China runs away from the food safety issues that lie at the core of this dispute.

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

4.43 Finally, any claims by China under the *SPS Agreement* are not within the Panel's terms of reference. In its submission, China fails to rebut the fundamental point that China did not request consultations on any claims under the *SPS Agreement*. The United States has offered to cooperate on a procedural way forward in the event China would wish to consult on any SPS claims. However, China – perhaps for the same reason that its submission fails even to acknowledge any relationship between Section 727 and food safety – has denied the offer. This is China's choice. But China cannot have it both ways – it cannot refuse to consult on SPS issues, while at the same time request that the Panel issue findings under the *SPS Agreement*.

2. Section 727 is the only measure at issue in this dispute

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

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

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

4.47 Finally, the alleged second measure was not identified in China's consultations request. As the Appellate Body has explained, DSU Articles 4 and 6 "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel". Although these provisions do not "require a precise and

exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel", the Appellate Body has emphasized that any such measures not precisely identified must not "change the essence of the [measures identified in the request for consultations]". The so-called "moratorium" of indefinite duration does not, however, constitute such a measure whose "essence" is the same as the explicitly time-limited restriction in Section 727.

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

4.49 China's submission states that China has the "initial view" that Section 743 violates WTO provisions, and "that [China] reserves the right to more fully challenge, in later submissions, the compliance of Section 743 with the United States' WTO obligations". The States does not understand how or why China would argue that Section 743 is WTO-inconsistent as Section 743 has resulted in a removal of the funding restriction contested by China. In any event, however, Section 743 is not within the Panel's terms of reference.

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

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

3. China mischaracterizes the legal effect of Section 727 in US domestic law

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

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

4.54 Accordingly, Section 727 was limited to preventing USDA from "establishing" or "implementing" a rule allowing the import of poultry from China for a temporary period during the

2009 fiscal year. Section 727 did not create a permanent funding restriction or prohibit FSIS from using funds to implement or establish a rule after its expiration. There are no longer any restrictions on FSIS's ability to "use funds to implement or establish a rule allowing poultry products to be imported from China".

4.55 Section 727 also did not ban imports of poultry from China. Even without Section 727, USDA procedures required a review of the prior equivalence determination before imports of processed poultry could have been authorized due to a substantial time period between the 2006 processed poultry rule and China's designation of facilities eligible to export to the United States. With respect to slaughtered poultry, USDA had not completed an equivalence determination. Thus, the most that China can allege is that Section 727 prevented USDA from taking final actions during fiscal year 2009 that *might* have otherwise occurred; China has no basis for alleging how, if at all, any final actions would have differed during that period.

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

4. Of the three claims presented by China, the Panel need only consider the claim under Article XI of the GATT 1994

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

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

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

4.60 China's Article I claim also lacks essential legal and factual argumentation. China provides no explanation for why poultry products from China are "like products" to poultry products from other WTO Members, including those authorized to export poultry products to the United States. While China correctly notes that some panels have considered that a measure that distinguishes between products solely on the basis of origin can be considered to provide less favourable treatment to certain like products without the need for a separate "like product" analysis, none of those reports has applied this approach to a situation like this one. Health and safety systems vary from country to country and

equivalency-based regimes respond to this fact. To be sure, China may believe that its poultry products present no particular safety issues as compared to products from any other WTO Member. But if so, that is an unsupported factual allegation which the United States does not accept, and there is no basis to assume it is true. Moreover, China conveniently ignores disputes such as *EC-Asbestos*, in which a panel examined issues of "likeness" in the context of products with different levels of safety.

4.61 However, the Panel need not address factual and legal issues under Article I to reach a resolution of this dispute. In particular, the core of this dispute involves whether Section 727 is justified by legitimate concerns with human and animal life and health. The most appropriate analytic framework to consider these issues is to examine the measure under Article XI, followed (if necessary) by findings under Article XX(b). If the measure is justified by Article XX(b), such a finding would excuse any alleged breach of Article I. It would not promote the resolution of this dispute to venture into issues under Article I concerning its application to equivalency-based regulatory regimes or to the likeness of products with different levels of safety.

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

4.63 Article 4.2 of the *Agreement on Agriculture* prohibits certain measures with respect to agricultural products. Article 4.2 provides that, with certain exceptions not relevant here, "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 to the *Agreement on Agriculture* 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.

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

5. Section 727 is justified pursuant to GATT Article XX(b)

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

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

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

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

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

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

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

4.72 Section 727 was enacted with the policy objective of protecting against this risk to human and animal life and health posed by the importation of poultry products from China. The first sentence of the Joint Explanatory Statement ("JES") accompanying Section 727 makes that clear: "There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S.". Similarly, the Committee Report accompanying the FY 2008 appropriations act also clearly demonstrates that Section 727's purpose is to protect human and animal life and health.

4.73 Statements by Section 727's author, Representative DeLauro, also indicate the measure was enacted to address this risk: "It is clear that the 2006 FSIS declaration that China's safety and inspection system was, quote, equivalent to the US 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 US consumer's safety."

4.74 Section 727 was also necessary to protect human and animal life and health from this risk. Imports of poultry from China pose a severe risk as a result of the broad systemic problems with China's food safety system. These problems include smuggling, corruption, and the inadequate

enforcement of China's food safety laws, issues that FSIS is not typically faced with when making equivalency determinations. Moreover, many food safety scandals have originated in China in recent years, including the melamine scandal that occurred in 2008 after FSIS issued a final rule on the equivalency of China's poultry processing system. Finally, some members of Congress were concerned about the process FSIS followed and believed that FSIS had not spent enough time considering the particular problems with food safety in China.

4.75 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.

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

4.77 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.

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

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

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

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

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

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

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

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

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

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

4.88 In addition, there is no other country where the same conditions prevailed as they did for China at the time Section 727 was enacted. Besides China, there was no other country as far along in the equivalency process with recent food safety scandals and systemic problems with smuggling, corruption, and enforcement. Since no other country has presented the same set of challenges that the US 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.

4.89 Finally, the evidence clearly demonstrates that Section 727 is not a disguised restriction on trade. The text of the measure, which states "There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S."

clearly indicates that the measure's policy objective, or intent, was to protect human and animal life and health from the risk of poultry from China.

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

6. China has not made a prima facie case in support of its claims under the *SPS Agreement*

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

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

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

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

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

7. Reply to China's response and third party comments on US Preliminary Ruling request of 1 October

4.96 Although China states that it intended to make claims under the *SPS Agreement* in the alternative (that is, if the United States invoked Article 2.4 of the *SPS Agreement* as a defense), it is undeniable that China's consultations request does not request consultations to pursue alternative

claims, but makes the request for consultations conditional on future developments. This is the defect in China's consultations request with respect to the *SPS Agreement*, and China's subsequent attempts at clarification cannot cure the jurisdictional requirement set forth in DSU Article 1.1 that consultations must be requested pursuant to the consultation and dispute settlement provision of each covered agreement for which dispute settlement is sought.

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

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

4.99 The issue presented by China's consultations request is not a mere technicality. In raising the deficiency of China's consultations request, the United States is pursuing an important systemic concern. If China's approach were to be accepted, it could lead to more and potentially greater confusion in future disputes. A responding party and potential third parties would be unable to divine what the exact legal issues will be in a dispute. The DSU provisions are clear and were agreed – a complaining party's consultations request "shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." A complaining party is not free to say that it is not using as the basis for its complaint a particular covered agreement only to say later that it is. Clarity in the request for consultations is important for the overall operation of the dispute settlement system.

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

C. EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Introduction and background

4.101 This is a case about arbitrary discrimination. A series of measures over the past two years have prevented *only* China from accessing US poultry import approval procedures. These include Section 733 and Section 727 of the Agriculture Appropriations Acts of 2008 and 2009[95], respectively, both of which have prohibited the relevant government agency from using any funds to "establish or

[95] Exhibits CN-1 and CN-8.

implement a rule allowing poultry products to be imported into the United States from the People's Republic of China". Sections 733, 727, and the latter's replacement, Section 743 of the *Agriculture Appropriations Act* 2010, reference the "establishment or implementation of a rule". This phrase implicates *all* of the Food Safety Inspection Service's (FSIS) "equivalence" procedures – the procedures that are *essential* prerequisites for exporting poultry to the United States. During the past two years, Section 727 and Section 733 have foreclosed any opportunity for China to secure and maintain such status, therefore denying China the opportunity to access the US poultry market.

4.102 FSIS is the *only* US entity with both the legal *authority* and the institutional *capability* to evaluate the food safety regime for poultry in exporting countries. It does so by examining five broad risk areas. FSIS, after applying its procedures to China, determined that it met all FSIS requirements and *established* a rule permitting imports of processed poultry products, making China one of just 10 countries to have successfully completed these procedures. FSIS was in the process of both maintaining that approval and applying the initial procedures to China's poultry *slaughter* inspection system when Congress abruptly removed China's access to the procedures. This all occurred as the United States was steadily *increasing* its consumption of Chinese food products, importing $5.2 billion worth in 2008 alone.[96] This discrimination violates various provisions of the WTO Agreements and cannot be cured by recourse to the exception in GATT Article XX(b).

2. Section 727 of the Agriculture Appropriations Act 2009

(a) Section 727 is inconsistent with Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, and 8 of the *SPS Agreement*

4.103 Having stated repeatedly in its first written submission that the purpose of Section 727 is the protection of human life and health[97], there is no doubt that the United States has demonstrated that Section 727 is an SPS measure as defined in the *SPS Agreement.*[98]

(i) Relationship between the SPS Agreement and GATT Article XX(b)

4.104 Both the *SPS Agreement* and GATT Article XX(b) prohibit the enactment of health-related measures in a manner that arbitrarily or unjustifiably discriminates among WTO Members. As the European Union correctly points out in its third-party submission[99], the provisions of the *SPS Agreement* provide relevant and immediate context for interpreting Article XX(b). Thus, the evidence and arguments supporting China's claims under the *SPS Agreement* are highly relevant and applicable to the rebuttal of the US defence under XX(b).

(ii) Section 727 is inconsistent with Articles 5.5 and 2.3 of the SPS Agreement

4.105 Article 5.5 of the *SPS Agreement* prohibits Members from applying different levels of sanitary protection to comparable situations without justification. The higher level of SPS protection applied by the United States to Chinese poultry products, reflected in Section 727, is arbitrary and unjustifiable and results in discrimination, in violation of Article 5.5.

4.106 In particular, Section 727 requires the United States to apply an "ALOP" to Chinese poultry that is different from the ALOP that is applied to, *first*, other food products imported from China and, *second*, to poultry products imported from any other WTO Member. This distinction in ALOPs in

[96] Exhibit US-24, p. 5. Processed poultry would amount to 0.2% of China's total food exports (Exhibit CN-41).
[97] United States' first written submission, paras. 119, 121, 122.
[98] *See, e.g.*, Panel Report, *EC – Hormones*, para. 8.40.
[99] Third party written submission by the European Union, paras. 35-40.

both situations is arbitrary and unjustifiable, and it results in discrimination against China. The ALOP that the United States applies to Chinese poultry products is stricter than zero tolerance, whereas the ALOP applied by the United States to both *other* Chinese food imports *and* poultry imports from other WTO Members is significantly lower. With respect to the rationale for applying an ALOP of less than zero tolerance to Chinese poultry products, the United States has provided no scientific evidence or justification for singling out *poultry* products from *China* for different treatment. This distinction in ALOPs results in discrimination, confirmed on the basis of the various warning signs developed by the Appellate Body. Having demonstrated Section 727's inconsistency with Article 5.5, China requests that the Panel also find a violation of Article 2.3, in accordance with Appellate Body case law.[100]

(iii) Section 727 is inconsistent with Articles 2.2, 5.1, and 5.2 of the SPS Agreement

4.107 Article 5.1 of the *SPS Agreement* requires that SPS measures be based on the conclusions of a scientific risk assessment that takes into account the factors in Article 5.2. As discussed in China's first written submission[101], there is *no* publicly available indication that Section 727 was enacted on the basis of *scientific evidence* demonstrating that Chinese poultry products pose any *specific* health threat, as required under Article 2.2, or on the basis of an Article 5.1-consistent risk assessment. Therefore, China requests the Panel find that Section 727 is inconsistent with Articles 2.2, 5.1 and 5.2 of the *SPS Agreement.*

(iv) Section 727 is inconsistent with Article 5.6 of the SPS Agreement

4.108 Article 5.6 requires that Members' SPS measures not be more trade restrictive than required to achieve their appropriate level of sanitary protection. To establish a violation of Article 5.6, a Member must demonstrate that there is an alternative SPS measure that is reasonably available, achieves the Member's appropriate level of protection, and is significantly less trade restrictive.[102] An alternative measure that meets all of these criteria is the application to China of the normal FSIS poultry import approval procedures.

(v) Section 727 is inconsistent with Article 8 of the SPS Agreement

4.109 Section 727 is inconsistent with Article 8 of the *SPS Agreement* because it leads to "undue delay" in the completion of conformity assessment procedures for the importation of Chinese poultry products. Section 727, together with its predecessor Section 733, delayed the application of FSIS procedures to China by 2 years. The prohibition imposed under Section 727 on Chinese access to FSIS approval procedures is without scientific or other justification, and it results in arbitrary and unjustifiable discrimination against Chinese poultry products. The delay created by Section 727 in the application of FSIS procedures to China is therefore unjustifiable, or "undue".

(b) Section 727 is inconsistent with Article I:1 of GATT 1994

4.110 Section 727 violates Article I of GATT 1994 as it has denied *only* Chinese poultry products the possibility of obtaining the necessary import approval under FSIS procedures.

4.111 Hypothetical like product analyses are appropriate when a measure imposes a *de jure* origin-based distinction.[103] Thus, the "like products" for the purposes of this analysis are the "poultry

[100] Appellate Body Report, *Australia – Salmon*, para. 109.
[101] China's first written submission, paras. 137-147.
[102] Appellate Body Report, *Australia – Salmon*, para. 194.
[103] Panel Report, *Colombia – Ports of Entry*, para. 7.356, Appellate Body Report, *Canada – Periodicals*, pp. 20-21.

products" of any other Member whose poultry products inspection system could have been evaluated (and possibly found to be equivalent) under the FSIS procedures. To the extent that the United States claims[104] that Chinese processed poultry is not "like" processed poultry produced in any other WTO Member due to alleged vague "differences in safety", it has presented no evidence to support that assertion.

(c) The United States concedes that Section 727 is inconsistent with GATT Article XI:1 and Article 4.2 of the *Agreement on Agriculture*

4.112 China demonstrated in its first written submission that Section 727 violates Article XI:1 and Article 4.2. The United States appears to concede these violations[105], but argues that they can be justified under Article XX(b) of GATT 1994. This defence, however, must fail.

(d) Inconsistency of Section 727 with GATT 1994 and the *Agreement on Agriculture* cannot be justified on the basis of GATT Article XX(b)

4.113 To justify a measure under the exceptions in Article XX, it must meet the requirements of both the specific exception invoked *and* the chapeau.[106] The requirements of neither are met in this case.

(i) Section 727 is not "necessary" within the meaning of GATT Article XX(b)

4.114 The United States has not met its burden of demonstrating that Section 727 falls within the scope of the exception in paragraph XX(b). The Appellate Body has identified the factors that must be considered when determining whether a measure at issue is "necessary" for the achievement of its stated objective under the relevant exception in Article XX.[107] Analysis of these factors demonstrates that Section 727 was not necessary for its objective – the protection of human life and health from "contaminated foods".

4.115 *First*, any contribution of Section 727 to this objective was insignificant. The United States claims that Section 727 was necessary to protect against contaminated foods, but it targets only one product – a product for which the United States gave no evidence of China-specific problems and which was expected to be imported in low quantities. While blocking the import of Chinese poultry, the United States continued to import massive quantities of other foods from China, any of which could have in theory been contaminated. Moreover, the FSIS procedures were entirely capable of identifying any problems with Chinese poultry and preventing importation if there was cause to do so. *Second*, Section 727's insignificant contribution does not outweigh its extreme trade-restrictiveness. The Appellate Body has confirmed that a measure as trade-restrictive as an import ban may be justified under Article XX(b), but only if its contribution to its stated objective is "material".[108] *Third*, there is an alternative measure available to the United States – the FSIS procedures. This alternative measure is reasonably available and would allow the United States to achieve the level of sanitary protection normally applied to imported poultry. *Finally*, the United States illogically instituted Section 733 in December 2007, just when China was scheduled to undergo an equivalence maintenance audit – a process that would have required FSIS to examine any allegedly "unique" risk posed by Chinese poultry that the United States claims justified Sections 733 and 727. Based on the

[104] United States' first written submission, para. 98.
[105] United States' first written submission, paras. 101-105.
[106] Appellate Body Report, *US – Gasoline*, Section IV; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139; Appellate Body Report, *US – Shrimp*, para. 139.
[107] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 82.
[108] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150-151.

above, Section 727 was not "necessary" and therefore does not fall within the exception in paragraph (b).

(ii) Section 727 does not comply with the chapeau *of GATT Article XX*

4.116 The United States has *also* not met its burden of demonstrating that Section 727 fulfils the requirements of the chapeau of Article XX. The application of Section 727 has resulted in both unjustifiable discrimination and arbitrary discrimination between countries where similar or identical conditions prevail, within the meaning of Article XX. Section 727 has blatantly discriminated against China, as compared to every other WTO Member similarly seeking to obtain FSIS approval for poultry products. The discrimination resulting from Section 727 is arbitrary for several reasons. First, there is no indication that it was enacted based on *any* scientific evidence regarding risks posed by Chinese poultry. Also, the United States has failed to demonstrate why it singled out poultry, as opposed to *other food products* from China, or why it singled out Chinese poultry, as opposed to poultry from *other WTO members*. China is one of just 10 countries with a poultry inspection system that has been deemed equivalent, yet its poultry is treated as *more dangerous* than poultry from all other WTO Members, including those without *any* or without *any effective* food safety laws.

3. Section 743 of the Agriculture Appropriations Act of 2010

4.117 China believes that Section 743 is a subsequent, closely-related measure to Section 727 that continues the US policy embodied in Section 727 of subjecting the import of only Chinese poultry products to discriminatory restrictions. On balance, Section 727 and Section 743 have the same substance, essence, and/or legal implications. The Panel should find that Section 743 is within its jurisdiction, and then provide China with the opportunity to detail the substantive violations caused by Section 743.

4.118 The US first written submission challenges China's assertion that Section 743 is within the Panel's terms of reference. China thus believes that it would be in the interest of all of the participants in this proceeding for the Panel to make a preliminary ruling with respect to whether Section 743 is within the Panel's jurisdiction.

4. Request for enhanced third party rights

4.119 China does not believe that this dispute merits enhanced third party rights.

D. EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

4.120 Mr Chairman, distinguished Members of the Panel, during the past two days, China has explained that Section 727 and Section 733 served to prevent the experts at FSIS from doing their job for nearly two years, but only with respect to China. Because FSIS is the only US government entity with both the legal *authority* and institutional *capability* to evaluate the food safety regime of Chinese poultry and to authorize poultry imports, these measures have served to foreclose China from having even the *possibility* of importing poultry into the United States. And they have done so without any regard to the actual safety and health risks of Chinese poultry, the facilities in which that poultry is processed, or the Chinese poultry inspection system.

4.121 At the same time, every other WTO Member that wished to import poultry into the United States continued to have full access to the standard FSIS procedures, including countries in which there was actual evidence of specific problems with poultry processing and safety. For example, as I mentioned yesterday, Mexico continued to access the FSIS procedures even after audits revealed a number of unsanitary conditions in Mexican poultry processing and slaughter

establishments that pointed to the systemic failure by Mexican officials to enforce food safety laws.[109] n fact, US-origin poultry has its own risks, and China has identified a survey finding *Salmonella* and/or *Campylobacter* in about two-thirds of chickens tested in the United States.[110] Scientific and other evidence does not support the conclusion that there is a health threat specific to *poultry from China* that is not also present in *any other* WTO Members.

4.122 China has explained in great detail why Sections 727 and 733 are inconsistent with the US obligations under the *SPS Agreement*, the GATT 1994, and the *Agreement on Agriculture*, based on the total absence of scientific evidence or risk assessment supporting these measures, the fact that they were not "necessary" within the meaning of Article XX(b), and the arbitrary and unjustifiable discrimination inherent in, and resulting from, these measures.

4.123 In response, the United States has argued that Section 727 was "adopted *in the context* of an ongoing food safety equivalency process" and that it was an "*intermediate*" "step in an ongoing review of the equivalency of China's food safety enforcement system as applicable to poultry products."[111] Mr Chairman, distinguished members of the Panel, this is an incredible statement. As China has explained, it is FSIS that performs the "ongoing food safety equivalency processes" with respect to poultry for the US Government, and it is FSIS that performs *all* of the steps in those ongoing reviews of equivalency, including reinspection of products at the US border. In stark contrast, Section 727 and its predecessor were extraordinary actions taken by the US Congress that suddenly and unexpectedly *terminated* any "ongoing" process that FSIS was conducting with respect to China, by taking away FSIS's funding for these purposes for several years.

4.124 In attempting to justify Sections 727 and 733 as qualifying as an exception under GATT Article XX(b), the United States repeated its allegations about generalized problems with China's food safety regime, citing to a number of reports on the topic.[112] Yet, given that the value of imports of food products from China has *increased dramatically* from $1 billion in 1999 to $5.2 billion in 2008[113], the United States is in no position to argue that the treatment of Chinese poultry is not arbitrary when it fails to present any evidence demonstrating why such poultry is somehow riskier than the other Chinese food products that are imported in massive quantities.

4.125 Next, the United States dedicated a substantial portion of its opening statement yesterday to telling us about alleged problems with Chinese-origin spinach, baby formula, seafood, turbot fish, pork, pet food, milk, and eggs, and cited to ten exhibits in support.[114] But these allegations are completely irrelevant to this case – which is a dispute about arbitrary measures that are specifically targeted at *poultry*, and only *poultry*.

4.126 The United States does mention generalized concerns related to the avian flu and its impact on poultry[115], but again does not explain why China should be treated differently than every other country that has avian flu issues, all of which have access to the normal FSIS procedures. Nor did it provide any evidence whatsoever – other than the unsupported statements in a Congressional Committee Report – to contradict the finding by FSIS that China was fully capable of exporting poultry that was not affected by the avian flu, findings that FSIS made when it first promulgated the

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[109] *Final Report of an Audit Covering Mexico's Meat and Poultry Inspection System FY 2008-1* (Exhibit CN-27). *See also* Exhibits CN-28 and CN-29.

[110] *Chicken survey finds two-thirds harbour salmonella, campylobacter* (Exhibit CN-46).

[111] United States' oral statement at the first substantive meeting of the Panel, paras. 3, 6 (emphases added).

[112] United States' oral statement at the first substantive meeting of the Panel, paras. 31-33.

[113] Exhibit US-24.

[114] United States' oral statement at the first substantive meeting of the Panel, paras. 34-35.

[115] United States' oral statement at the first substantive meeting of the Panel, para. 29.

rule allowing China to export processed poultry after years of detailed reviews, audits, and inspections.[116]

4.127 The only other evidence that the United States described yesterday that specifically related to Chinese poultry involved a reference to one instance of alleged smuggling of poultry, none of which was found to pose any health risk to US consumers.[117] Yet, as China explained yesterday, there is simply no basis for the United States to conclude that cutting off funding for FSIS equivalence rulemaking is somehow "necessary" to control smuggling from China, or that alleged smuggling justifies in any way the arbitrary discrimination established by Section 727. This is clear from the FSIS response during its 2006 rule-making with respect to processed poultry from China, that "[t]his rule is not expected to have *any impact* on illegal entry of products"[118] because "U.S. Customs and Border Protection, rather than FSIS, addresses smuggling" and "acts as a first line of defense for all products entering the country."[119]

4.128 In the end, although the United States would like to believe, as it states, that its "evidence makes clear" that "the importation of potentially unsafe poultry from China may pose a significant risk to human and animal life and health"[120], the most cursory review of this so-called "evidence" reveals a lack of *any* connection to problems that *are in any way* specific to Chinese poultry or China's poultry inspection system.

4.129 Why, one might ask, does the United States have nothing specific to say about the health and safety risks that could arise from importing Chinese poultry as a result of alleged deficiencies in the Chinese inspection system? The answer is simple. For almost two years, the people at FSIS with the capability to develop any such evidence have been precluded from doing so as a direct result of Section 727 and Section 733. I recall that, yesterday, the United States provided the Panel with the definition of "arbitrary", a term that is critical to evaluating both China's SPS claims and the United States' GATT Article XX(b) defense. Arbitrary is defined as something that is "based on mere opinion or preference as opposed to *the real nature of things*".[121] With respect to evaluating the safety of Chinese poultry products, FSIS is the only agency with the institutional capability and scientific expertise to determine the *"real nature of things*", and they were foreclosed from making that determination in the year leading up to the imposition of Section 727, and beyond. It follows that Congress was instead acting "based on mere opinion or preference" of some of its Members, and that such action was, by definition, "arbitrary".

4.130 In its efforts to defend Section 727 as a measure that is not "arbitrary" pursuant to the Article XX chapeau, the United States emphasised at paragraph 50 of its opening statement that "there is no other country that had been as far along in the equivalency process" where "the same conditions prevail." In essence, the United States was asserting that there was some sense of *urgency* with respect to Chinese equivalence that made it appropriate for Section 727 to single out China. But, several minutes earlier, in paragraph 23 of the same statement, the United States contradicted itself, stating that "even in the absence of Section 727, FSIS would not have necessarily allowed China to export poultry to the United States." In fact, there was *no sense of urgency* in view of how "far along in the equivalency" process China had gone. This is because, for a variety of reasons, more than two years had passed since the most recent on-site audits of the poultry safety and control system had last

[116] United States' oral statement at the first substantive meeting of the Panel, para. 39, quoting Exhibit US-42.
[117] United States' oral statement at the first substantive meeting of the Panel, para. 35; Exhibit US-30 (noting that the smuggled poultry products contained no bird-flu virus).
[118] Exhibit CN-14, p. 20869.
[119] Exhibit CN-14, p. 20869.
[120] United States' oral statement at the first substantive meeting of the Panel, para. 41.
[121] Exhibit US-52.

taken place in China, in August 2005.[122] As a result, at the time that Section 727 and its predecessor were enacted and in force, FSIS, in the exercise of its normal equivalence rule-making procedures, would have been *required* to analyse and conduct on-site audits of China's poultry safety and control regime before Chinese poultry could enter the United States. Through such audits, FSIS would have naturally evaluated and examined, *inter alia*, any allegedly unique risks posed by China, and any alleged food "safety scandals".

4.131 Consequently, the United States once again fails in its attempt to characterize China's situation as unique, as it has previously failed when trying to distinguish China by discussing health and safety concerns such as avian flu, bacteria, and contaminants that are all inherent in other countries that have never lost access to FSIS procedures.

4.132 Yesterday, the United States pointed out that "while Section 727 was in effect, 56 major US companies and trade associations representing the domestic industry wrote a letter to President Obama asking him to oppose an extension of Section 727."[123] In particular, the industry argued in the letter that "Section 727 and its predecessors effectively bar FSIS from conducting a necessary and appropriate risk assessment on whether imports of cooked chicken from China pose any risk to American consumers."[124]

4.133 Mr Chairman, distinguished Members of the Panel, the companies that signed on to that letter (including through the various trade associations) include many profit-seeking companies that are in the business of selling poultry products in US markets. Other than the US Government, these companies have the greatest knowledge of the capabilities of FSIS, and they would also have the greatest commercial risk from advocating the removal of legislation that genuinely protected the safety of the poultry sold in the United States. If US consumers were to fear the safety of any poultry sold in US grocery stores and restaurants as a result of a scare related to imported Chinese poultry, it would certainly have spillover effects on the demand for US-origin poultry.[125] Consequently, the US industry letter actually supports China's arguments that Section 727 was not "necessary", and that the normal FSIS procedures constitute an alternative SPS measure that achieves the United States' appropriate level of protection, and is significantly less trade restrictive.

4.134 Yesterday, in its latest attempt to distract the Panel from the substantive problems with Section 727 and Section 733, the United States asked a series of questions to China to identify precisely *when* China believed that it was first "demonstrated" that the US measures were SPS measures. China believes that this question is entirely irrelevant to the issue of whether its consultation request properly requested consultations under Article 11 of the *SPS Agreement*. That is because China's consultations request not only specifically invoked Article 11 of the *SPS Agreement*, but it also included potential violations of specific provisions of that agreement, namely Articles 2.1, 2.2, 2.3, 5.1-5.5, and 8 of the *SPS Agreement*, and a brief statement of the basis for those violations. China framed its SPS claims just like any other arguments in the alternative, and China's understanding of the true objective of the US measures has evolved during the course of this dispute. An argument in the alternative can not be a proper basis for disrupting the ability of China to achieve a "prompt settlement of" this dispute that is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members", pursuant to Article 3.3 of the DSU.

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[122] Exhibit CN-16.

[123] United States' oral statement at the first substantive meeting of the Panel, para. 39, citing Exhibit US-55.

[124] Exhibit US-55.

[125] See, e.g., Exhibit US-14, in which one concerned company explained that "[i]f American consumers cannot buy with confidence, they may decide to avoid poultry products altogether".

4.135 With respect to the question of whether Section 743 falls within the scope of the terms of reference, China provided a list of five key reasons why Section 743 has the same substance, essence, and/or legal implications as Section 727.[126] In response, the United States emphasised that "because Section 743 was drafted and adopted after consultations were held, it was impossible for consultations to be held on the measure."[127] But China notes that the lack of consultations in this situation can not be a determining factor, or else future measures could *never* fall within the scope of the terms of reference of *any* dispute, which would be contrary to Appellate Body precedent.[128]

4.136 Finally, in closing, I would like to recall one of the key points that China made yesterday. Even if, during the term of Sections 727 and 733, every scientist in the world had independently concluded that China's poultry inspection system and, in turn, Chinese poultry products were the safest in the world, Section 727 would have *still* operated to exclude Chinese poultry products from obtaining FSIS import approval and therefore, from being exported to the United States. The United States has not disputed this conclusion. In China's view, it is inconceivable that such an arbitrary measure, with such a dramatic trade effect, could be consistent with the disciplines of the GATT 1994, the *SPS Agreement*, and the *Agreement on Agriculture*. It clearly is not.

E. EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

4.137 China's submission and oral statement overlook two important facts: first that Section 727 was adopted in the context of an ongoing food safety equivalency procedure, and second that Section 727 and was of only limited duration and effect. A proper examination of Section 727 under relevant WTO rules requires both of these facts to be fully taken into account.

4.138 First, under the US system for ensuring the safety of imported poultry products, FSIS must determine that the exporting country has a poultry inspection system that achieves the same level of sanitary protection as the US system. The equivalency determination is not addressed to the food safety of particular products, but to the equivalency of the inspection system of the exporting country. China does not contest the right of a WTO Member to adopt an equivalency-based food safety system. However, China argues that Section 727 was "discriminatory" simply because it mentions China. This argument ignores the fundamental point that Section 727 was addressed to China because the measure was an exercise of Congressional oversight over the ongoing equivalency procedure involving China's poultry inspection system. An action taken in the context of an equivalency review of a particular country's food safety inspection system will, by its very nature, make explicit reference to that country. The country-specific nature inherent in an equivalency review does not automatically raise questions of "discrimination".

4.139 Second, Section 727, on its face, was of only limited duration and effect. Neither Section 727, nor any other US measure, imposed an indefinite restriction on the completion of the equivalency procedures applicable to China's poultry inspection system. Rather, Section 727 applied for a period of less than seven months, and was intended to ensure that China's lax food safety enforcement was properly considered. The measure has expired, and under a separate measure – Section 743 – the funding restriction has been removed. Section 727 also applied only to the establishment or implementation of equivalency rules for Chinese poultry; it did not prohibit – and indeed contemplated – the consideration of issues related to China's food safety enforcement system during the period subject to the measure.

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[126] China's opening oral statement at the first substantive meeting of the Panel, paras. 126-131.
[127] United States' oral statement at the first substantive meeting of the Panel, para. 15.
[128] Appellate Body Report, *Chile – Price Band System*, paras. 139-144.

4.140 Thus, to the extent that China establishes that the measure is inconsistent with any discipline of the GATT 1994, the question is not – as China seems to frame it – whether a Member may impose an indefinite import ban. Rather, the question is whether the measure actually at issue, which was limited in both time and substantive effect and which was adopted for the purpose of ensuring the consideration of a legitimate food safety issue, may be justified under GATT Article XX.

4.141 Finally, the mere fact that a measure implicates food safety does not dictate whether or how such a measure is covered by the *SPS Agreement*. To the contrary, the *SPS Agreement* – in its Annex A – contains a specific and detailed definition of covered measures. And as illustrated in the *EC – Approval and Marketing of Biotech Products* dispute, even if a measure is covered by Annex A, it is far from trivial to determine how each of the differing SPS obligations apply to any particular measure.

4.142 Along these lines, it is up to China, as the complaining party, to allege how and why a measure is covered by the *SPS Agreement* if it wishes to receive DSB findings under that agreement. In this dispute, China has not chosen to make the case that Section 727 is covered by the *SPS Agreement*. In fact, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the meaning of the *SPS Agreement*".

4.143 China, however, has alleged that the US measure is subject to, and is inconsistent with, disciplines under the GATT 1994. As a result, the United States has presented its defense of the measure under the relevant provisions of the GATT 1994. Had China requested consultations under the *SPS Agreement*, and had China made a prima facie case of how and why the US measure fell under the *SPS Agreement*, the United States would have presented its defense under that framework. But the United States, as responding party, cannot be expected to present a defense based on claims never consulted upon and with respect to which China has failed to make even a prima facie case.

4.144 China asserts that two other measures – an "indefinite moratorium" and the subsequently enacted Section 743 – also are inconsistent with the WTO Agreement. Section 727, however, is the only measure within the terms of reference of the Panel. China has no basis for the allegation of the separate, distinct measure that it calls "the moratorium". In particular, China's citation to a provision in the 2008 appropriations bill does not establish an indefinite moratorium. The fact that Congress enacted a time-limited funding restriction twice does not show the existence of an *"indefinite"* suspension of approvals. Moreover, Section 743 disproves China's claim as it has resulted in a lifting of the funding restriction.

4.145 In addition, contrary to China's assertions, Section 743 is not a measure that the Panel may examine for conformity with the covered agreements because it is not within the Panel's terms of reference as part of the "matter" referred to the Panel by the DSB. First, the parties did not consult on its provisions. Second, Section 743 plainly changes the "essence" of Section 727.

4.146 China also mischaracterizes the effect of Section 727 by failing to take account of the "scope and meaning" of provisions contained in US appropriations legislation generally, and of the particular conditions contained in Section 727 specifically. US domestic law dictates that a congressional funding restriction is limited to its explicit terms. Funding restrictions do not amend or modify the underlying law administered by an executive agency. Accordingly, these restrictions do not prevent the agency from taking actions *related* to the prohibited act as long as the agency does not take the prohibited act itself. Further, unless the funding restriction states otherwise, it only applies to the fiscal year covered by the appropriations bill in which it is contained.

4.147 Thus, Section 727's legal meaning was limited to preventing USDA from "establishing" or "implementing" a rule allowing poultry products from China to be imported into the United States for

a temporary six and a half month period during the 2009 fiscal year. Section 727 did not create a permanent funding restriction that would impact FSIS's ability to establish and implement rules related to equivalency after its expiration. And indeed, as a consequence of Section 743, the funding restriction on FSIS has been lifted.

4.148 Further, Section 727 did not prohibit FSIS from using funds to engage in activities under the PPIA *related* to an equivalency rulemaking for China. To the contrary, Section 727 directed FSIS to engage in this work, and it did so during 2009. FSIS reviewed its documentation with regard to China's equivalency application, it sent a letter to China requesting additional information on its new food safety law, and it provided an equivalency action plan to Congress. FSIS could have done even more work, including the PPIA's document analysis step, but its work was thwarted by China's failure to respond to its letter requesting additional information.

4.149 Finally, Section 727 did not ban imports of poultry from China. Rather, the import prohibition was imposed by the PPIA, a measure not at issue in this dispute. And even in the absence of Section 727, FSIS procedures would not have necessarily allowed China to export poultry to the United States. For neither processed or slaughtered poultry was it a foregone conclusion that FSIS would find China's inspection system to be equivalent.

4.150 Thus, the most China can allege is that Section 727 prevented FSIS from taking final actions to specifically establish or implement equivalency rules 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 had this measure not been enacted.

4.151 In any event, Section 727 is justified pursuant to GATT Article XX(b).

4.152 Section 727's policy objective falls within Article XX(b)'s range of policies. First, it is well known that poultry can contain bacteria, contaminants, and other additives and substances that pose a risk to human life and health. Thus, if China's authorities fail to enforce its laws to ensure that its poultry is produced under equivalent conditions, then the life or health of US consumers would potentially be at risk. Similarly, avian influenza-infected poultry can pose a risk to animal and human life and health. And entry of infected poultry from China could occur if Chinese authorities did not adequately enforce the law to ensure that poultry had been cooked or otherwise processed sufficiently to kill the disease.

4.153 The risk posed by China's lax enforcement of its food safety laws is further highlighted by critical reports on China's systemic problems and the series of food safety crises that have plagued China in recent years. For example, the Asian Development Bank noted that "unsafe food in the PRC remains a serious threat to public health," and indicated that "there is a pressing need for further reform". Similarly, the World Health Organization's food safety chief characterized China's food safety system as "disjointed", noting that this feature of the system helped prolong the melamine crisis. Finally, a study by *Global Health Governance* pointed out that the reluctance of local officials in China "to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country." The report also stated: "corruption within the Chinese government poses a further challenge" to food safety as this problem "extends from grass-roots cadres to the highest levels."

4.154 In addition, numerous high-profile crises have occurred, threatening the life and health of consumers and leading to frequent bans on Chinese products. Most notably, in 2007, the use of melamine in China to adulterate feed and gain bigger profits led to the deaths of numerous US household pets, with unofficial figures indicating the practice responsible for the death of up to 4,000 cats and dogs. In 2008, it was discovered that Chinese producers were using melamine in products intended for human consumption, such as baby formula, milk, and eggs. Consumption of melamine-

tainted products led to over 300,000 illnesses and the deaths of at least 14 infants. The World Health Organization dubbed China's melamine crisis "one of the largest food safety events the agency has had to deal with in recent years".

4.155 China's central government even recently acknowledged the extent of its problems with food safety. For example, China's Ministry of Health stated that "China's food security situation remains grim, with high risks and contradictions". And as a result of these problems, China was forced to enact a new food safety law earlier this year.

4.156 These many broad-ranging food safety crises raise serious questions about China's ability to enforce its laws. And the question of enforcement is of particular importance in the context of an equivalency regime where the United States must rely on China to enforce its laws to ensure that the poultry it is exporting to the United States is safe.

4.157 With these risks in mind, the US Congress enacted Section 727. The measure and its Joint Explanatory Statement ("JES") make clear that its policy objective was to protect against the risk posed to human and animal life and health from potentially unsafe poultry from China. In fact, the JES accompanying Section 727 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." Similar language was also included in the Committee Report accompanying Section 733.

4.158 Section 727 was necessary to achieve this important policy objective in light of the severe risks posed by the importation of potentially unsafe poultry from China. China's food safety system suffers from broad systemic problems, problems that FSIS is not typically faced with when making an equivalency determination. These include widespread smuggling, corruption, and the lax enforcement of China's food safety laws. Furthermore, China has experienced numerous food safety crises in recent years, such as the devastating melamine crisis that occurred shortly after FSIS had made a final determination about China's poultry processing system.

4.159 The conclusion that Section 727 was necessary is bolstered by the analysis that past panels have used when addressing whether a measure was "necessary" in the context of Article XX(b). Other panels have often found it helpful to weigh and balance the importance of the interests or values at stake, the contribution made by the measure to its policy objective, and the trade restrictiveness of the measure. In the instant dispute, these factors all support the conclusion that Section 727 was necessary.

4.160 First, the need to protect human life and health from the risk posed by consuming potentially unsafe poultry is of the utmost importance, as is the need to protect animal life and health from the threat of avian influenza. Second, there is a direct relationship between Section 727's policy objective and its contribution to food safety. Section 727 directly contributed to the protection of human and animal life and health by ensuring that FSIS did not establish or implement equivalency rules that would allow for potentially unsafe poultry to be imported into the United States. In addition, Section 727 set up a process by which FSIS could further evaluate the rules in light of China's systemic problems and recent food safety crises. Finally, Section 727 was temporary and did not stop work related to China's equivalency application, and it was explicitly designed to allow FSIS to move forward with the implementation and establishment of equivalency rules when the funding restriction was lifted.

4.161 Section 727 also meets the conditions of the Article XX chapeau. Section 727 was not discriminatory because there is no other country where the same conditions prevail as they did for China at the time the measure was enacted. No other country as far along in the equivalency process

had experienced food safety crises of such a serious magnitude. Neither had any country in that situation suffered from the systemic problems that plagued China's food safety system.

4.162 Even if the Panel considers Section 727 discriminatory, it was not applied in an arbitrary or unjustifiable manner. The *Brazil – Retreaded Tyres* Appellate Body Report noted that whether a measure is applied in a way that is "arbitrary or unjustifiable" should focus "on the cause of the discrimination, or the rationale put forward to explain its existence". Section 727's application was not arbitrary or unjustifiable because there was a strong rationale for the measure's treatment of China that directly relates to the measure's policy objective – namely the many legitimate concerns about China's food safety system.

4.163 Section 727 is also not a disguised restriction on trade. First, the text of the explanatory statement accompanying the measure explicitly indicates that the measure's policy objective was to protect human and animal life and health, not to protect a domestic industry. Further, if Section 727's objective were to restrict trade, it would not have included language instructing FSIS to set the stage for expeditious action on the implementation and establishment of the equivalency rules as soon as the funding restriction was lifted. Statements by members of Congress directly involved with Section 727's enactment also support this view, as does the US poultry industry's widespread opposition to the measure.

4.164 The United States believes that any SPS claims by China are not within the Panel's terms of reference. DSU Article 1.1 states that consultations must be requested pursuant to the consultation and dispute settlement provisions of each covered agreement for which dispute settlement under the DSU is sought. But here, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the meaning of the *SPS Agreement*".

4.165 China's *ex post facto* explanation that it wanted to invoke claims under the *SPS Agreement* as "alternative claims" is unavailing. First, regardless of what China subjectively intended, the governing document is the request for consultations itself, which does not request consultations in order to pursue alternative claims, but asserts that the US measures at issue are not SPS measures. Second, Members routinely invoke alternative claims by stating just that: that particular claims are presented "in the alternative". China in its request for consultations could have, but did not, present SPS claims in the alternative.

4.166 The issue presented by China's consultations request is not a mere technicality. In raising the deficiency of China's consultations request, the United States is pursuing an important systemic concern. 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. China's approach could lead to greater confusion in future disputes. The DSU provisions are clear and were agreed upon – 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". As stated in the US preliminary ruling request, clarity in the request for consultations is important for the overall operation of the dispute settlement system.

4.167 Finally, the United States agrees with China that the Panel should not accept the EU's request that the Panel alter its working procedures in order to provide enhanced third party rights. The present dispute is not comparable to past cases where panels have granted enhanced third-party rights. For example, in *EC – Bananas III* and *EC – Tariff Preferences*, the panel granted enhanced rights because third parties had substantial trade interests in the measure at issue in the dispute. And in *EC – Hormones*, the panel granted enhanced rights to what were essentially co-complainants in parallel proceedings. But here, the basis for the EU's request is that issues under the *SPS Agreement* may be further developed after the first substantive meeting. The United States submits that this rationale

cannot suffice as the basis for granting enhanced third party rights. It is a common element of nearly every dispute that the legal and factual issues continue to develop after the first substantive meeting. Indeed, if this were not the case, the DSU's requirement for a second substantive meeting would be pointless.

F. EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

1. Introduction and summary

4.168 The Parties' responses to the Panel's questions confirmed certain undisputed facts:

- Securing and maintaining on an annual basis an equivalent status under FSIS rules is *the* essential prerequisite for exporting poultry to the United States.

- During the past two years, Section 727 and Section 733 foreclosed for China – but not any other WTO Member – any opportunity to secure and maintain equivalence status and, consequently, any opportunity to access the US poultry market.

- The termination of China's access to the full range of FSIS rule-making procedures began with the implementation of Section 733 in December 2007 and has continued until at least 12 November 2009.

- There was no possibility that poultry from China could have been imported into the United States at any time between December 2007 and 12 November 2009 without FSIS *first* conducting a detailed audit and examination of China's poultry safety and inspection regime.

- During the period from December 2007 through 12 November 2009, FSIS rules-based equivalence procedures continued to be available to countries (a) affected by highly pathogenic avian influenza, (b) that failed to adequately enforce their food safety laws, and/or (c) where FSIS found "systemic failures" in food safety inspection procedures, including those previously found to be equivalent.

- Chinese exports of non-poultry products to the US market increased considerably throughout the December 2007 – 12 November 2009 period, without Congress ever suspending China's access to normal import procedures applied by the FDA.[129]

4.169 China has previously established that Section 727 violates the GATT 1994, the *Agreement on Agriculture* and the *SPS Agreement*[130], and that Section 727 cannot be justified under Article XX(b) of GATT 1994. The arguments set forth by China to rebut the US Article XX(b) defence also support China's SPS claims.

2. The United States cannot sustain its argument that China and the United States did not consult under the *SPS Agreement*

4.170 The United States continues to elevate form over substance in addressing the Panel's jurisdiction over the SPS claims, maintaining its assertion that China did not request consultations pursuant to Article 11 of the *SPS Agreement*. However, China's consultations request *specifically* invoked Article 11 and listed potential violations of specific provisions of that Agreement. Furthermore, the United States has not claimed that China's consultations request affected US due

[129] *See* China's second written submission, para. 1.
[130] These arguments are not repeated in detail in this submission.

process rights with respect to the *SPS Agreement* claims. This leaves the United States' argument as one that is purely formalistic.

3. China has established prima facie claims under Articles I:1 and XI:1 of GATT 1994 and the *Agreement on Agriculture*

(a) China's claims under Article I:1 of GATT 1994

4.171 In enacting Section 727, the United States withheld an advantage it accorded to all other WTO Members by denying *only* Chinese poultry products the opportunity to access FSIS procedures and, thus, the possibility of being exported to the United States. China has *repeatedly* demonstrated that "like products" in this dispute are "poultry products" hypothetically capable of accessing the procedures and being exported to the United States. While China has established a prima facie case, the United States has never presented a rebuttal.

(b) China's claims under Article XI:1 of GATT 1994

4.172 Section 727 is inconsistent with Article XI:1 of GATT 1994, because it imposes import restrictions that negatively impact the competitive opportunities for Chinese poultry products, and also imposes a *de facto* import prohibition on such products. The United States effectively concedes a violation of Article XI:1, as the only defence it presents is under Article XX(b).

(c) China maintains its claim under Article 4.2 of the *Agreement on Agriculture*

4.173 China is confused by the US statements asserting that China indicated that it would no longer pursue its claim under Article 4.2 of the *Agreement on Agriculture*. China did no such thing. China has established a prima facie case that Section 727 is inconsistent with Article 4.2, because the measure results in the maintenance of quantitative restrictions on the import of Chinese poultry products.[131] The United States has not rebutted China's prima facie case other than asserting a defence under Article XX(b) of GATT 1994, which lacks any merit.

4. The United States has not established that Section 727 falls within the exception under Article XX(b) of GATT 1994

(a) Introduction

(i) Section 727 is not "necessary" to the protection of human life and health under paragraph (b) of Article XX

4.174 Section 727 does not fall within the scope of the exception in GATT Article XX(b) because, *inter alia*, it is not "necessary" for the protection of human or animal life and health.[132]

4.175 *First*, Section 727 (and Section 733 before it) prohibited the entry of just *one* of the many types of food products that were imported from China between December 2007 and November 2009 in ever-increasing amounts. During the time that these measures were in effect there was no evidence of any food safety problems related to Chinese processed poultry. *Second*, there was no imminent risk posed by Chinese poultry as importation was never "imminent" during the period of December 2007 – November 2009. FSIS was required to conduct audits of China's poultry processing inspection system, and Chinese poultry could only have been imported *following* a multi-month, science-based

[131] China's first written submission, paras. 107-114. China argued this no less than 6 times in its opening (paras. 4, 29, 32, 83) and closing oral statement at the first substantive meeting (paras. 3, 17).

[132] These arguments are also relevant to China's claims under the *SPS Agreement*.

confirmation by FSIS that the system *remained* equivalent to that of the United States. Similarly, China would have had to obtain an initial equivalence determination by FSIS to export other types of poultry. Sections 727 and 733 were thus not even remotely "necessary" to protect US consumers from any alleged imminent danger. A less trade-restrictive approach that would have achieved the US' preferred level of protection would have been application of the standard FSIS procedures, correctly described by the United States in its responses to the Panel's questions as being "based on science".[133] In sum, Section 727 does not fall within the scope of Article XX(b), as it is not "necessary" for the achievement of its stated objective.

(ii) Section 727 does not fulfil the requirements of the chapeau *to Article XX*

4.176 The United States also has failed to establish that Section 727 does not result in "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", within the meaning of the chapeau of Article XX. China has demonstrated that the *de jure* discrimination against China in Section 727 is arbitrary for several reasons, including: the lack of scientific risk assessment for the measure; the absence of evidence that China's processed poultry inspection system was deficient; the different treatment accorded to other WTO Members such as Mexico; the different treatment accorded to non-poultry food products from China relative to Chinese poultry products; and the lack of evidence that Chinese poultry was more likely to be contaminated or that such contamination was less likely to be detected in China as opposed to in other Members.[134]

(b) Various US Arguments related to its Article XX(b) defence are unsupported by the evidence and legally erroneous

4.177 In its responses to questions, the United States raised various arguments in an attempt to justify Section 727 under Article XX(b) of GATT 1994. China addresses each one below.

(i) China did <u>not</u> have access to normal PPIA/FSIS procedures, by the explicit terms of Section 727 and its predecessor

4.178 The United States claims that Section 727 did not deny China's access to the PPIA, allowing FSIS to conduct activities "related to" China's equivalence. These claims are irrelevant, however, as the explicit terms of Section 727 prohibit any action that could result in the *establishment* or *implementation* of an equivalence rule for China. An FSIS document *specifically states* that equivalence verification is "pending" for China because "FY 2008 appropriation legislation bars the FSIS from spending funds on import of poultry from China".[135]

4.179 Yet the United States now suggests that, when read in light of the JES, Section 727 permitted FSIS to take a number of equivalence-related actions.[136] This is a unjustified, *post hoc* attempt to rewrite the unambiguous, explicit wording of Section 727. Furthermore, legislative history only has a limited role under US law; only if the textual meaning is unclear should an advocate examine the legislative history. China notes that the interpretation of a domestic measure is a question of fact for the Panel. However, *even if* the Panel elects to refer to the JES, it only *confirms* the extent to which Congress restricted the role for the FSIS in relation to China's poultry equivalence. Consistent with the text of Section 727, it does *not* authorize any funding for FSIS to implement or establish a rule in respect of China. At most, it permits two limited activities: *first*, USDA is "urged" to "submit a report"

[133] United States' response to Panel question No. 61.

[134] China's opening oral statement at the first substantive meeting of the Panel, paras. 107-120.

[135] Exhibit CN-21. China has established in detail the meaning of the terms of Section 727 and its extremely restrictive (essentially prohibitive) effect in China's first written submission (paras. 10-23, 30-54, 56-60).

[136] United States' response to Panel question No. 23.

on China's food safety laws and, *second*, USDA is "directed" to submit a "plan of action" to guarantee the safety of poultry products from China. Neither activity actually forms a part of the equivalence procedures and neither permits the *establishment* or *implementation* of a rule.

4.180 Finally, the United States suggests that the 12 May 2009 letter to China requesting documentation regarding China's general food safety laws was a normal part of FSIS's equivalence process under the PPIA. But *nothing* in that letter states that the information was needed for a equivalence procedures – instead, it references the report that FSIS was "urged" to submit to Congress under the JES. The letter did not, and could not, create any expectation in China that submitting the requested information would result in the establishment or implementation of an equivalence rule.[137]

4.181 In sum, it is misleading and incorrect for the United States to now suggest that FSIS was taking steps to maintain China's equivalency status for processed poultry and to establish its equivalency for domestically-slaughtered poultry by creating a "plan" starting in May 2009. Even under the most expansive interpretation, the preparation by FSIS of a "plan of action" or a "Report to Congress" does not come close to fulfilling the many procedures necessary to secure and maintain equivalence. Even if FSIS *theoretically* could have performed work "related to" China's equivalence determinations, the explicit terms of Section 727 manifestly excluded the possibility of FSIS finalizing or maintaining a finding of equivalence for China, due to the restriction on funding for *establishing* or *implementing* a rule in Section 727.

(ii) Section 727 was not necessary because there were no "imminent" imports of Chinese poultry at the time it was enacted

4.182 The United States repeatedly argues that Section 727 was "necessary" within the meaning of Article XX(b) because no other country that was allegedly "imminently" able to export poultry products had recently experienced food safety crises. However, after claiming that Chinese imports were "imminent" at the time that Section 727 (and presumably 733) was enacted, the United States contradicts itself, pointing out that China was *not* in a position to immediately export poultry products when funding was restricted as FSIS would have to conduct an equivalence maintenance audit for processed poultry and finalize a rule for slaughtered poultry before the relevant poultry products could enter the United States.

4.183 Equivalence maintenance audits include in-country meetings with officials, on-site inspections, and analysis of information about China's inspection system. If FSIS found the system to be somehow deficient, it would suspend or withdraw equivalence. Similarly, the finalization of a rule also involves several procedural steps. At a minimum, the as-yet-uncompleted steps would include the publication of a proposed rule, review of comments, and a *final* decision by FSIS, followed by – if positive – the publication of a final rule in the CFR. If started at the beginning, an initial equivalence determination would take *three to five years* of resource intensive work before a rule may be finalized.

4.184 The United States confirms why FSIS was uniquely placed to determine whether general Chinese problems with food safety were *actually* impacting China's poultry inspection system. It stated: "[u]nder its applicable statute and regulations, *FSIS is permitted to consider <u>any issue</u> relevant to the equivalency of another country's poultry inspection system* when it is making an equivalency determination".[138] *First*, it is clear from this passage that the FSIS already had the ability to consider the issues of concern to the United States in the course of its procedures. Thus, it is those procedures, not Section 727, that would be "necessary" to determine whether China's processed poultry safety and inspection system is reliable. Thus Section 727 cannot be considered "necessary" within the meaning

[137] Such laws and information were made available to, *inter alia*, the United States, through the SPS Committee.

[138] United States' response to Panel question No. 77 (emphases added).

of Article XX(b). *Second*, if it were true that China had such severe food safety problems, logically that should have made it *easier* for FSIS to find and reject or withdraw equivalence. *Third*, FSIS procedures are "based on science".[139] Yet Sections 733 and 727 cut off funding allowing FSIS scientists to conduct audits of China's inspection regime. It is illogical to assert that Section 727 was *necessary* to ensure FSIS would fully consider these serious issues as, by removing FSIS funding, Section 727 ensured that FSIS scientists and experts could not examine these alleged problems in any comprehensive manner leading to an equivalence rule.

(iii) FSIS equivalence procedures for poultry are not inherently more risky for human life and health than non-equivalence safety and inspection procedures

4.185 The United States argues that equivalence systems involve significant risk, and that systemic enforcement problems would be of particular importance in the context of equivalence due to the reliance placed on the exporting country. However, contrary to the US suggestion, FSIS is not permitted to blindly rely on the exporting country. Foreign poultry *cannot enter the United States* unless the scientific experts at FSIS affirmatively grant – and regularly confirm the maintenance of – equivalence. Under the procedures, FSIS officials must confirm that the applicant country's poultry inspection regime achieves sanitary results equivalent to those of the US system. Without such an initial determination – which takes several years to obtain and which has only been achieved by 10 countries – foreign poultry cannot enter the United States. Furthermore, the initial equivalence determination is constantly re-verified on an ongoing basis, through reviews, audits, and re-inspection. Indeed, the United States has pointed out that, in the absence of Section 727 and 733, FSIS would have audited China's inspection system before any imports from China could have entered the United States.

4.186 Moreover, there is no evidence that non-equivalence-based systems, such as those employed by FDA, are inherently *less* risky than FSIS equivalence procedures. The active involvement of FSIS inspectors and scientists in the establishment and annual maintenance of equivalence, coupled with enforcement of a poultry safety and inspection system by the exporting country, does not create a *greater* risk to human life or health than FDA rules and procedures regulating the importation of non-poultry food products. To the contrary, FDA procedures generally regulate the safety of imports of many food products by relying on individual exporting companies to certify compliance with FDA's import requirements.[140] For the vast majority of imported food products, FDA does not appear to conduct any "in-country" audits prior to exportation to the United States. Furthermore, FDA inspectors are not present at every port-of-entry. The fact that FDA rules generally do not employ equivalence procedures does not mean that FDA procedures can guarantee *less* risk to human life or health than FSIS procedures related to equivalence. Thus, the US argument that Sections 733 and 727 were necessary because the FSIS system is somehow more vulnerable than other import procedures cannot be sustained. To the contrary, the targeting of *poultry* was both unnecessary and constituted arbitrary and unjustified discrimination.

(iv) US arguments alleging a fear of a breach of APHIS Regulations and avian influenza do not support a conclusion that Section 727 is necessary

4.187 The United States incorrectly contends that Sections 727 and 733 were necessary because of a risk that China's poultry inspection system could not protect against the spread of poultry diseases such as highly pathogenic avian influenza (HPAI).

4.188 China's approval to export poultry to the EU is limited to processed poultry in a hermetically sealed container that has been heated to at least 70 degrees. This reflects current science and OIE

[139] United States' response to Panel question No. 61.
[140] FSIS Fact Sheets: Production and Inspection (Exhibit CN-61).

recommendations about avian influenza, including the understanding that processing (cooking) kills the H5N1 virus and that cooked poultry cannot transmit the virus. China had obtained FSIS authorization in 2006 to export only *processed* poultry to the United States (and *even then*, only poultry slaughtered in the United States or an equivalent country). Thus, there was no need for Sections 733 and 727 to protect domestic US poultry from the risk of avian influenza, since: (a) the virus is not transmitted via cooked poultry; and (b) China could not have exported anything other than cooked processed poultry to the United States at that time, due to its limited FSIS authorization and APHIS avian flu restrictions.

4.189 There was also no "imminent" risk from avian influenza, as FSIS audits were required before even fully-cooked poultry could be exported. "Animal diseases" and "enforcement" are two of the five risk areas evaluated by FSIS auditors. When audits were conducted in 2004 and 2005, a period during which HPAI was a major worldwide concern, the FSIS found "no deficiencies" in China's handling of poultry diseases with respect to processed poultry, and was satisfied with China's ability to enforce its poultry safety regulations. Had this not been the case, FSIS would have denied equivalence for processed poultry. In addition, if Sections 733 and 727 had not been enacted, FSIS would have conducted a maintenance audit before China could have exported any processed poultry to the United States under the 2006 rule. Had inspectors uncovered problems during this audit, FSIS could have withheld the confirmation of equivalence, and no Chinese poultry would have entered the United States. Furthermore, if the US poultry industry was concerned that Chinese poultry *could* have posed a risk to US animals, or to consumer confidence, it would have opposed the removal of Section 727. It did not. China also notes that more than 80 countries have been affected by avian influenza, including some facing significant problems in regulating food safety. The US Congress did not block access to FSIS procedures for these or any other countries – *only* for China.

(v) The United States references anecdotal news reports on eggs and animal feed, but provides no evidence of food safety problems related to processed poultry

4.190 The United States submitted two further exhibits (US-62 and 63), to support its claim that Section 733 and 727 were "necessary" to respond to poultry-related food safety issues in China. However, both exhibits relate to *feed* for poultry raised and (possibly) slaughtered in China. Under the terms of the established processed poultry rule, China could only export poultry that had been raised and slaughtered in the United States (or another equivalent country). Alleged food safety crises that related to *contents* of the *feed* given to birds raised in *China* could therefore not have affected: (a) the health at slaughter of poultry raised in the United States or other equivalent countries; or (b) the safety of processed poultry from China. China also notes that there is no evidence that the US Congress took these cases of alleged contamination into account when enacting Sections 727 and 733.

(vi) The United States fails to demonstrate that china is different than all other countries in a manner that justifies arbitrary discrimination

4.191 A key element of the US Article XX(b) defence is establishing that the same conditions do not prevail between China and other countries eligible for normal FSIS procedures. The United States has this burden and it has not met it. It asserts generally that the same conditions do not prevail for China because no other WTO Member that had the scope and type of alleged food safety problems as China was so far along in the equivalence process, but it provides no credible evidentiary support.[141]

Pool of countries to assess whether "same conditions" prevail

4.192 It is proper for the Panel to compare China to *every other* WTO Member to assess "same conditions", as each had the opportunity to seek, achieve, and maintain equivalence. Every WTO

[141] *See, e.g.,* United States' response to Panel question No. 62.

Member *except* China had the right to access normal FSIS procedures and to possibly obtain authorization to export poultry if they obtained and maintained equivalent status. Only China was *irrebuttably* presumed to not be equivalent. However, *even if* the pool of Members are those that had applied for or had already been granted equivalency, China was *still* in the same position as these other countries, as elaborated below.

Issue of "imminent" imports of Chinese poultry

4.193 The United States acknowledges that China is "similarly situated" in "some ways" to WTO Members that had applied for equivalence. However, it then incorrectly asserts that *only* China was in the position of imminently being able to export poultry products and had recently experienced food safety crises. As China has demonstrated above, the United States admits that China was *not* in a position to imminently export poultry products at the time that Section 733 or 727 were enacted. Thus, during the pendency of those provisions, China arguably posed less of a risk than other "equivalent" countries, such as Mexico – which was exporting poultry to the United States when FSIS concluded that it was experiencing "systemic failures" in its poultry inspection regime. Thus, *even if* the US' unsupported allegations of risks were true, such risks would appear to be the "same" as the *actual* risks posed by Mexico's "systemic failure".

Applicability of *US – Shrimp*

4.194 China is similarly situated to any WTO Member seeking access to FSIS procedures to secure an equivalence determination or to maintain a prior finding of equivalence, under the rationale of the Appellate Body's decision in *US – Shrimp*. In that case, the 'same conditions prevailing' 'between countries' were that each of the shrimp producing countries sought to be certified to export shrimp to the US market. The Appellate Body found that the different treatment of exporting countries desiring certification in order to gain access to the United States shrimp market constituted *unjustifiable* discrimination within the meaning of the chapeau of Article XX. The Appellate Body made a similar finding on *arbitrary* discrimination. It saw no need to examine the conditions *within* each of those countries in making these findings.

4.195 These findings are highly relevant and analogous to this dispute. Like in *US – Shrimp*, the only way to obtain the right to export to the US market is to have access to and comply with FSIS regulations, and all applicants are in the same position because all expect that these regulations will be applied consistent with due process and in a transparent and timely manner. China is in the same position as other Members who seek access to equivalence procedures.

Poultry risk factors in countries seeking to export poultry to the United States

4.196 Even assuming *arguendo* that the "same conditions" are those inside the applicant or equivalent countries, China was *still* in the same position as these other countries. Poultry contaminants are common to many poultry-producing countries, including countries with significant resources allotted to food safety such as the US, EU, and Japan. As to the alleged threat from avian influenza, in terms of the application of APHIS and FSIS rules, all other countries have generally been treated the same – except China. No other country has ever had extraordinary congressional action bar its access to FSIS procedures. To the contrary, Israel, affected by HPAI in 2008, exported 1,957,215 pounds of poultry that year to United States.

4.197 While it provided no evidence of systemic issues relating to China's poultry inspection system, the United States argues that no other country allegedly experienced systemic failures in food safety. The evidence in Exhibit CN-28, an audit report from Mexico, directly contradicts this, showing FSIS found "*systemic* failures" in three enforcement-related risk areas. Yet Mexico's access

to FSIS procedures was never blocked by extraordinary action by Congress, and Exhibit CN-72 shows that poultry products were imported from Mexico during that time.

4.198 This evidence strongly supports China's assertions that normal FSIS procedures are a reasonable, and less trade-restrictive, alternative to Section 727. FSIS is clearly capable of identifying and working through a wide range of problems, even *systemic* failures. This evidence also strongly contradicts US arguments that Sections 727 and 733 did not "arbitrarily" or "unjustifiably" discriminate against China. It is not credible for the United States to argue that Mexico somehow presented a far less serious problem to human life and health. In addition, what is relevant for the purposes of the "same conditions" element of the Article XX chapeau is that both China and Mexico export or seek to export poultry to the United States, both have achieved a rule of equivalence for processed poultry, and FSIS procedures and resources are capable of conducting a full examination of each country's poultry inspection system. In sum, the United States cannot meet its burden under the chapeau of Article XX to establish that the same conditions do not prevail between China and other countries seeking to take advantage of FSIS procedures and potentially export to the United States.

5. China's claims under the *SPS Agreement*

4.199 The United States has not yet presented a substantive defence of the SPS claims. It claims it will do so in its second written submission. China will respond to any such defences asserted by the United States if and when they are made.

G. EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

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

4.201 Throughout this dispute, China has attempted to distract the Panel from the question of Section 727's necessity for poultry. For example, China implies that Section 727 was not necessary because it did not apply more broadly to all Chinese products; however, this argument ignores the fact that poultry was the only product subject to an equivalence determination when Section 727 was enacted. Similarly, China downplays the relevance of its many food safety crises, but ignores the concerns that they raise about its ability to enforce its food safety laws. Finally, China argues that Section 727 is arbitrarily or unjustifiably discriminatory while ignoring distinctions between China and others who have tried to export poultry to the United States.

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

4.203 In addition, the United States will address China's arguments, first submitted in its oral statement at the first substantive meeting, that Section 727 is subject to the *SPS Agreement* and inconsistent with certain *SPS Agreement* obligations. Any claims by China under the *SPS Agreement* are not within the Panel's terms of reference. Further, China has failed to show either that the *SPS Agreement* provisions cited by China apply to Section 727, or that Section 727 is inconsistent with those provisions. Finally, as China's substantive arguments under its SPS claims are essentially

the same as those presented in connection with Article XX(b) of the GATT 1994, there is no need for the Panel to address these additional claims under the *SPS Agreement*.

2. Section 727 is justified under GATT Article XX(b)

4.204 Section 727 was justified under GATT Article XX(b). Section 727 was within the scope of the XX(b) exception because it was necessary to protect against the risk posed by the importation of Chinese poultry. At the same time, Section 727 was consistent with the chapeau because it was not applied against China in a manner resulting in arbitrary or unjustifiable discrimination, nor was it a disguised restriction on international trade.

4.205 The United States has demonstrated that Section 727 falls under the scope of the Article XX(b) exception because its policy objective was to protect human and animal life and health from the risk posed by Chinese poultry. Since China has not challenged this element, the United States will focus on issues related to Section 727's necessity.

4.206 Section 727 was necessary to protect against the risk posed by the importation of Chinese poultry. China has struggled with corruption, smuggling, and the lax enforcement of its food safety laws. In addition, avian influenza exists in China, and China has suffered numerous food safety crises in past years. As a result, China was in the process of overhauling its food safety law when Section 727 was enacted. At the same time, China was also in the midst of an ongoing equivalence proceeding for poultry. Therefore, Section 727 was necessary to ensure that FSIS fully considered China's systemic food safety problems before "establishing" or "implementing" rules that would allow China to export poultry products to the United States.

4.207 This conclusion is consistent with the analysis used by the Appellate Body to determine whether a measure is necessary, which involves a weighing and balancing of multiple factors (importance of the policy objective, contribution of the measure to its policy objective, trade restrictiveness). All of these factors support Section 727's necessity.

4.208 Section 727 directly contributed to the protection of human and animal life and health by ensuring FSIS did not implement" or "establish" rules related to China's equivalence without fully considering the systemic problems with China's food safety system and their relevance to China's poultry inspection system. Before China's equivalence application, FSIS had never before been confronted with a situation that presented such severe systemic problems with food safety law enforcement or such numerous and widespread food safety crises. Therefore, Section 727 was necessary to ensure FSIS adequately dealt with these unique issues.

4.209 To help accomplish this task, the JES accompanying Section 727 specifically directed FSIS on how to move forward with China's equivalence determinations. In accordance with the JES, FSIS developed an action plan shortly after Section 727 took effect. FSIS implemented the action plan's first three steps during 2009. FSIS reviewed and summarized all of its documentation related to China's equivalence application and reached out to China via letter on May 12, 2009. This letter included a summary of the documents FSIS had uncovered and requested that China provide any changes to its relevant food safety laws to FSIS for review.

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

4.211 In response to its experience evaluating China's equivalence and Section 727, FSIS has reconsidered the extent to which the agency communicates with US trading partners and the extent to which it considers food safety issues that do not directly involve meat, poultry, or egg products. In the past, FSIS limited its equivalence evaluations to the information provided by the country regarding its food regulatory systems for meat, poultry, or egg products. Now, FSIS has expanded the scope of its equivalence review to consider information that does not directly involve the products it regulates but have a bearing on the integrity of the country's food safety system. This new process will apply to China's equivalence review as well as the review of other countries. FSIS believes that this will help address some of the issues raised by China's equivalence application and US consumers will be better protected as a result.

4.212 During 2009, FSIS took other steps to improve the equivalence process. For initial equivalence determinations, FSIS revised the Self-Assessment Tool it asks exporting countries to submit as a part of their initial application. Similarly, for ongoing monitoring of equivalent countries, FSIS improved its audit methodology to better ensure the ongoing adequacy of system controls after a country has been found equivalent. FSIS believes these new processes will be more effective and has requested all of its trading partners, including China, adhere to them.

4.213 In response to the issues raised by China's equivalence application, the rest of the US Government has also taken action to evaluate and address the risks posed by Chinese poultry imports. In June 2009, the House Agriculture Appropriations Subcommittee held a hearing to examine "the process the US Department of Agriculture used to determine China's equivalency to export processed poultry to the United States." USDA also released a report in June 2009 thoroughly examining the safety of food imported from China. Further, in March 2009, President Obama created a Food Safety Working Group focused on enhancing US food safety laws, including improving the United States' ability to ensure the safety of imported food from China and other countries. These actions all made a material contribution to the protection of human and animal life and health, the vitally important policy objective of Section 727.

4.214 China argues that its widespread food safety crises are not relevant to Section 727's necessity. The United States disagrees. In fact, China's melamine crisis and many other non-poultry crises are relevant to an equivalence decision because they raise questions about a country's ability to enforce its food safety laws. And enforcement problems are particularly troubling in the context of an equivalence regime. The reason for this is that after FSIS has made its initial equivalence determination for a particular exporting country, it relies on that country to enforce its laws to ensure that the US level of sanitary protection is being met. And if the exporting country fails to enforce its laws, it could pose a direct risk to the life and health of those who consume the poultry produced in potentially dangerous conditions.

4.215 China argues that Section 727's necessity is undermined by the fact that the measure did not apply to other Chinese products. In essence, China's argument appears to be that a Member may not take action to protect life or health from the risk posed by a particular product until after that Member has evaluated the risks posed by all products, and any action must be comprehensive with respect to all products. But of course nothing in Article XX(b) says this, nor does Article XX(b) say that a Member must delay action to protect life or health until after such a comprehensive approach can be put in place. Not only does China's approach have no basis in the text of Article XX(b), but it does not make sense to say that Members agreed that they could not apply measures to protect life or health with respect to particular products, but only with respect to all products. It is clear that the delays inherent in such an approach, and the resultant risks to life and health, would not be acceptable to Members.

4.216 In addition, there were several very good reasons why Section 727 applied only to poultry. First, poultry is subject to FSIS's equivalence regime, which is different from FDA's regime for

ensuring the safety of the products under its jurisdiction, which include all of the food products China has exported to the United States to date. While FSIS and FDA share a similar goal – namely, ensuring that imported food is safe – they use different legal frameworks to achieve this goal.

4.217 Under FSIS's equivalence system, countries desiring to export an FSIS-regulated product to the United States must apply to FSIS for approval. FSIS's approval process examines whether a country's inspection system achieves the same level of sanitary protection as the US system. If FSIS determines that the foreign country's system is equivalent, the country is then approved to export that product to the United States. Although FSIS conducts follow-up audits, FSIS generally relies on the exporting country to enforce its laws to ensure that its inspection system continues to achieve the US level of sanitary protection after the initial determination is made. If a country fails to enforce its laws, this level of sanitary protection may not be maintained.

4.218 By contrast, FDA does not require an exporting country's system to be found equivalent to the US regulatory system prior to allowing the entry of food products. Rather, FDA approaches compliance on a firm-by-firm basis, and any firm whose products comply with applicable FDA requirements can ship to the United States. When the product reaches the US border, it is then examined for violations of FDA requirements. If a violation is found, FDA works with the firm to have the product brought into compliance. If the product cannot be brought into compliance, it is re-exported or destroyed.

4.219 These differences between the regulatory regimes are relevant to the question of Section 727's necessity. The reason is that China's lax enforcement of its food safety laws raise particular concerns in the context of an equivalence regime that relies on the exporting country to enforce its laws to ensure that the US level of sanitary protection is maintained that may not be raised in other contexts. Thus, Section 727 was necessary in the context of FSIS's equivalence regime to ensure that China did not export potentially unsafe poultry to the United States.

4.220 Second, China had never before tried to export a product under FSIS's jurisdiction to the United States, and before China's poultry application, FSIS had never before been faced with a review of any food inspection system within China. Therefore, FSIS was not accustomed to dealing with a country with such severe food safety problems. Given the unique nature of the task FSIS was facing, Section 727 was necessary to ensure the agency more thoroughly considered its ultimate determination on the equivalence of China's poultry inspection systems. Further, because poultry was the only product from China with a pending equivalence application, Section 727 was targeted to only affect the equivalence of poultry products.

4.221 Third, China's poultry industry has suffered from food safety crises. For instance, in 2008, melamine was found in animal feed that was consumed by chickens in China and in eggs laid by Chinese chickens. As a result of this, China's Health Secretary stated that China would begin testing chicken meat for melamine. Similarly, in 2006, ducks and hens in China's Hebei and Zhejiang Provinces were fed carcinogenic red dye so their red-yolk eggs would sell for a higher price. Poultry from China was also smuggled into the United States in 2006. Further, China is a country where avian influenza is known to occur. This is of particular concern due to China's problems with lax food safety enforcement. Under APHIS regulations to prevent the spread of avian influenza, any poultry exported to the United States must be fully cooked or otherwise processed sufficiently to kill the avian influenza virus. Thus, China's poor enforcement track record raised concerns about whether Chinese authorities would enforce APHIS's requirements to protect against the potential spread of avian influenza.

4.222 Finally, Section 727 is not the only measure that the United States has taken to address the risk posed by unsafe Chinese imports. In fact, FDA has issued import alerts against Chinese products that it has determined are unsafe, including red melon seeds, bean curd, dried fungus and mushrooms,

fresh garlic, honey, farm-raised fish, wheat gluten, rice protein products, shrimp, eel and milk products. FDA refuses a much higher proportion of food from China than other countries. Further, FDA in 2007 also negotiated a Memorandum of Understanding (MOU) with China to address its concerns about the melamine crisis.

4.223 Despite the numerous problems FDA has had with Chinese imports, China continually refers to its increasing exports of these products in an attempt to undermine Section 727's necessity. For example, China rhetorically asks why the US Congress did not cut out funding to allow the import of products regulated by FDA. Putting aside whether China believes it would be advisable to take this action, the implication that the United States has not acted against other unsafe Chinese products is simply untrue. The United States will and does take appropriate measures to protect human life and health when it is necessary to do so. For example, while Section 727 was necessary to achieve this goal in the context of poultry, FDA's import alerts and an MOU were necessary in the context of other Chinese food products.

4.224 If China's export statistics prove anything, it is that the United States is willing to trade with China when it can be confident that the products China is exporting are safe. That said, the fact remains that FDA's treatment of products under its jurisdiction is simply not relevant to whether Section 727 was necessary to protect against the risk posed by poultry imports from China. The Panel need not examine whether the United States could have or did take additional steps to address concerns about other Chinese food products. The only question before the Panel is whether Section 727 was necessary to protect human and animal life and health based on concerns about Chinese poultry. As the United States has demonstrated, this was the case.

4.225 While the United States bears the burden to demonstrate that Section 727 was necessary in accordance with Article XX(b), it does not have to "show in the first instance, that there are no reasonable alternatives to achieve its objective." Rather, the complaining party must put forward a reasonably available WTO-consistent alternative. In the instant dispute, China has failed to present a reasonably available alternative that achieves the US level of protection, which requires that processed and slaughtered poultry be safe. China's proposed alternative – "the application of normal FSIS procedures" – is not an alternative at all. Rather, China's suggestion that the US adopt this so-called "alternative" is simply another way of saying that Section 727 was not necessary in the first place. In this sense, China is making a circular argument.

4.226 Section 727 also complies with the Article XX(b) chapeau because it is not applied in a manner that results in arbitrary or unjustifiable discrimination against China nor is it a disguised restriction on trade. Because China does not appear to be challenging Section 727 as a disguised restriction on trade, the United States will focus its discussion on the issue of discrimination.

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

4.228 In addition, Section 727 did not deny China access to the PPIA. The legal impact of an appropriations restriction is limited to its explicit terms. Section 727 states that "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from ... China." Section 727's legal effect is limited to prohibiting the "establishment" or "implementation" of equivalence rules for Chinese poultry, nothing more. In accordance with the action plan accompanying Section 727, FSIS was permitted to engage in activities related to the equivalence rulemaking during fiscal year 2009. This includes actions that are

part of the PPIA. Therefore, China was not discriminated against vis-a-vis other WTO Members because it was not denied access to the PPIA.

4.229 China also argues that it was discriminated against because the United States is not applying the same ALOP to Chinese poultry as it is applying to poultry from other WTO Members. China's assertion is untrue. In general, the United States requires that poultry be safe. However, requiring the same ALOP for all Members who are seeking to export poultry products to the United States does not mean that all of these Members will have identical experiences with the equivalence process. Some Members will take a long period of time to achieve equivalence, while others may never be found equivalent. These different experiences by Members seeking to export poultry products to the United States make sense. In order to ensure that its ALOP is met, the United States may have to take different steps in different circumstances in order to respond to the particular challenges that each application presents.

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

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

4.232 Another distinction between China and these Members is that many of them had been trading with the United States under an "equal to" regime for many years without significant incident before their applications for equivalence were considered. Indeed, FSIS's equivalence process only dates to 1995 and the adoption of the Uruguay Round Agreements Act. Before that time, Canada, France, Great Britain, Israel and Hong Kong had already been exporting poultry products to the United States under FSIS's old regime and all of these countries had a history of supplying safe products without incident. Thus, at the time these WTO Members were subject to FSIS's equivalence process to determine whether they could continue to import poultry products to the United States, FSIS already had confidence in their systems for ensuring the safety of the poultry that they produced. Therefore, their situations were different from China's, which had never before exported poultry to the United States when it applied for equivalence in 2004.

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

4.234 Among the equivalent Members that China compares itself with, it singles out Mexico as a Member who has had problems with food safety enforcement. While it is true that FSIS found some deficiencies during audits of Mexico's meat and processed poultry system, it is not unusual to find at

least some deficiencies during audits of food regulatory systems. In general, when deficiencies are found, the Member is advised of the deficiencies and then initiates appropriate corrective actions. During the next audit, FSIS verifies the effectiveness of the corrective actions taken by the country. This is the process that was followed after the Mexico audits. Because Mexico took immediate and appropriate actions, FSIS continues to have confidence in the ability of Mexico's meat and poultry inspection system to produce products for export to the United States that are wholesome and not adulterated. Further, the United States is also not aware of such widespread crises in Mexico as have occurred in China and is not aware of any broad systemic problems that raise significant questions about Mexico's ability to enforce its own laws to the extent that they do with China. Finally, it is notable that Mexico is still not equivalent for slaughtered poultry.

4.235 China was also not discriminated against vis-a-vis other countries that China alleges have food safety enforcement problems. For example, China notes that "in Bangladesh, reports indicated that two children died and more than forty people were sickened with viral encephalitis contracted from eating poultry." The reason this comparison does not prove discrimination is simple – unlike China, Bangladesh has not filed an equivalence application for poultry and is not actively seeking to export to the United States. As a result, even if Bangladesh's food safety problems, and in particular its problems with enforcement, were established and shown to be of the same magnitude as China's, China is not being discriminated against vis-a-vis Bangladesh.

4.236 Finally, China was not discriminated against vis-a-vis all 151 other WTO Members. First of all, as the United States has explained, China continued to have access to the PPIA. Second, only a small subset of these 151 Members had submitted an equivalence application and shown an interest in exporting poultry to the United States. Further, among the 28 Members seeking to export to the United States, none of them was as far along in the process as China when Section 727 was enacted. Finally, among the majority of those Members who have submitted equivalence applications for poultry, and certainly among those whose have made significance progress, the United States is not aware of problems of the same magnitude as exist in China. China even cites one of these Members, Korea, as an example of a Member "known for requiring strict levels of sanitary protection." This fact alone would seem to distinguish Korea from China.

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

3. China has failed to show that Section 727 results in a breach of any obligation under the *SPS Agreement*

4.238 In it oral statement, China for the first time alleged that Section 727 was enacted for food safety purposes and is subject to several different obligations of the *SPS Agreement*. As the complaining party, China has the burden of proving that Section 727 meets the definition of an SPS measure and of explaining how each SPS provision cited applies to the measure. But China has not met its burden, and China mainly relies on inapposite provisions of the *SPS Agreement*.

4.239 In particular, the central provisions of the *SPS Agreement* on equivalence processes are contained in Article 4, *Equivalence.* Article 4 recognizes that Members may adopt equivalence-based regimes to ensure the achievement of their ALOP, and provides certain obligations with respect to equivalence-based systems. Equivalence systems are premised on the differential treatment of products from different WTO Members. That is, under Article 4.1, importing Members need only accept the equivalence of SPS measures in exporting countries if the exporting Member objectively

demonstrates that the measures meet the importing Member's appropriate level of protection. Likewise, under Article 4.2, recognition agreements need not be reached with all Members. The existence of SPS Article 4 helps show that China's basic approach is flawed. The question is not whether China is treated differently than other Members – indeed, the course of proceedings and the outcome of each equivalence determination necessarily will be based on the specific facts and circumstances of the exporting Member's SPS measures.

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

4.241 Articles 2.2 and 5.1. China has not shown that Article 2.2 and 5.1 of the *SPS Agreement* apply to a measure – such as 727 – specifying the process to be used in the course of an ongoing equivalence determination. China's logic is vastly over-simplistic, ignores the context provided by the language of other provisions of the *SPS Agreement*, and (if applied) would result in absurd and often circular interpretations. As the panel discussed at length in the *EC –Approval and Marketing of Biotech Products* dispute, the *SPS Agreement* cannot be applied in such a "mechanistic fashion".

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

4.243 In *EC – Approval and Marketing of Biotech Products*, the panel addressed this interpretive issue by examining the context of other SPS Articles, and finding that Article 5.1 was intended to require a scientific basis not for any measure that might fall under Annex A, but only for measures "applied for achieving the relevant Member's appropriate level of sanitary or phytosanitary protection". Applying this type of reasoning to the present dispute, it is the PPIA itself – not Section 727 – which achieves the US ALOP by requiring equivalence of the regulatory regimes of exporting Members. Section 727 does not itself provide the level of protection; rather, Section 727 is a procedural requirement adopted in the course of an ongoing equivalency review. As such, the *SPS Agreement* cannot be mechanistically interpreted – as China suggests – as requiring that this measure be based on sufficient scientific evidence or a risk assessment.

4.244 Moreover, the process of determining equivalence for an exporting Member's SPS measures is not the same as the process of performing a risk assessment of products imported from another Member. The determination that poultry poses a risk of being unsafe, and therefore that measures are needed to protect against that risk, pre-dates Section 727 and applies regardless of origin. Indeed, it is not contested in this dispute that imported poultry can pose a risk of being unsafe. Accordingly, the issue is not whether there is a basis for measures to ensure that poultry is safe. The only real issue is whether the proper procedure was being followed to make the determination as to whether China's measures are equivalent to US measures for poultry. This is not an issue for Article 2.2 or 5.1, but rather for Article 4.

4.245 Article 2.3. It is uncertain whether Article 2.3 is intended to apply to every procedural requirement adopted in the course of operating SPS measures, or whether – like Articles 2.2 and 5.1 – Article 2.3 should be applied to substantive SPS measures intended to achieve the importing

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

4.246 In the context of this dispute, the Panel has no need to reach any issue under Article 2.3. The language of Article 2.3 mirrors the language of the Article XX chapeau, and the United States has already explained why the US measure meets the chapeau requirements. Similarly, China's Article 2.3 arguments are essentially the same as China's position regarding the application of the Article XX chapeau. Thus, in the context of this particular dispute, the Panel would have no need to address Article 2.3 because the very same issues have been examined under the Article XX chapeau.

4.247 Article 5.5. China's argument as to why Section 727 is inconsistent with obligations under Article 5.5 of the *SPS Agreement* is without merit – it fundamentally misconstrues the *SPS Agreement* and the US measure at issue. China has not shown, and cannot show, that Section 727 resulted in distinctions in levels of protection in different situations. The PPIA establishes the level of protection for poultry, not Section 727: the basic question evaluated under the PPIA is whether each exporting Member's poultry safety system will result in the same level of protection as the US system. And indeed, this is the fundamental description of "equivalence" provided under Article 4 of the *SPS Agreement*.

4.248 China's Article 5.5 argument also confuses the concepts of the ALOP and the measures applied to achieve the ALOP. A disagreement about whether, for example, a measure results in arbitrary discrimination under Article 2.3 or the Article XX chapeau does not automatically create a claim under Article 5.5 of the *SPS Agreement*. In short, under China's approach, any difference in the measures applied by a Member to various products would by definition mean that there is a distinction in the ALOP sought to be achieved by that Member. China's approach is incorrect – the *SPS Agreement* is clear that these two concepts are separate and distinct.

4.249 Article 5.6. The response of the United States to China's Article 5.6 claim is similar to that with respect to China's SPS Article 2.3 claim: China has not shown that Article 5.6 applies to a procedural requirement adopted in the context of an equivalency determination. Article 5.6 does not appear to apply to every procedural requirement adopted in the course of operating SPS measures. Instead, it appears to apply to substantive measures "establishing or maintaining" the importing Member's ALOP. In addition, it is difficult to see how the language of Article 5.6 applies in the context of equivalence determinations. In an equivalence regime, it is the exporting Member that chooses the SPS measures intended to achieve a level of protection, and the question for the importing Member is whether those measures achieve the result of equivalence. In this context, it is hard to apply Article 5.6, which turns on whether SPS measures chosen by the importing Member are more trade restrictive than required.

4.250 Article 8 and Annex C. China's arguments regarding alleged "undue delay" under Article 8 and Annex C(1)(a) of the *SPS Agreement* fail to show that Section 727 breaches those provisions. Article 8 and Annex C of the *SPS Agreement* apply to "control, inspection, and approval procedures," which do not include equivalence determinations described under SPS Article 4. In addition, China's Annex C "undue delay" claim adds very little, if anything, to the substance of China's arguments. Rather, China's Annex C argument is conclusory, merely stating that "China has already demonstrated, in connection with its other claims", that Section 727 is lacking in "justification" and results in "discrimination". But to the contrary, as the United States has shown, Section 727 falls squarely within the Article XX(b) exception and is both necessary under the meaning of Article XX(b), and not discriminatory under the meaning of the chapeau.

H. EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Section 727 is inconsistent with the *SPS Agreement*

4.251 Section 727 and its predecessor violate multiple provisions of the *SPS Agreement*. The US response to China's SPS claims generally does not address the *substance* of China's SPS claims. The United States has never stated that Section 727 is not an SPS measure and it acknowledges that the purpose of its "law", Section 727, is the protection of the life and health of US consumers from potentially contaminated foods.

(a) Section 727 is not an intermediate step in FSIS equivalence procedures

4.252 Section 727 is not an "intermediate" step in an "equivalence review". The CFR and FSIS documents describe the equivalence process in detail and neither refers to Congressional action blocking the application of procedures to a country for a potentially unlimited period of time. The PPIA is a separate law from Section 727. Thus, legal questions such as whether the *SPS Agreement* applies to every incremental step, or "secondary procedure", taken to apply an SPS measure – are **not** before this Panel.

4.253 The US "intermediate" step argument appears to be based on *EC – Approval and Marketing of Biotech Products* – the reasoning from which is inapplicable to Section 727 for at least five key reasons. *First*, this Panel is *not* faced with a situation where the normal process for product approval has been delayed for *all* producers – only China. *Second*, unlike the measure in *EC – Approval and Marketing of Biotech Products*, Section 727 is clearly a "law". *Third*, as 727 applies a "less than zero tolerance" ALOP to poultry from China, it clearly implies a particular level of protection. *Fourth*, China had already been granted equivalence by FSIS for processed poultry, and thus the key "pre-marketing approval requirement" had been satisfied and 727 is clearly the source of the ban. *Fifth*, 727 set out a "particular mode or course of action" and, with the JES, established its own "procedures".

(b) 727 is subject to Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, and 8 of the *SPS Agreement*

4.254 The United States claims that equivalence procedures are only subject to a limited subset of obligations in the *SPS Agreement*, primarily Article 4. On this basis, the United States claims that Articles 2.2, 2.3, 5.1, 5.6, and 8 do not apply to Section 727; according to the United States, only Article 4 should apply to Section 727.

4.255 Section 727 cannot be considered part of the FSIS equivalence procedures. Even assuming it was *in arguendo*, and if the US Article 4 argument were accepted, it would mean that even the basic rights and obligations in Article 2 of the *SPS Agreement* would not apply to equivalence measures. This would create an enormous gap in the SPS disciplines. SPS measures can take a variety of forms, and equivalence measures are not singled out for special treatment under Annex A(1). Nothing in Article 4 explicitly exempts equivalence-related SPS measures from any of the other disciplines in the Agreement. And where the drafters intended to establish an exception to the disciplines of the *SPS Agreement*, such exceptions are made explicit in the text, *e.g.*, Articles 2.2 and 3.1.

4.256 The US argument would transform Article 4 into a safe haven allowing Members to apply equivalence-related SPS measures in, for example, a discriminatory manner, or without scientific justification. But Members cannot avoid fundamental obligations in the *SPS Agreement* (such as Article 2) by inserting the word "equivalence" in an SPS measure. Furthermore, China's challenge is **not** to the PPIA or the FSIS equivalence procedures. China's challenge is to Section 727, a measure wholly distinct from the US equivalence procedures, which prevents importation of Chinese poultry.

(c) China has sustained its burden of proving a violation of Article 5.5 of the *SPS Agreement*

4.257 Unlike China's other claims, the United States appears to accept that Section 727 is subject to Article 5.5 of the *SPS Agreement*, and therefore addresses the substance of that claim. These US arguments, however, fail to rebut China's prima facie case.

(i) The two situations identified by China are comparable under Article 5.5 of the SPS Agreement

4.258 The United States asserts that China has not shown that Section 727 resulted in distinctions in levels of protection in different but comparable situations, and argues that "it is the PPIA that establishes the level of protection for imported poultry", not 727. However, 727 is legally distinct from the PPIA, and it reflects the strict ALOP applicable to only China.

4.259 Different situations may be compared if "they present some common element or elements sufficient to render them comparable". In *EC – Hormones*, the Appellate Body found that situations involving the same substance and the same health risk were "comparable". In *Australia – Salmon*, the Appellate Body found that in comparing different situations "it is sufficient for these situations to have in common a risk of entry, establishment or spread of one disease of concern". This confirms that the two sets of situations described by China are comparable under Article 5.5, based on common potential contaminants. These situations are: *first*, the importation of poultry versus non-poultry products from China; and, *second*, the importation of Chinese poultry versus poultry from other WTO Members.

4.260 *First*, in relation to poultry products, the United States has mentioned pathogenic bacteria such as *Salmonella* and *Campylobacter* as potential contaminants. It has also discussed avian flu. It is undisputed that these contaminants are not unique to China. Based on the shared risk of their transmission, these situations are "comparable" under Article 5.5.

4.261 *Second*, Chinese poultry and Chinese *non*-poultry foods also share one or more potential contaminants. *Per* the logic of the JES and US arguments, *any* food product from a country experiencing an alleged food safety crisis could be contaminated, including with the same contaminant. For instance, *Salmonella*, which the United States has cited in connection with poultry, can *also* affect other food products. The shared risk of transmission of the same contaminant via the importation of different food products from China thus renders the second set of situations "comparable" under Article 5.5.

4.262 China is not arguing that any time a different measure is imposed in respect of different but comparable situations, there is necessarily a violation of Article 5.5. Instead, Article 5.5 prohibits the application of *arbitrary* or *unjustifiable* distinctions in ALOP in different but comparable situations, if such distinctions results in discrimination. China has demonstrated that in this case, the distinction in ALOPs is arbitrary and unjustifiable.

(ii) The United States applies distinct ALOPs to comparable situations

4.263 The United States asserts that the ALOP for all imported poultry, including poultry from China, is that reflected in the PPIA. But this facile assertion ignores the fact that normal FSIS procedures were not, and could not be, applied to China for two years.

4.264 Because the United States has not specified the ALOP for Section 727, China has deduced that Section 727 reflects a level of sanitary protection of *lower than zero risk tolerance.* Even if Chinese poultry was the safest poultry in the world Section 727 would still prevent its importation into the US. In contrast, all other WTO Members have the possibility, under normal FSIS procedures,

of obtaining equivalence and exporting to the United States. Section 727 (and 733) thus resulted in a much stricter ALOP than that normally considered appropriate for imported poultry under the PPIA: that imported poultry must be "safe".

4.265 The US ALOP has also not been specified in respect to non-poultry food products. China has deduced it based on the SPS measure applied to them: the FDA import procedures. FDA procedures continued to be funded and active while 727 and 733 were in effect. During this period, over $5 billion of non-poultry food products were imported from China. These continued imports necessarily reflect a less strict ALOP than 727's less than zero tolerance.

(d) In addition to Article 5.5, Section 727 is inconsistent with Articles 2.2, 2.3, 5.1, 5.2, 5.6, and 8 of the *SPS Agreement*

4.266 The US asserted that Articles 2.2, 2.3, 5.1, 5.6, and 8 do not apply to 727 because it is an "intermediate measure", and offers no substantive defences to China's claims under these provisions. China refers the Panel to its earlier arguments and addresses just two issues here:

4.267 *First*, China confirms that it has brought a separate claim under Article 5.2. *Second*, Section 727 violates Article 8 because it resulted in an unjustifiable delay of nearly two years in the appraisal of China's compliance with the US requirements for imported poultry.

4.268 The United States incorrectly claims that Article 8 and Annex C do not apply to Section 727, based on the argument that equivalence procedures are only subject to Article 4. Apart from the fact that Section 727 is not part of any US equivalence procedures, Annex C does *indeed* apply to Section 727. China agrees with the US that the list of measures covered by Article 8 is "inclusive rather than exhaustive".

(e) SPS violations cannot be justified on the basis of GATT Article XX(b)

4.269 The *SPS Agreement* provides specific "obligations which are not already imposed by GATT", and which are "additional" to the requirements of Article XX of GATT. There is no presumption of consistency with the *SPS Agreement* for measures that are found to be consistent with GATT Article XX(b). Therefore, even if the US demonstrated that Section 727 fell within Article XX(b), this would *not* be sufficient to defend against China's SPS claims.

(i) Violations of GATT 1994 and of the Agreement on Agriculture cannot be justified under Article XX(b)

(f) Section 727 was not "necessary"

4.270 A "necessary" measure is one that is close to "indispensable" for the achievement of an objective. Section 727 does not meet that test. *First*, there were no imminent poultry imports from China. *Second*, Section 727 actually undermines the protection of US consumers by denying funding to the very agency able to examine the condition of China's poultry regime. *Third*, 727 and 733 were not enacted as part of a general program to enhance food safety.

(i) Section 727 did not materially contribute to its objective

4.271 The Appellate Body has explained "when a measure produces restrictive effects", it cannot be considered necessary unless its contribution to the achievement of its stated objective is "material". Sections 727 and 733 did not materially contribute to protecting human life and health from "contaminated foods". To the contrary, they *prevented* FSIS from conducting science-based analysis that would have uncovered any risk of contamination.

(ii) FSIS procedures are a reasonably available alternative to Section 727

4.272 The conclusion that 727 and 733 were not "necessary" is confirmed by the existence of an alternative measure: the normal FSIS equivalence procedures. They were reasonably available, would achieve the same objective as Section 727, and would do so in a far less trade-restrictive manner. Further, as FSIS experts were aware of press reports of alleged food safety crises in China, they would have paid close attention to whether such alleged crises had any impact on poultry production. Logically, this makes it *more*, rather than *less*, likely that FSIS would have identified any problems, weighing *against* the need for Congress to suspend FSIS procedures.

4.273 The US preferred level of sanitary protection for imported poultry is set by the PPIA as follows: imported poultry must be "safe". The FSIS procedures are the "implementing regulations" for the PPIA. Therefore, by definition, they meet the level of sanitary protection imposed by that law. The new US *post hoc* "policy objective" for Section 727 is different: to ensure that FSIS "fully consider[ed] China's systemic food problems". But Section 727 severely restricted FSIS' activities, cutting off all funding for the evaluation of China's poultry inspection system FSIS would have otherwise conducted. Thus, the US assertion that standard FSIS procedures are "not an alternative at all" is clearly erroneous.

(g) Section 727 is inconsistent with the requirements of the Article XX chapeau

4.274 The United States has also failed to establish that Section 727 meets the requirements of the chapeau to Article XX. China has shown that Section 727 is applied in a manner that constitutes arbitrary and unjustifiable discrimination between China and other WTO Members where the same conditions prevail. China notes its earlier submissions, where the evidence demonstrates that: *First*, during the pendency of Sections 727 and 733, FSIS procedures were available to *all* WTO Members except China despite the fact that it was one of *just 10* equivalent WTO Members; *Second*, China exported to Japan, Korea and the EU while 727 and 733 were in effect; *Third*, there is no evidence that any alleged *general* food safety problems affected China's *poultry* safety regime; *Fourth*, the United States imported approximately $5 Billion of non-poultry food annually; *Fifth*, unlike 727, FDA always worked within its procedures; *Sixth*, during 727, FSIS used its normal procedures to address "systemic" and "deeply rooted" problems in other WTO Members; and *finally*, during Section 727, over 80 *other* Avian Influenza-affected WTO Members had access to FSIS procedures, and one such Member even exported over a million pounds of poultry to the US. Thus, Section 727 arbitrarily and unjustifiably discriminated against Chinese poultry.

I. CLOSING STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

4.275 Mr Chairman, distinguished Members of the Panel, this has always been a dispute about arbitrary discrimination. For two years, poultry from China alone was subject to an import ban. The ban was unrelated to the actual safety of Chinese poultry or the quality of its poultry inspection system. It was created and maintained without any science-based justification. As confirmed by the text of Section 727, its JES[142], and the FSIS Action Plan[143], China did not have access to FSIS equivalence procedures during this time. These rule-making procedures are applied for the purpose of denying or granting approval to export poultry to the United States. Section 727 eliminated any possibility of such approval, and did so for China alone.

[142] Exhibit CN-33, p. 82 (directing USDA only to "submit a *plan* of action" and to post it on the Internet "upon its completion", but not to take any other action).

[143] Exhibit US-43 (compare description of steps that FSIS "will" take to prepare "report on Chinese Food Safety Revisions" with steps FSIS "would" take with respect to the "Plan of Action").

4.276 The arbitrary nature of this discrimination is underscored by the undisputed fact that, even if every scientist in the world had independently verified that Chinese poultry was 100% risk-free, China would still not have been able to export to the United States while Section 727 was in effect.

4.277 Despite the United States' suggestion to the contrary[144], if an Executive Branch official had issued an arbitrary directive with the same impact as Section 727, and based on the same limited and non-science-based information relied upon by Congress, the measure would certainly be subject to challenge on the same grounds as Section 727. It makes no difference who precisely in the US. Government adopts a particular measure. What matters is whether that measure complies with WTO disciplines.

4.278 The United States stated yesterday that Section 727 should not be deemed a "ban" on Chinese poultry. But a "ban" is a "formal and authoritative prohibition; a prohibitory command or edict".[145] There is no dispute that Sections 733 and 727 are "formal and authoritative" measures that "prohibited" the import of Chinese poultry – regardless of anything that FSIS or China did during their pendency.

4.279 The United States also emphasised yesterday the "temporary nature" of Section 727, and that it was in effect until the "set period" expired.[146] Of course, whether a ban exists for two years or ten years does not change the fact that it is a ban. Moreover, the United States fails to acknowledge that there was no reason for China or FSIS to believe that the ban was, in fact, temporary. That is because when the first so-called "temporary" ban – Section 733 – was supposed to "expire" in September 2008, after its so-called "set period", it was extended for another 6 months by the Continuing Appropriations Resolution of 2009. Then, when that Resolution was replaced by Section 727 in March 2009, it was supposed to "expire" in September 2009. Again, it was extended by a continuing appropriations resolution that maintained Section 727 until the passage of yet *another* China-specific measure, Section 743.[147] This certainly was not a ban effective over a "set period" of time.

4.280 China recalls that it is not bringing this case to force the United States to accept its poultry. China is also not claiming that its food safety inspection system is perfect; no country's is. China is simply seeking the opportunity, which has remained available to every WTO Member except China, to participate in the normal FSIS equivalence process. This is a process that *can provide China* with the ability to import poultry into the United States, rather than a process that can do nothing more than *provide the US Congress* with a report and "plan of action" but nothing for China.

4.281 In view of the overwhelming and un-refuted evidence of the arbitrary and unjustifiable nature of Section 727, China requests that the Panel find that Section 727 is inconsistent with the United States' obligations under the GATT 1994, the *Agreement on Agriculture*, and the *SPS Agreement*. Although Section 727 has now expired, it is clear from its predecessors and successors that China's ability to access FSIS procedures – unlike any other Member – is dependent on provisions in annual appropriations measures of the US Congress. Consequently, China requests that the Panel issue a recommendation that the United States not revert to language similar to that in Section 727 in its future legislation.

4.282 In closing, I would like to thank the Panel and the Secretariat for their efforts and attention, and we look forward to answering your further questions.

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[144] United States' opening oral statement at the second substantive meeting of the Panel, para. 9.
[145] *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 175.
[146] United States' opening oral statement at the second substantive meeting of the Panel, para. 15.
[147] *See* China's first written submission, para. 26.

J. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

4.283 China's second submission makes six arguments in an effort to undermine Section 727's necessity and to demonstrate that the measure is applied in a manner that would constitute arbitrary or unjustifiable discrimination against China. China's arguments often miss the point and frequently mis-characterize the US position. China also overlooks the fact that Section 727 was an act of congressional oversight taken in the context of an ongoing equivalence proceeding.

4.284 China's first substantive Article XX(b) argument is that Section 727 denied China access to the PPIA. However, this is not the question presented. There is nothing in the GATT provisions China cites requiring a Member to utilize a particular set of procedures when evaluating whether another Member's system ensures the safety of its exported food. In fact, there is nothing that speaks to providing an exporting Member with "access" to any procedures.

4.285 Rather, the question presented is whether food exported from a Member poses risks to life or health such that it is necessary for the importing Member to take steps to ensure that the exported food will be safe. That is what the United States did here. The United States was faced with a situation where China had massive food safety problems and had overhauled its food safety system while a process was underway to ascertain and ensure the safety of exports of Chinese poultry. It was in this context that Congress took the steps it deemed necessary to ensure the safety of the US food supply with respect to Chinese poultry exports.

4.286 There are many legitimate steps a Member could take to ensure food safety within this context. A Member could decide that it could not complete an equivalence process until after it sought additional information, additional audits, further explanation, or additional scientific studies. Section 727, which provided that the United States could not complete its equivalence process for a short time while additional work was underway, was also a legitimate step.

4.287 Thus, China's argument is simply incorrect because it overlooks that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding. Congressional oversight is commonplace in the US system of governance. In this instance, Congress enacted Section 727 to ensure that FSIS protected life and health by fully considering China's systemic food safety enforcement problems and new food safety law before establishing or implementing equivalence rules for Chinese poultry. Congress's action was not separate and apart from the US system to ensure the safety of imported food, but is a part of that system. Had an executive branch official taken action to ensure that China's enforcement problems were fully considered, we doubt that we would even be before this Panel today.

4.288 Putting this aside, the United States agrees with China that Section 727 did not allow FSIS to undertake every possible aspect of the equivalence procedure. In fact, for a short time period, FSIS could not complete two specific tasks. FSIS could not use funding to "establish" a rule related to Chinese slaughtered poultry and it could not use funding to "implement" a rule related to Chinese processed poultry. However, Section 727's impact went no further and did not prevent FSIS from conducting activities related to China's equivalence application, including specific PPIA activities. As a result, China was not denied access to the PPIA.

4.289 China also suggests that whether FSIS could take related activities is "ultimately irrelevant". However, FSIS's ability to conduct this work during Section 727's applicability is far from meaningless. Indeed, FSIS's ability to engage in related work underscores Section 727's contribution to its objective and its limited trade restrictiveness. In this context, China's submission incorrectly asserts that FSIS's equivalence-related actions during 2009 were "minimal". To the contrary, FSIS did considerable work related to China's equivalence application including the development of an action

plan, steps under the action plan, and steps to improve its equivalence process. FSIS could have done more had China been responsive to its request for information about its food safety overhaul.

4.290 China concedes it did not respond to the US request of 12 May 2009, but relies on notifications made much later to the SPS Committee. In addition, the regulations were not effective until 1 December 2009. It was reasonable for the United States to want to know what changes China was making to its system, how they would operate in the real world, and how they would affect China's poultry inspection system. Yet China did not find it important to respond.

4.291 China's second argument is that Section 727 was not necessary to protect life and health because imports of Chinese poultry were not imminent when Section 727 was enacted. China quotes a US response to questions noting that "China was not in a position to immediately export poultry products to the United States at the time the funding restriction was enacted".

4.292 China misses the point. By stating that China would not have been able immediately to export poultry in Section 727's absence, the United States was illustrating the measure's limited restrictiveness by contrasting it with other measures that would have impeded products upon enactment, such as an import ban. Further, the need for FSIS to conduct certain procedures before China could export poultry does not undermine Section 727's necessity. Implementing or establishing equivalence rules is one, significant step in the process by which China could ship poultry to the United States. It was important that this step only be taken when there was reason to be confident that poultry exports would be safe. Additionally, the equivalence review process that China refers to could have been completed within the period set by the measure, and even if it could not, this is irrelevant. After all, the need for protection begins with the first shipment of Chinese poultry and continued into the future to protect against every shipment of Chinese poultry that could enter the United States and harm consumers if FSIS were to "establish" or "implement" equivalence rules without fully considering China's systemic food safety problems.

4.293 China also attempts to use the fact that FSIS theoretically could have considered China's systemic food safety problems in Section 727's absence as evidence against its necessity. However, it is typical for a Member to have different options to ensure food safety. The mere existence of these options does not mean that any given option is not "necessary". Chinese poultry exports posed a risk, and it was necessary to be sure that these exports were safe to protect life or health. The fact that there might be another way to do so does not take away from Section 727's necessity.

4.294 China also ignores that FSIS had never before made an equivalence determination for a Member with such widespread food safety crises and systemic problems like China. As a result, there were strong concerns that FSIS did not and would not fully account for these novel risks. Accordingly, Section 727 was necessary to focus FSIS's attention on these problems to ensure they were fully considered before equivalence rules were established or implemented to ensure life and health was protected.

4.295 China's third argument relates to the differences between FSIS and FDA procedures for ensuring the safety of imported food. China argues that "the United States cannot justify having blocked application of only FSIS procedures by suggesting that equivalency systems involve greater risk than other types of food import procedures".

4.296 China ignores the significant measures taken to protect life and health from the risk posed by FDA-regulated Chinese products, including import alerts and efforts to deal with China's serious, and unfortunately, still ongoing, melamine crisis. The fact that these measures were necessary to protect life and health for FDA-regulated products does not undermine the fact that Section 727 was necessary to protect from the risk posed by Chinese poultry.

4.297 Section 727's necessity was in large part due to concerns about China's food safety enforcement track record. China's food safety enforcement problems raise particularly serious concerns under an equivalence regime because FSIS heavily relies on the exporting country to enforce its laws to ensure that the US level of sanitary protection is being met. While FSIS does conduct audits and re-inspections, these measures are not sufficient to protect life and health. FSIS's re-inspections simply monitor compliance with certification and labeling requirements. It is the equivalence determination itself that is FSIS's primary tool to protect life and health.

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

4.299 China's argument overlooks key facts related to AI. China points out that more than 80 countries have been affected by highly pathogenic avian influenza, but China fails to mention that it is one of only 15 of these countries that the OIE has classified as having current unresolved disease events, infection present, or demonstrated clinical disease. China also argues that Section 727 was not justified by AI concerns because cooked poultry cannot transmit the disease. However, under APHIS's requirements to protect against AI, China would have to certify that its poultry is fully cooked or otherwise processed sufficiently. APHIS would be relying on China to make this certification and enforce the related requirements. In this context, China's problems with the enforcement of its laws raise concerns about whether China's poultry inspection system could be relied upon to protect against the potential spread of AI.

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

4.301 Again, China's arguments avoid or overlook key facts. China argues that its chicken feed crises are not relevant to the safety of Chinese poultry because contaminated chicken feed does not increase the risk of consuming the related poultry meat. However, China fails to mention that China's Health Secretary responded to the chicken feed crisis by announcing that all Chinese chicken meat would be tested for melamine to ensure that it was safe to eat. Similarly, China notes that the EU currently accepts Chinese poultry, but avoids the fact that the EU banned Chinese poultry for six years from 2002 to 2008. Perhaps China does not raise this issue because the EU's ban on Chinese poultry was largely based on concerns about AI in China, an issue China argues is not relevant to the safety of Chinese poultry.

4.302 China's sixth argument is an attempt to demonstrate that Section 727 is applied such that it discriminates against China in an arbitrary or unjustifiable manner. In short, China argues that the same conditions prevail in China and in other countries not within Section 727's scope.

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

4.304 In determining whether Section 727 was applied against China in an arbitrary or unjustifiable manner, China argues that it should be compared with all other Members. However, a comparison of this nature does not make sense. After all, most Members have never attempted to export poultry to the United States and there would never be a reason to enact a measure like Section 727 with regard to their products. Instead, the proper comparison for Article XX purposes is between China and those Members whose poultry inspection systems had already been found equivalent or those Members who had progressed far enough along in the equivalence process such that a determination was imminent. It is these Members who were similarly situated as China in that they had an expressed desire to export poultry to the United States, acted on that desire, and were in a position to be able to export in the near future.

4.305 Among these Members, China's application stands out for its unique concerns. No other Member who has been found equivalent or who is nearing an equivalence determination has had such severe enforcement problems or massive food safety crises. Another distinction is that many of these Members had been exporting poultry or meat to the United States for many years without incident before they were found equivalent under FSIS's current equivalence regime. Thus, at the time these WTO Members were subject to FSIS's equivalence process for poultry, FSIS already had a familiarity with them and confidence in their inspection systems for ensuring the safety of the products that they exported to the United States. By contrast, China had never before exported poultry or meat to the United States when it applied for equivalence in 2004.

4.306 Among these Members, China spends a lot of time comparing itself with Mexico. We agree that FSIS's audit reports on Mexico are troubling. In fact, the 2008 audit that China cites led FSIS to suspend Mexico from being able to export poultry products to the United States. However, FSIS's reports on China are also troubling. For example, for every single Chinese slaughtering facility that FSIS audited in 2005, it concluded: "If this establishment were certified to export to the US, this establishment would be immediately delisted."

4.307 Despite the fact that FSIS's audits of both China and Mexico raised concerns, this comparison does not prove discrimination. Unlike China, Mexico was not in the middle of an ongoing equivalence proceeding in which new rules had to be implemented and established to allow Mexico to export poultry to the United States at the time Section 727 was enacted. Additionally, Mexico had a long history of exporting meat and poultry products to the United States at the time of the audit, which gave FSIS confidence that Mexico would work to resolve the problems it identified during the audit as it had done in the past. More fundamentally, China's discrimination argument appears to rest on a faulty premise. China asserts that it was discriminated against because FSIS continued to work with Mexican officials to resolve its issues while by enacting Section 727, FSIS was refusing to work with China. However, to the contrary, FSIS did engage in work related to China's equivalence application during 2009 and did reach out to China so it could do even more work on this matter.

4.308 China also has no basis for an Article I claim. China's argument misses the point of an equivalency-based regime. Many of a Member's actions taken in implementation of an equivalency-based food-safety regime will differ for different Members, depending on the specific facts and circumstances of that Member's status in the process of applying for a determination of equivalency. China tries to get around this fundamental point by claiming that the US measure is somehow different than a regulatory action, because it was adopted by the US Congress as opposed to FSIS, the US regulator. China's argument, however, relies on an artificial distinction between procedures administered only by FSIS, and the broader US system of ensuring food safety, which includes congressional oversight. This distinction has no basis in the WTO Agreement. The fact that the particular exercise of oversight involved in this dispute applied to one Member does not establish an Article I violation, just as the fact that a specific FSIS regulatory action applied to only one Member would not establish an Article I violation.

4.309 In addition, China has provided no explanation for why poultry products from China are "like products" to poultry products from other WTO Members, including those already authorized to export poultry products to the United States. China's "hypothetical like product" approach is circular. China is assuming that its exports of poultry products would be as safe as exports from other Members, yet that is the point of an equivalency process.

4.310 China's claims under the *SPS Agreement* are not within the terms of reference because China failed to request consultations under the *SPS Agreement*. China characterizes this issue as one of an "initial" failure by the United States to understand China's consultations request, and that the matter was subsequently clarified in further communications from China. The issue here is not a matter of misunderstanding: China stated that it considered that the *SPS Agreement* did not apply, and China would only request consultations under the *SPS Agreement* in the future if there were a subsequent demonstration that any US measure was subject to the *SPS Agreement*. Thus, under the plain meaning of China's consultations request, and as China has confirmed, China would only have requested consultations under the *SPS Agreement* well after this panel process began. Accordingly, China had not invoked the *SPS Agreement*, nor consulted under it, such that the *SPS Agreement* could be within the terms of reference of the Panel.

4.311 Thus, the question is whether the DSU allows a Member to include claims under a covered agreement without seeking consultations under that agreement. Members agreed in the DSU to the rules that would apply in invoking the DSU. China has not followed those rules, but still asserts that it is entitled to the mechanisms under the DSU. If China's approach here were to be accepted, it would be in derogation of the agreed rules, would undermine the usefulness of the consultation process, and lead to uncertainty and confusion in all future disputes.

4.312 China's second submission also argues that the United States has not "advanced a claim that the consultations request affected the United States' due process rights". Although the United States has not used that phrase, certainly "due process" must include the right to have disputes conducted in accordance with the rules set out in the DSU, and those rules also serve to protect the rights of other Members.

V. ARGUMENTS OF THE THIRD PARTIES

A. EUROPEAN UNION

1. Executive summary of the third party written submission by the European Union

(a) Concerning the existence of the alleged measures

(i) On the notion of "future closely-related measures"

5.1 The European Union notes that the Appellate Body and the WTO panels generally limit their analysis and findings on the compatibility of a contested measure with the covered agreements to the provisions of that measure as they were on the date of the establishment of the panel. Amendments introduced after the date of the establishment of the panel are generally taken into consideration in reaching such findings only in circumstances where specific conditions are met.

5.2 Applying the principles that the Appellate Body clarified in the *Chile – Price Band System* case to the facts of the present case, the European Union first notes that the terms of reference of the Panel, which reflect the measures challenged by China in its request for the establishment of the Panel, are broad enough to include amendments to Section 727. They also include an express reference to the draft provision of the United States Bill that served as the basis for Section 743 and the *Agriculture Appropriations Act 2010*. We also note that China's request defined such "future

closely-related measures" as measures that have "the same substance, essence and/or legal implications for imports of poultry products from China", as Section 727. However, the United States argues that, far from having the same substance, essence or legal implications with Section 727, Section 743 "plainly changes the essence of Section 727" because it "removes the restriction" introduced by Section 727.

5.3 If, after having analysed the facts of the case, the Panel comes to the conclusion that Section 743 does not have "the same substance, essence and/or legal implications" as Section 727, then the Panel should also conclude that Section 743 does not fall within its terms of reference. On the other hand, if the Panel concludes that Section 743 and Section 727 have the "same substance, essence and/or legal implications", then the Panel should further assess whether Section 743 was adopted "with a view to shielding from scrutiny a measure", or whether an analysis of Section 743 "is necessary in order to secure a positive solution to the dispute", as required by the Appellate Body's report in the *Chile – Price Band System* case. If the Panel concludes that either of these conditions is satisfied, then the Panel should conclude that Section 743 falls within its terms of reference and should make findings on its compatibility with the covered agreements.

(ii) On the notion of the "moratorium"

5.4 The European Union notes that China bases its claim for the existence of the "measure" called "the moratorium" on two elements: first, the existence of Section 727 and its predecessor, Section 733 of *the Agriculture Appropriations Act 2008*; and second, the alleged "ongoing inaction of FSIS with respect to rules related to the importation of Chinese poultry products", both in relation to existing rules and in relation to expanding the scope of Chinese poultry products that could be imported into the United States.

5.5 On the first point, the European Union agrees with the United States that the existence of different pieces of legislation, adopted at different points in time, relating to the same product market and imposing similar rules and procedures (or even restrictions) is not necessarily sufficient evidence of the existence of another, separate and distinct "measure" qualified as a "moratorium" and consisting of the "sum" of the individual measures. China should have produced additional specific and precise evidence establishing the existence of a United States' measure to prohibit indefinitely the importation of Chinese poultry products. In the absence of such evidence, the Panel should conclude that there is no "measure" called "moratorium" and should limit its analysis only to the examination of Section 727 (and, eventually, Section 743) and their compatibility with the covered agreements.

5.6 On the second point, the European Union notes that both China and the United States have included in their first written submissions extensive descriptions of the United States' legislation, which regulates the functioning of the FSIS. There is nothing in these descriptions indicating that, for as long as Section 727 was in place, the FSIS could have taken action to promote the importation of Chinese poultry products into the United States, let alone expand the scope of Chinese poultry products that could be imported, contrary to the provisions of Section 727. If this is confirmed by the Panel's assessment of the United States' legislation, then the alleged "inaction of the FSIS" during the period when Section 727 was in place, would be simply the direct result and consequence of Section 727. In such circumstances, the alleged "inaction" of the FSIS would not constitute additional evidence establishing the existence of another, separate and distinct "measure" called "the moratorium".

(iii) On the expiry of Section 727 and the letter of 12 November 2009

5.7 According to the United States Section 727 expired on 30 September 2009, i.e. after the establishment of the Panel. Nevertheless, China seeks not only findings but also a recommendation. In light of this, even if the Panel would make findings with respect to Section 727, the Panel may need to

consider the jurisprudence suggesting that, in such circumstances, it may not be necessary to make a recommendation. Also according to the United States, with respect to Section 743, on 12 November 2009 a letter from the Secretary of Agriculture to Congress set forth certain commitments, with the consequence that there are no longer any funding restrictions. Nevertheless, China seeks not only findings but also a recommendation. In light of this, the Panel may also need to consider whether or not it is necessary to make a recommendation with respect to Section 743.

(b) Claims relating to the application of the GATT

(i) On the application of GATT XI

5.8 The European Union notes that the parties do not dispute the fact that the United States' legislation contains a general prohibition on the importation of poultry products into the United States. The United States' legislation introduces an exception to this general rule, by allowing the importation of poultry products produced in countries that can "show that their food safety regulatory system results in the same level of public health protection achieved by the United States' regulatory system". For as long as such a determination of equivalence has not been made by the competent United States authorities, for any reason, a WTO Member cannot export any poultry products to the United States. One reason for the absence of such determination may be that the competent authorities of the United States have concluded that a particular WTO Member failed to show that its food safety regulatory system results in the same level of public health protection as the level achieved in the United States. Another reason may be that the WTO Member has not asked the competent United States authorities to engage in the procedures necessary for the evaluation of its food safety system. A third reason may be that the competent United States authorities have been requested to perform the evaluation, but have not completed the necessary procedures yet, or have not yet started them.

5.9 In any and all of these cases the general prohibition on the importation of poultry products would apply and the WTO Member would not be allowed to export any poultry products to the United States. The particular reason for which this WTO Member would not be able to make use of the exception allowed under the PPIA would not matter: the inability to export poultry products into the United States would be the consequence of the general prohibition. In these circumstances, it would appear that the "measure" imposing the "restriction" on the importation of poultry products into the United States is the underlying legislation containing the general prohibition on the importation of poultry products. An exception to this general prohibition exists and this exception may be granted to a WTO Member, or not. The refusal to extend the advantage of this exception to a particular WTO Member (while it is extended to other WTO Members) may constitute a violation of GATT Article I, if the conditions for the application of that Article are met. However, the mere absence of authorization would not constitute an additional or different "restriction", which would exist alongside the real restriction imposed by the general prohibition and which could give rise to a separate claim under GATT Article XI.

5.10 This does not preclude that, depending on the facts of the case, an additional and distinct measure permanently or temporarily closing down the exception might constitute an additional restriction. In this respect, for the purposes of interpreting and applying Article XX(b) of the GATT 1994, whether there is an inconsistency with Article I or Article XI of the GATT might not be the critical point, if it is clear that at least one of those provisions is breached.

5.11 The European Union notes that, in the present case, China expressly states that it does not challenge (i) the general prohibition on the importation of poultry products and (ii) the exception introduced by the "procedures for evaluating equivalence and approving imports of poultry products". China only challenges the United States' alleged refusal to allow China to participate in the procedures for the evaluation of China's food safety system, while the United States allows other

WTO Members to participate in these procedures. In light of the above, the European Union considers that, if on the basis of its assessment of the facts of this case, the Panel concludes that the contested measure constitutes an additional restriction to the main restriction imposed by the underlying legislation of the United States, then the Panel should also examine whether such additional restriction also constitutes a "restriction" within the meaning of Article XI of the GATT.

(ii) On the relation between GATT XX(b) and the SPS Agreement

5.12 The European Union notes that the United States has confirmed that the contested measures were "enacted in order to protect human and animal life and health from the risk posed by the importation of poultry products from China". This would seem to indicate that the United States accepts that the contested measures satisfy the definition of "sanitary measures" included in the *SPS Agreement*.

5.13 The European Union also notes that the Preamble of the *SPS Agreement* starts by repeating the text of Article XX(b) and of the chapeau of Article XX of the GATT and concludes with the statement that the purpose of the *SPS Agreement* is to "elaborate rules for the application of …, in particular, GATT XX(b)".

5.14 The European Union also notes that Article 2.4 of the *SPS Agreement* provides that "sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." Similarly, Article 3.2 of the *SPS Agreement* provides that SPS measures that conform to international standards are deemed necessary and presumed consistent with the relevant provisions of the *SPS Agreement* and the GATT 1994. The European Union takes the view that because of this close relationship between GATT Article XX(b) and the *SPS Agreement*, the provisions of the *SPS Agreement* provide immediate context for the interpretation of the provisions of GATT Article XX(b).

5.15 The European Union draws support for this view from the fact that, as clearly stated in the Preamble of the *SPS Agreement*, the *SPS Agreement* "elaborates rules for the application" of "in particular" Article XX(b) and the chapeau of Article XX of the GATT, as well as from the fact that measures which satisfy the provisions of the *SPS Agreement* are expressly stated to satisfy also the provisions of GATT Article XX(b). Consequently, where a contested measure satisfies the definition of "sanitary measure" included in the *SPS Agreement*, the Panel's assessment of its compatibility with GATT Article XX(b) needs to take into consideration the relevant provisions of the *SPS Agreement*. The European Union considers that this is particularly true for the Panel's assessment of whether the contested measure is "necessary" in order to achieve the stated objective of protection of human, animal or plant life or health.

5.16 In light of the above, the European Union considers that, if after having examined the facts of this case, the Panel concludes that the contested measures constitute "sanitary measures" in the terms of the *SPS Agreement*, then the Panel should assess their compatibility with the provisions of GATT Article XX(b) also taking into consideration the relevant provisions of the *SPS Agreement*.

5.17 In this respect, the European Union considers that the present case is not procedurally or substantively comparable to the *Brazil – Retreaded Tyres* case. In that case the European Union made no claims under the *SPS Agreement* and Brazil invoked in its defence Article XX(b) of the GATT but not the *SPS Agreement*. Moreover, in that case, the European Union never argued that the provisions of the *SPS Agreement* should be included in the assessment as immediate context for the interpretation of Article XX(b) of the GATT. The present case is procedurally different. China is seeking review of the measures at issue against various obligations in the *SPS Agreement* (and the Panel will have to

decide whether those claims are within its terms of reference) and in any event will no doubt be referencing those very same provisions as immediate context for the interpretation of GATT Article XX(b).

5.18 The present case is also substantively different. In the present case the focus of the discussion is on whether the poultry products subjected to the "pause" in the approvals regime constituted a *direct* threat to human or animal health, justifying the measure at issue – a classic SPS problem. By contrast, in the *Brazil – Retreaded Tyres* case the public health issue was not related to the product itself, but was more attenuated, and related rather to the manner in which the product was disposed off. As a result, it is not clear whether the Brazilian measure against the importation of retreated tyres was covered by the definition of "sanitary measure" in Annex A, paragraph 1 of the *SPS Agreement*.

(c) Claims relating to the application of the *SPS Agreement*

5.19 The European Union considers that the legal framework that most readily lends itself to an objective assessment of this case, which appears to involve an admitted "temporary restriction" on the import of certain poultry products for reasons of human or animal health, is the *SPS Agreement*. The European Union observers that notwithstanding consultations and the exchange of first written submissions, there has as yet been no detailed development of substantive arguments under the *SPS Agreement*. Consequently, as a Third Party having notified its substantial interest to the DSB, the European Union considers that, to-date, its interests have not been fully taken into account, pursuant to Article 10 of the DSU. It is for that reason that the European Union requests enhanced third party rights, as set out in the following section. For the time being, and pending a response to that request, the European Union has the following observations. Leaving aside the question of which GATT provisions other than Article XX(b), if any, the *SPS Agreement* implements, as explained above, the European Union considers that, at least in this case, the *SPS Agreement* must be constantly read together with the relevant provisions of Article XX of the GATT, and eventually other relevant GATT provisions (in this case, Articles I and XI of the GATT 1994). That is because the rights and obligations of the parties are dispersed amongst these various provisions, so that it is only by objectively assessing all of them that the Panel can properly carry out its task of considering whether or not the balance between the various interests at play struck in the measures at issue is consistent with the cited provisions of the covered agreements. These observations have particular implications for burden of proof issues. The principles are not controversial: a party asserting a fact should prove it; a complaining party should make its case; and a defending party invoking an "affirmative defence" should do likewise. These principles need to be reasonably applied with flexible intelligence in the context of any covered agreement, but particularly one such as the *SPS Agreement*, which touches on issues of scientific proof or evidence, including circumstances where there is a paucity bordering on an absence of science.

5.20 With respect to the characterisation of Section 727 (and Section 743), the European Union notes that the United States describes it as a "pause". To the European Union, that description seems apt. One might conceptualise such a "pause" as a "delay", within the meaning of Article 8 and Annex C.1(a) of the *SPS Agreement*, in which case the essential legal question before the Panel would resolve itself into whether such delay was "due", i.e. justified. Alternatively, one might conceptualise such pause as a temporary or provisional measure, such as is referenced in Article 5.7 of the *SPS Agreement*. The United States has not invoked Article 5.7; but China has made a claim under Article 2.2, which cross-references the exception in Article 5.7. In either case, the same basic principles would apply, since the disciplines of Article 5.7 would certainly constitute immediate context relevant to determining whether a "delay" was "due".

5.21 One of the particular features of the measures at issue in this case that the Panel may no doubt wish to consider is that, unlike in most if not all of the past SPS cases, the measures would not appear to be in the nature of a general or specific measure prohibiting or restricting the import of a particular

product and having regard to relevant science. Rather, the measures at issue would appear to be in the nature of a measure, such as any Member might adopt, were it to determine that a particular facility (such as a slaughterhouse) previously authorized in fact no longer complied with the applicable rules. For example, it is not controversial that *Salmonella* constitutes a public health risk (no need for an extended debate on the science), and that an import ban would be a proportionate response to any Member demonstrating itself incapable of sufficiently eliminating that threat (no need for an extended debate on alternative measures). Rather, the more limited question in this case would appear to be whether or not the particular circumstances justified the "pause". With this in mind, the Panel may consider Article 8 and Annex C.1(a) of the *SPS Agreement* particularly relevant.

5.22 Turning to the reasons for which the measure at issue was apparently adopted, the United States appears to refer to three public health issues: "poultry that is not produced under sanitary conditions or thoroughly inspected for contaminants"; avian influenza; and a "particular risk" associated with China. With this in mind, and to begin the analysis in conventional fashion under the *SPS Agreement*, and looking at the provisions of Articles 5.1 and 5.7, the European Union would have been interested to know whether or not the United States had conducted any risk assessment under those provisions, or based itself on any available pertinent information, or sought additional information within a reasonable period of time. China asserts that no such documents exist. The United States first written submission does refer to certain documents. For example, the United States refers to USDA facts sheets about *Salmonella*, *Campylobacter* and *Listeria*; a weekly report from the Center for Disease Control about avian influenza; and APHIS restrictions on imports of poultry from regions such as China where avian influenza exists. The United States also refers to a number of documents about food safety in China generally. However, the European Union would have been interested to better understand, within the terms of the *SPS Agreement*, how such general documents might relate to and justify the measures at issue.

5.23 The European Union has also reviewed the Final Report of an Initial Equivalence Audit Covering China's Poultry Inspection System and the Final Report of an Initial Equivalence Audit Covering China's Poultry 'Slaughter' Inspection System. The European Union observes that the Panel may have to consider whether or not these documents could justify, perhaps with other documents, the "delay" occasioned by the measures at issue. The latter document, in particular, appears to suggest deficiencies with respect to poultry slaughter. With respect to the former document, the European Union would agree with a proposition that it understands to be implied in the United States' defence, namely that the existence of an internal municipal law document providing for approval does not determine or pre-judge a position subsequently adopted by a risk manager. In other words, the Panel's task is to objectively determine whether or not the "pause" occasioned by the measures at issue was consistent with the cited provisions of the covered agreements. In carrying out that task, the fact that one agency within the municipal system had provisionally indicated a favourable attitude towards approval carries very little if any weight in the Panel's assessment.

5.24 In similar vein, the European Union would have been interested to understand how the United States would characterise its acceptable level of risk or appropriate level of protection with respect to this matter, but again, there is an absence of explanation. In similar vein, the European Union would have been interested to understand whether or not the United States has ever applied such a measure to other WTO Members' poultry products (Article 2.3) or other products (Article 5.5), but again, there is an absence of explanation. In similar vein, the European Union would have been interested to understand what other measure, if any, might have been available, or why such other possible measure would not have been considered suitable, but again, there is an absence of explanation. In the absence of such explanation, the European Union can only observe that, at this stage, a defence of the measures under Article 5.1 of the *SPS Agreement* would appear to be attenuated.

5.25 The European Union could not, however, rule out the possibility of a defence of the measures under Article 8 and Annex C.1(a) or Article 5.7, if the European Union could better understand, for example, the relationship between the alleged unsanitary or inadequate conditions and the mooted public health threat, and any specific associated evidence or information.

(d) Request for enhanced third party rights

5.26 The European Union notes that the parties have not yet engaged in a detailed discussion of the core issue raised in this case, namely the compatibility of the contested measures with the provisions of the *SPS Agreement*. It is reasonable to expect that a profound discussion of this issue will take place through the parties' second written submissions and during the ensuing second substantive meeting with the Panel. Regrettably, as the Panel's working procedures currently stand, Third Parties will not have the opportunity to participate to that discussion and offer to the Panel their views on the positions taken by the Parties. The European Union considers that, in order to ensure that the interests of third parties under the GATT and the *SPS Agreement* at issue in this dispute are fully taken into account during the panel process, the working procedures should be amended to provide for enhanced third party rights. In particular, third parties should be given access to the parties' second written submissions and allowed the opportunity to make their views known to the Panel and the parties through another third party written submission, or through their participation in the second substantive meeting with the Panel, or both. The European Union hereby respectfully requests the Panel to amend its working procedures accordingly.

B. KOREA

1. Executive summary of the third-party submission of Korea

5.27 It is undisputed that China's consultation request did contain language invoking the dispute settlement provisions of the *SPS Agreement* in a conditional manner ("if it were demonstrated that any such measure is an SPS measure"). And the United States contends that this conditional invocation was legally ineffective because it does not comply with jurisdictional requirements that are allegedly established by Article 1.1 of the DSU.

5.28 In light of analysis of the relevant text based on the *Vienna Convention on the Law of Treaties*, Korea believes that there may be sound reasons for a panel to insist upon procedural requirements of the type suggested by the United States where compliance with such requirements is necessary to uphold the responding party's due process rights to have adequate notice of the nature of the claims against it. In this case, however, the United States has not claimed that the alleged defects in China's consultation request caused it any prejudice. Consequently, Korea does not believe that the claims raised by China under the *SPS Agreement* are outside the terms of reference of this Panel.

5.29 In addition, Korea is of the view that the United States has invoked the exception of Article XX(b) of the GATT 1994 as a defense to claims presented by China, thereby accepting that the measure at issue *is* an SPS measure in accordance with Annex A(1) of the *SPS Agreement*.

5.30 Having said that, Korea reiterates the importance of taking a precautionary perspective in the SPS regulation, especially when human life and health are at stake. The United States has yet to, and may decide not to submit a defense based on the *SPS Agreement*, such as Article 5.7. Nonetheless, Korea deems that the precautionary principle embodied in the provisions of the *SPS Agreement* must also be fully taken into account in interpreting Article XX(b) of the GATT 1994.

5.31 For the foregoing reasons, Korea respectfully requests the Panel to actively review the SPS issues in this dispute and keep mindful of legitimate concerns of the public or people of a Member

state regarding risks on human life and health from a precautionary perspective in interpreting the *SPS Agreement* or Article XX(b) of the GATT 1994.

5.32 Lastly, Korea is of the opinion that there can be systemic benefits, such as improving transparency of dispute settlement proceedings, from enhancing third party rights. However, Korea also believes that expanding third party rights without obtaining the consent of the parties of a dispute is contrary to the mandate of the DSU. Notwithstanding the foregoing, should the Panel decide to grant third parties access to the second set of submissions, opportunity to participate in the second substantive meeting or to present its views to the Panel on the second submissions, Korea reserves its right to participate in those proceedings with other third parties as the Panel sees fit.

C. CHINESE TAIPEI

1. Oral statement by Chinese Taipei

5.33 Mr Chairman, distinguished members of the Panel, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), as a third party in this proceeding, would like to thank the Panel for this opportunity to present its views on this dispute. Chinese Taipei joined this dispute as a third party because of its systemic interest in the correct interpretation of the covered agreements at issue, in particular, the *Agreement on the Application of Sanitary and Phytosanitary Measures* (*SPS Agreement*) and the *Agreement on Agriculture*.

5.34 Chinese Taipei notes that the European Union ("EU") requested for enhanced third party rights in their written submission[148], and Chinese Taipei would like to echo the EU's request for the following reasons.

5.35 While Article 12.1 and Annex 3 of the DSU do not specifically address this issue of granting enhanced third party rights, the Appellate Body has found that such decisions are well within the scope of the panel's authority and discretion. As the Appellate Body indicated in *EC – Hormones*, the decision to grant enhanced third rights is a "decision that falls within the scope of discretion and authority of the panels, particularly if the panel considers it necessary for ensuring to all parties due process of law."[149] The Appellate Body then found that Panel's grant of enhanced third party rights justified under the particular circumstances.[150]

5.36 In the present dispute, as the EU has rightly observed, "the parties have not yet engaged in a detailed discussion of the core issues raised in this case, namely the compatibility of the contested measures with the provisions of the *SPS Agreement.*"[151] We share the EU's observations and also expect that the in-depth discussion of these issues will very likely take place in the parties' second written submissions and during the Panel's second substantive meeting with the parties.[152]

5.37 Without participating in the entire proceeding of the Panel's second substantive meeting with the parties, third parties can hardly assess whether the provisions of the *SPS Agreement* are interpreted correctly, let along providing their views accordingly for the Panel's consideration. To ensure that the interests of third parties under the covered agreements in this dispute are fully taken into account during the panel process, we respectfully request the Panel to amend its working procedures and grant third parties the following enhanced rights:

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[148] European Union's third party written submission, paras. 57-58.
[149] Appellate Body Report, *EC – Hormones*, para. 154.
[150] Appellate Body Report, *EC – Hormones*, para. 154.
[151] *Supra* footnote 144, para. 57.
[152] *Id.*

(a) to receive the parties' second submissions and other documents associated with the Panel's second substantive meeting with the parties;

(b) to observe the Panel's second substantive meeting with the parties; and

(c) to make a brief statement during the Panel's second substantive meeting with the parties.

5.38 Chinese Taipei believes that granting enhanced third party rights in this dispute not only would allow the third parties to assist the Panel in reaching correct interpretations of the relevant provisions of the covered agreements but would also ensure the systemic interests of Members. We also believe that the additional rights granted by the Panel would not become an "inappropriate blurring of the distinction drawn in the DSU between parties and third parties".[153] Thank you.

D. TURKEY

1. Oral statement by Turkey

5.39 Mr Chairman, respective Members of the Panel, first of all, I would like to express Turkey's appreciation for giving the opportunity to third parties in the current proceedings to present their views and contribute to the settlement of this dispute.

5.40 I would also especially like to indicate that, Turkey is not in the intention to present an opinion on the specific factual context of this dispute and takes no position what so ever as to the defense and allegations presented by the parties on whether the specific legislation at issue is inconsistent to the subject provisions of the WTO Agreements. Turkey wishes to contribute, by expressing its opinion on some systemic issues regarding the interpretation of the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (*SPS Agreement*).

5.41 The first issue Turkey wishes to address is that, Turkey believes the restriction on the importation of certain poultry products is actually an SPS measure because as defined in Annex A Article 1 of the *SPS Agreement*, it aims to protect animal or plant life or health within its territory from the risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms or from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.

5.42 When taken into account, the definition in GATT Article XX(b), we believe that for a member to be able to take a measure under paragraph (b) of Article XX, it has to meet the requirements under the *SPS Agreement* if the risk is caused by additives, contaminants, toxins or disease causing organisms in food, beverages and feedstuff.

5.43 The second issue Turkey wishes to address is the definition of the expression "scientific evidence" in Article 2.2 of the *SPS Agreement*. To the extent that by the panel, the contested measures are to be considered sanitary and phytosanitary measures within the meaning of the *SPS Agreement* and in the scope of the terms of reference of the current dispute, clarification of the meaning and scope of this expression will contribute to the resolution of the dispute and to the proper application of SPS measures.

5.44 As foreseen in Article 2.2 of the *SPS Agreement*, the SPS measure should bring no more restriction than needed to realize the aim of protection.

[153] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(d).

5.45 In regard to Articles 3.1 and 3.3 of the *SPS Agreement*, we are of the view that these articles should be addressed together. When done so, it is clear that an SPS measure can only be introduced provided that it is based on international standards, guidelines and recommendations where they exist, and if not, the country introducing the measure should have scientific evidence as to the consequences of what the potential damage might be, considering the measure is not introduced. This is to ensure that measures are not taken arbitrarily and are not used as a tool for manipulating international trade.

5.46 Another Article under which China is challenging the United States is Article 5 of the *SPS Agreement* which envisages that the appropriate level of sanitary or phytosanitary protection is to be taken according to a risk assessment taken by the country introducing the measure.

5.47 Members are obliged to take available scientific information into account. The level of protection taken under any SPS measure must not exceed the level that satisfies the need for protection. This again is to ensure fair and equal treatment among member states and a foreseeable environment for international trade.

5.48 In Article 5.7 of the *SPS Agreement* it is envisaged that, where scientific evidence is insufficient, a member may provisionally adopt SPS measures on the basis of available pertinent information but it is also determined that the member must at the same time continue to seek to obtain the additional information necessary for a more objective risk assessment.

5.49 Finally, Article 8 and Annex C of the *SPS Agreement* determines that the control, inspection and approval procedures of members must be consistent with the provisions of the aforementioned Agreement, therefore has to be carried out without undue delays and must be applied in a non-discriminatory manner.

5.50 As I conclude Turkey's oral statement, I would like to state that Turkey will be pleased to take any questions that the Panel may have.

VI. INTERIM REVIEW

A. GENERAL

6.1 On 14 June 2010, the Panel issued its Interim Report to the parties. On 28 June 2010, both parties submitted written requests for the review of precise aspects of the Interim Report. The parties submitted written comments on the other party's comments on 8 July 2010. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the arguments made at the interim review stage, wherever the Panel felt that explanations were necessary. The Panel has also modified certain aspects of its Report in light of the parties' comments wherever it considered appropriate. Finally, the Panel has made a limited number of editorial corrections to the Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

B. CHINA'S COMMENTS ON THE INTERIM REPORT

1. Factual aspects

6.3 Regarding paragraph 2.26 of the Interim Report, **China** suggests to the Panel that the first sentence be amended to read: "~~Nearly two years after the United States' first request, o~~On 12 March 2008 ...". China argues that the sentence is duplicative and that the date is sufficient to indicate the

amount of time that had passed. This, it claims, also harmonises the style of paragraph 2.26 with its surrounding paragraphs, particularly 2.23, 2.27 and 2.28.

6.4 The **United States** disagrees and points out that the relevant language is accurate and that China is not arguing otherwise. For the United States, the language is not duplicative because mowhere else does the Interim Report note the period of time between the FSIS's request for a list of certified establishments and China's response to that request.

6.5 Having considered the comments of both parties, the Panel declines China's request to delete the said language. The Panel considers that it is not duplicative, it is accurate and assists the reader in understanding the time span between the request for a list of certified establishments by the FSIS and China's response to such a request.

2. Whether Section 727 is an SPS measure

6.6 **China** has made two requests for review concerning the Panel's charaterisation of China's position towards Section 727 being an SPS measure. The paragraphs concerned are 7.71 and 7.72.

6.7 Regarding paragraph 7.71 of the Interim Report, China suggests to the Panel that the first sentence be amended to read: "China's characterization of Section 727 as an SPS measure has, during the proceedings, evolved ~~from one extreme to the other~~ significantly." Regarding paragraph 7.72, China suggests the sentence be amended to read: "During the first substantive meeting, China ~~radically changed its position and~~ argued for the first time that Section 727 *is* an SPS measure."

6.8 China makes this suggestion because it believes that the amended language would more accurately reflect the evolution of China's characterisation of Section 727. China submits that, from the beginning of this dispute, China left open the possibility that Section 727 could potentially be considered an SPS measure, which China does not believe should be considered an "extreme" position.

6.9 The **United States** disagrees and points out that the language chosen by the Panel is the more accurate characterisation of the developments in this dispute. For the United States, it is hard to imagine a more stark contrast between a measure adopted for "budgetary purposes", as China initially described Section 727, and a measure adopted to protect against food safety risks, as China subsequently described Section 727. In contrast, China's suggested phrasing ("evolved significantly") would inaccurately suggest that China had gradually shifted its position over time. The United States further argues that China's suggested modification to the first sentence of paragraph 7.72 is a less accurate description of the developments in this dispute. In its view, the language used in the Interim Report appropriately notes that China changed its position – which is a fact that China does not even dispute. Yet, it argues, China's suggested modifications would delete from the first sentence of paragraph 7.72 the information that China had changed its position.

6.10 Having considered the comments of both parties, the Panel declines China's request to amend the language in paragraphs 7.71 and 7.72. The Panel reminds China that it began its argumentation on the basis of Section 727 not being an SPS measure and referred to its SPS claims as being in the alternative in the event that "it were demonstrated" that Section 727 was an SPS measure. China then changed its position at the first substantive meeting and argued that Section 727 was an SPS measure. For the Panel, "being an SPS measure" lies at the oposite extreme of "not being an SPS measure". In our view, such a change in position can only be qualified as moving from one extreme to the other.

3. Miscellaneous

6.11 In addition to the substantive comments presented above, **China** offered a number of typographical, editorial and stylistic suggestions. The Panel has accommodated China's suggestions where appropriate.

6.12 In particular, concerning footnote 294, China suggests adding (Exhibit CN-33) to the end of the footnote. The **United States** has not objected. The Panel has made the suggested change in footnote 298 of the Final Report.

C. UNITED STATES' COMMENTS ON THE INTERIM REPORT

1. General comments on judicial economy

6.13 The **United States** requests the Panel to exercise judicial economy in respect of China's claims under Articles 2.3, 5.5, 8 and Annex C of the *SPS Agreement*, and Article I of the GATT 1994. The United States submits that the Panel should exercise judicial economy with respect to these claims based on several factors. The United States points out that this is the first WTO dispute involving a food-safety regime based on the principle of equivalence and therefore there are a number of issues of systemic importance regarding the legal relationship between Article 4 and other SPS provisions. According to the United States, the result of the Interim Report's analysis under Article 5.5 and Article 8 of the *SPS Agreement* is to make far-reaching findings on the legal relationship between Article 4 and other SPS provisions. The United States further argues that the Interim Report's reliance on *Japan -- Apples* to support the application of other SPS provisions to Article 4 equivalence measures is misplaced because Article 4 is "clearly different" from Articles 2.2, 5.1 and other provisions of the *SPS Agreement*.

6.14 The United States is concerned about the systemic implication of the Interim Report's analysis under Article 5.5 of the *SPS Agreement* (and the consequential Article 2.3 findings), especially with respect to the operation of an equivalence-based regime. The United States argues that the approach in the Interim Report would appear to turn many ordinary actions taken in the course of an equivalence review into breaches of Article 5.5 of the *SPS Agreement* while Article 5.5 analysis is not essential to the resolution of this dispute.

6.15 The United States is also concerned about the systemic implication of the finding that an equivalence regime falls within the scope of an "approval procedure" under Article 8 of the *SPS Agreement*. The United States argues that the Panel's analysis of the scope of Article 8 and Annex C in the Interim Report is not supported by any language within the *SPS Agreement* itself or by the SPS Committee's Decision on the Implementation of Article 4. The United States fundamentally disagrees with the reasoning in the Interim Report, which the United States describes as filling a "loophole" in SPS disciplines.

6.16 Additionally, the United States submits that the Panel's findings regarding China's claims under the other provisions largely flow from the Article 5.1 findings and involve little if any additional factual analysis and therefore do not add to a resolution of this dispute. The United States considers that these types of consequential breaches would seem ideal candidates for judicial economy.

6.17 Finally, the United States argues that it would seem unnecessary to the effective resolution of this dispute that the Interim Report finds nine different breaches of the WTO Agreements arising from a one-sentence, expired measure.

6.18 Having noted the approach of previous panels towards judicial economy when claims were made under more than one GATT 1994 provision, and recognizing that the core issues in the dispute were determined in the context of an Article XX exception, the United States requests the Panel to adopt the same approach by exercising judicial economy with respect to China's claim under Article I of the GATT 1994. The United States is concerned about the systemic implication of the application of the GATT "like product" standard between two otherwise identical products based on the food safety system in place at the product's origin which, it submits, has long been one of the more difficult and controversial aspects of the GATT and the WTO. The United States argues that under Article 4 of the *SPS Agreement*, the products from an exporting Member who fails to demonstrate that its measures are equivalent, are not "like products" to those shipped by another exporting Member whose food safety regime has been demonstrated to be equivalent to the importing Member's food safety regime or otherwise any difference in procedures applied in determining Member's equivalence– as well as any difference in procedures applied in any origin-based safety determination – will be deemed to result in a breach of Article I of the GATT 1994.

6.19 **China** strongly objects to the United States' request that we exercise judicial economy in respect of its claims under Articles 2.3, 5.5, 8 and Annex C of the *SPS Agreement*, and Article I of the GATT 1994.

6.20 China submits that the United States' request reads more like a party's special third written submission on the merits of judicial economy, rather than comments on the Interim Report of a panel that has already gone through the time and effort of carefully considering and deciding the numerous legal questions presented in this dispute. China contends that the substance of the United States' arguments regarding judicial economy largely mirrors and repeats virtually identical arguments that were made in the United States' previous submissions – arguments that were rejected by the Panel and that need not be considered again in this context. Consequently, it submits, the United States' arguments on judicial economy are inappropriate as part of a request for review of an Interim Report. More importantly, China argues, they are based on erroneous statements about the *SPS Agreement*, the GATT 1994, and of the underlying facts.

6.21 For China, to the extent that judicial economy is intended to reduce the workload of a panel, the United States' request for judicial economy would instead call for the opposite – it would require *additional* work by the Panel. China argues that the United States extensively reiterates and expands arguments from its earlier submissions in its attempt to persuade the Panel to remove certain of its findings from the Interim Report on the grounds of judicial economy. China recalls that panels and the Appellate Body have found it inappropriate for a party to repeat prior arguments at the interim review stage, and they have found that further development of arguments at the interim review phase were outside of a panel's jurisdiction.

6.22 China submits that each of the findings made by the Panel are necessary for an effective resolution of this dispute and it is important to recall that judicial economy is not referred to in the DSU, and should be applied carefully in exceptional cases at the discretion of the Panel. China argues that the three factors invoked by the United States are not justification to exercise judicial economy of any of the claims. As for the first factor being this is the first WTO dispute that tangentially relates to an equivalence regime, China submits that the United States' argument on a number of issues of systemic importance concerning the relationship between Article 4 and other provisions of the *SPS Agreement* does not justify a request that the Panel redact its findings on Articles 2.3, 5.5, 8, and Annex C of the *SPS Agreement* and Article I of the GATT 1994. With respect to the United States' argument that Article 5.1 of the *SPS Agreement* is the only provision that the Panel need consider, China believes this argument is deeply flawed and inconsistent with the object and purpose of the *SPS Agreement.* According to China, because each individual claim under the *SPS Agreement* addresses a different element of Section 727 exercising judicial economy on the other SPS claims would result in reversible error in law as well as be "false judicial economy" because the Panel's

findings will only provide a partial ineffective resolution to the matter at issue. With respect to the idea that the number of breaches found of various provisions of the WTO agreements arising from an expired measure that would seem unnecessary to the effective resolution of this dispute, China argues that all of the findings are important for providing predictability for future cases dealing with the same or similar matters taking particular note that the same language used in Section 727 was used in previous appropriations measures. China also notes that the expiration of a measure at issue has not prevented panels and the Appellate Body from making extensive findings in respet of those measures.

6.23 With respect to the United States' request to exercise judicial economy on China's claims under Articles 5.5 and 2.3 of the *SPS Agreement*, China argues that the findings under Articles 5.5 and 2.3 regarding Section 727 will not have any of the ominous impacts on equivalence-based systems that the United States claims to fear because Section 727 is not a part of, or an "ordinary action taken in the course of", the FSIS equivalence procedures but instead a discriminatory ban on poultry products from China – and only China. Moreover, China contends that if the Panel were to delete its findings under Articles 2.3 and 5.5, it must then go on to more fully develop and expand its Article XX(b) analysis – which is clearly not something that can be considered "judicial economy".

6.24 With respect to the United States' request to exercise judicial economy on China's claims under Articles 8 and Annex C of the *SPS Agreement*, China argues that the United States' request that the Panel reconsider the same arguments they made with respect to the substantive interpretation of the provisions, this time as a justification for judicial economy, is inappropriate and based on the same erroneous reasoning presented in its second written submission which has been properly considered by the Panel.

6.25 With respect to the United States' request to exercise judicial economy on China's claim under Article I of the GATT 1994, China contends that out of the three reasons invoked by the United States only the reason where there is already a finding under Article XI of the GATT 1994 relates to judicial economy. China considers that, nevertheless, such a reason is unconvincing because the Panel's ruling highlights a line that WTO Members cannot cross – to violate the core most favoured nation non-discrimination principles of Article I of the GATT. China additionally argues that the United States enactment of Section 743, which it says is the successor to Section 727, is an important reason for not exercising judicial economy on this claim, as this Section continues to single out and impose restrictios on China. Therefore, China believes that there is a compelling need for the Panel to send a clear and strong reminder to the United States and other WTO Members that such discriminatory treatment is not, and cannot be, justified under GATT and WTO rules. Furthermore, China supports the Panel's reliance on an hypothetical like product analysis where there is an origin-based discrimination or it is not possible to make the like product comparison because of, for example, a ban on imports. China reiterates that Section 727 is not the outcome of an equivalence procedure but instead it blocked access to the normal equivalence procedures for China, and China alone, in a manner that was grossly discriminatory and completely unrelated to the outcome of an equivalence procedure.

6.26 The Panel has carefully considered both the United States' request that we exercise judicial economy in respect of China's claims under Articles 2.3, 5.5, 8 and Annex C of the *SPS Agreement*, and Article I of the GATT 1994, and China's objections thereof.

6.27 As put by the Appellate Body, the practice of judicial economy allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions of the covered agreements when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[154] Behind this practice lies the understanding that the job of panels is not to create law or provide authoritative interpretations of provisions of the WTO Agreements but rather to provide a

[154] Appellate Body Report, *Canada – Wheat Export and Grain Imports*, para. 133.

positive solution to the dispute at hand. Panels are nevertheless not constrained to resort to judicial economy.[155] Indeed, as the Appellate Body has concluded, "[a]lthough the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint."[156] In fact, the Appellate Body has ruled that in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis.[157]

6.28 We are therefore not *compelled* to exercise judicial economy but have discretion to do so where we believe our findings under one or more provisions of the covered agreements within our terms of reference have already provided a positive solution to the dispute and additional findings would serve no purpose. The Panel recalls that we have resorted to judicial economy in respect to China's claims under part of Article 5.5 of the *SPS Agreement* and Article 4.2 of the *Agreement on Agriculture.* We are however of the view that, in the circumstances of the present dispute, we should not be exercising judicial economy in respect of China's claims under Articles 2.3, 5.5, 8 and Annex C of the *SPS Agreement*, and Article I of the GATT 1994.

6.29 The United States submits that the Panel should exercise judicial economy with respect to these claims based on three factors. The first of these factors is that, as we acknowledge in paragraph 7.134 of the Interim and Final Reports, this is the first WTO dispute involving a food-safety regime based on the principle of equivalence. The United States seems to argue that because there are a number of issues of first impression which have systemic importance, particularly the legal relationship between Article 4 and other SPS provisions, the Panel should avoid these issues through the guise of judicial economy. First, the Panel notes that it was the United States who raised the relationship between Article 4 and the other provisions of the *SPS Agreement* when it argued that those provisions were inapplicable to Section 727 because it was governed solely by Article 4, a provision which is outside the Panel's terms of reference. The Panel is obliged under Article 11 of the DSU to determine the applicability of the provisions cited in the Panel Request, before entering into an examination of whether the challenged measures are in conformity with those provisions. Because the United States argued particularly that Article 4 was the applicable provision to the exclusion of the ones cited by China, the Panel was compelled to enter into an examination of the relationship between Article 4 and the other provisions of the *SPS Agreement*, in particular the question of whether coverage under Article 4 precludes the applicability of other provisions of the *SPS Agreement.* If the Panel had not done so we would have been acting contrary to our obligation under Article 11 and to the due process rights of the United States. Additionally, the Panel fails to understand why, as China points out, the fact that this is the first WTO dispute involving a food-safety regime based on the principle of equivalence and that some of the findings may have systemic relevance should be a factor in deciding whether the Panel exercises judicial economy on China's claims under Articles 2.3, 5.5, 8, and Annex C of the *SPS Agreement.* As explained above, judicial economy relates to finding a positive solution to the dispute at hand rather than to the systemic nature of the claims being raised. It is our view that panels should not use judicial economy to avoid tough questions as this does not provide a positive solution to the dispute. Additionally, if every panel were to avoid systemic issues of first impression, those provisions would never be clarified, which is one of the principal purposes of the dispute settlement system articulated in Article 3.2 of the DSU.

6.30 The second factor alleged by the United States as a reason for this Panel to exercise judicial economy is that the Panel's findings regarding China's claims under the other provisions largely flow from the Article 5.1 findings and involve little if any additional factual analysis and therefore do not

[155] The Appellate Body has often cautioned panels against exercising "false judicial economy". Appellate Body Report, *Australia – Salmon*, para. 223.

[156] Appellate Body Report, *Canada – Wheat Export and Grain Imports*, para. 133.

[157] Appellate Body Report, *US – Gambling*, para. 344.

add to a resolution of this dispute. We disagree with the United States. As pointed out by China, each individual provision of Article 5 addresses a different obligation some address risk assessment others the appropriate level of protection. We do not believe that a finding solely on the lack of a risk assessment provides a positive resolution with respect to a claim of discrimination in the application of the appropriate level of protection. We do not contend that panels need always examine each and every claim under the *SPS Agreement*. The Panel recalls that we did exercise judicial economy in respect to part of China's claim under Article 5.5 of the *SPS Agreement* and on China's claim under Article 4.2 of the *Agreement on Agriculture*. Furthermore, we did not make findings under Article 5.6 of the *SPS Agreement* because, as explained in paragraph 7.336 of both the Interim and Final Reports, we did not have the necessary elements before us to examine the claim. However, under the circumstances of this dispute, the Panel does not believe that exercising judicial economy on China's claims under Articles 2.3, 5.5, 8, and Annex C of the *SPS Agreement* is appropriate.

6.31 The third factor put forward by the United States is that finding nine different breaches of the obligations in the WTO agreements arising from a one-sentence, expired measure would seem unnecessary to the effective resolution of this dispute. Again, the Panel fails to understand the relationship between the length of the measure at issue and the need to exercise judicial economy on a number of claims. If panels were to consider the length of the measures at issue as a factor in their decision to whether or not exercise judicial economy, we wonder what would happen in cases where the measure at issue is an omission, rather than a legal provision. The United States also stresses the fact that Section 727 has expired. The Panel agrees with prior panels and the Appellate Body that making findings on expired measures may serve to provide a positive resolution to a dispute. Particularly in a case such as this, where the measure at issue was one that was contained in annual appropriations measures which by their nature expire at the end of every fiscal year, basing a decision to exercise judicial economy on the fact that the measure is expired could deprive the complainant of any meaningful review of its claims and any findings that would assist in the positive solution of the dispute. The Panel does address the fact that the measure is expired precisely in paragraphs 8.7 to 8.9 of the Interim and Final Reports where we explain that, although the Panel is making findings on the consistency of Section 727 with the *SPS Agreement* and the GATT 1994, it refrains from making recommendations under Article 19 of the DSU.

6.32 The United States' other argumentation in support of its position on judicial economy seems to repeat or expand its prior submissions to this Panel on its views of the substantive interpretation of the provisions of the *SPS Agreement* and the GATT 1994. We note that the interim review is not the appropriate forum for relitigating arguments already put before a panel[158] and that the Panel has already addressed the United States' arguments where appropriate in its findings. We will therefore briefly address the United States' arguments and will thus refrain from engaging in a new analysis of the United States' substantive arguments on these provisions. We will also make a brief clarification with respect to the United States' arguments on Article 8 and Annex C.

6.33 In the context of requesting the Panel exercise judicial economy on China's claims under Article 8 and Annex C, the United States argues that the Panel has characterised its interpretation of Article 8 and its relationship to equivalency procedures that might also be governed by Article 4 as filling a "loophole". The Panel would like to clarify that in paragraphs 7.375-7.376 of the Interim Report, we were expressing our understanding that the implications of following the United States' interpretation that equivalency procedures are exempt from the strictures of Article 8 and Annex C would *create* a loophole in the *SPS Agreement.* The Panel did not say nor did it intend to imply that its interpretation was "filling" a loophole that currently exists in the Agreement as we understand it.

6.34 The last point raised by the United States that we should exercise judicial economy on China's claim under Article I:1 of the GATT 1994 and instead examine China's claim only under Article XI of

[158] Panel Report, *Japan – DRAMS*, para. 6.2.

the GATT 1994. The main reasoning of the United States is again its concern of the systemic implications of the like products analysis under Article I given the alleged food safety difference between the products. The Panel renews its view that judicial economy is not appropriately used to avoid issues of first impression or those that might have systemic implications. Secondly, we note that Articles I:1 and XI:1 address different obligations, namely MFN treatment and the prohibition on quantitative restrictions. We do not see how a finding of violation of Article XI:1 on import prohibitions provides a positive solution to a dispute with respect to discrimination.

6.35 Accordingly, the Panel declines the United States' request that the Panel exercise judicial economy on China's claims under Articles 2.3, 5.5, 8, and Annex C of the *SPS Agreement* and Article I of the GATT 1994.

2. Factual aspects

6.36 Regarding paragraph 2.17 of the Interim Report, the **United States** suggests to the Panel that the last sentence be amended to read: "The report found a number of deficiencies in some processing and slaughter plants, and as a consequence, the FSIS sent a letter to China proposing a follow-up equivalence audit to check whether the deficiencies identified in the slaughter system during the December 2004 audit had been corrected". The United States argues that this change is necessary to reflect the fact that the letter sent by the United States on 13 June 2005, which is cited in this paragraph, only related to the deficiencies identified in the slaughter system, not to any deficiencies FSIS found in the process system.

6.37 **China** does not object to this insertion in particular.

6.38 The Panel has made the suggested change in paragraph 2.17 of the Final Report.

6.39 Regarding paragraph 2.18 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

> "The FSIS conducted the second initial equivalence audit on China's poultry slaughter inspection system in July and August 2005, and on 4 November 2005 issued its Final Report. On the basis of the first on-site audit~~this Report~~, on 23 November 2005, the FSIS proposed to amend the Federal Poultry Products Inspection regulations to add China to the list of countries eligible to export processed poultry products to the United States, provided that the poultry products processed in certified establishments in China came from poultry slaughtered in the United States or certified establishments in other countries eligible to export poultry to the United States."

6.40 The United States argues that these changes are needed to reflect the fact that the second initial equivalence audit was only focused on China's poultry slaughter inspection system.

6.41 **China** does not object to this insertion.

6.42 The Panel has amended the first sentence in paragraph 2.17 of the Final Report as suggested but decides to partially keep the language of the second sentence. The Panel has also redistributed the language between the relevant paragraphs for clarity purposes.

6.43 Regarding paragraph 2.19 of the Interim Report, the **United States** suggests to the Panel that the third sentence in that paragraph ("The initial equivalence audits for poultry processed but not slaughtered in China and that of the slaughtered poultry in China were conducted separately.") be deleted. The United States argues that this deletion is needed to reflect the fact that the initial

equivalence audit included an assessment of China's processed poultry inspection system and poultry slaughter inspection system.

6.44 **China** does not object to this insertion.

6.45 The Panel has made the suggested change in paragraph 2.19 of the Final Report.

3. Whether Article 4 is the only provision of the *SPS Agreement* applicable to Section 727

6.46 The **United States** has requested that the Panel insert the following sentence at the end of pargraph 7.151 of the Interim Report: "In addition, the United States argues that Section 727 and its JES also contributed to the protection of life and health by ensuring that FSIS would take additional steps to evaluate China's food safety inspection system in light of its recent food safety crises, enforcement issues, and new food safety law".

6.47 **China** objects to the proposed insertion because it does not add anything material to the Panel's summary of the United States' arguments. However, should the Panel accept the United States' suggestion, China suggests some redrafting. In particular, China requests that the text be removed from "by ensuring that FSIS ..." onwards and replaced with "by urging USDA to submit a 'report' within one year, and to submit a 'plan of action' to guarantee the safety of poultry products from China to Congress". China submits that such a language is a more accurately reflection of the only actions FSIS could have undertaken during the pendency of Section 727.

6.48 Having considered the comments of both parties, the Panel agrees with the insertion of the sentence at the end of paragraph 7.151 of the Final Report as suggested by the United States because the paragraph in question intends to summarize the arguments put forward by the United States and such a language reflects the United States' argumentation in paragraphs 17-30 of its second written submission.

6.49 The **United States** also requests that the Panel modify the first sentence of paragraph 7.154 in the following manner: "It is through this ban, as well as the related activity that the U.S. government took while the ban was in place, that Section 727 would be contributing to combating the risks highlighted by the United States." The United States indicates that it is suggesting this modification to avoid the misleading implication that the limitation on Chinese poultry imports during FY 2009 related to the funding restriction was the only manner in which Section 727 contributed to the objective of protecting human and animal life and health from the risk posed by Chinese poultry. The United States submits that the JES which accompanied Section 727 also contributed to this objective by instructing the FSIS to take certain actions to respond to the concerns that US Congress raised with regard to the safety of poultry from China.

6.50 **China** has not raised any objections to the proposed insertion.

6.51 The Panel will insert a reference to the actions the JES urged the USDA to undertake but declines to use the exact language volunteered by the United States and instead uses language closer to that actually contained in the JES. The Panel has thus inserted the following language in paragraph 7.154 of the Final Report: "It is through this ban, as well as the related activity that the USDA was urged to undertake, that Section 727 would be contributing to combating the risks highlighted by the United States."

4. Whether Section 727 is based on scientific principles and is not maintained without sufficient scientific evidence as required by Article 2.2 of the *SPS Agreement*

6.52 The **United States** has requested the Panel to modify the language of paragraphs 7.196 and 7.202. Concerning paragraph 7.196, the United States would like the panel to revise as follows:

> "The United States argues that evidence of China's food safety crises and enforcement problems support Section 727, especially in light of the fact that FSIS's equivalence system places a large reliance on the exporting country to enforce its own laws to ensure that the food being exported is safe. In addition, the United States produced scientific evidence related to avian influenza, poultry smuggling, and melamine in chicken feed. The United States also contends that it follows scientifically from this evidence, ~~of food safety enforcement problems in China~~ that there was a need to take additional action to ensure that exports from China would be safe."

6.53 With respect to paragraph 7.202, the United States proposes that the Panel modifies its language as follows:

> "Additionally, with respect to the evidence the United States refers to, we note that the majority ~~while it~~ of this evidence deals ~~generally~~ with widespread food safety issues in China~~, it~~ and does not specifically address China's poultry inspection system. The United States also introduced evidence with regard to avian influenza and the particular risk posed by China's enforcement problems in the context of FSIS's equivalence regime. ~~We also note that the evidence does not address the existence of the risk which the measure is supposed to address.~~ We accept the United States' point that the general science on the safety of poultry products was well established prior to the imposition of Section 727. However, the evidence referred to ...".

6.54 The United States explains that these changes are necessary to accurately reflect the evidence that the United States introduced in the record with regard to the risk posed by Chinese poultry. The United States submits that, as currently drafted, the Interim Report ignores the evidence provided by the United States regarding poultry-related crises that occurred in China, such as China's avian influenza problems, poultry smuggling, and the testing of Chinese poultry for melamine. At the same time, the United States submits, the Interim Report also ignores the discussion of the unique risk posed by China's enforcement problems in the context of an equivalence regime, including the fact that the United States would be relying on China to enforce its own laws to ensure that American consumers are protected. Finally, the United States indicates that the Interim Report also ignores the numerous problems that FSIS uncovered while conducting audits of Chinese poultry inspection facilities. The United States contends that it discussed the relevance of these three issues at length and introduced numerous exhibits into the record to support these points.

6.55 **China** objects to the changes requested by the United States in both paragraphs. According to China, the two most problematic elements in the United States' suggestions are the proposed additions to each paragraph. The suggested insertions to both paragraphs relate to the Panel's characterisation of the evidence that the United States tendered to support Section 727. In this regard, China argues, the most troublesome additions relate to the FSIS procedures, such as the insertion on the third line of paragraph 7.202, immediately after the Panel's statement that "the evidence the United States refers to . . . does not specifically address China's poultry inspection system." The insertion suggested by the United States effectively asks the Panel to state that the United States, in fact, adduced evidence "with regard ... to the particular risk posed by China". China submits that this is patently false. In successive submissions, the United States never adduced specific scientific evidence of the particular risks posed by China's poultry products or its poultry inspection system.

6.56 China further indicates that it can agree only that the United States did submit several anecdotal and unconfirmed newspaper articles regarding alleged enforcement problems – generally relating to foodstuffs other than poultry. China can also agree that the United States adduced evidence that Chinese poultry flocks had been affected by Avian Influenza – despite the facts that (a) China was not yet eligible to export domestically slaughtered poultry to the United States (making avian flu irrelevant for the poultry products that China initially expected to export); (b) the United States readily imported poultry products from Israel when Israel was affected by Avian Influenza; and (c) FSIS recognizes that "processed poultry" is poultry "processed with kill steps sufficient to inactivate bacteria and viruses".

6.57 Having considered the comments of both parties, the Panel notes that some of the language suggested by the United States could be misinterpreted as if the Panel considers that Section 727 was based on scientific evidence and thus an appropriate risk assessment was conducted. It is correct that the United States has submitted evidence relating to food crisis (baby formula, food additives etc) and enforcement problems in China. This evidence which was mainly in the form of newspaper articles, studies from international bodies or by US authorities such as the USDA, relates to food products other than poultry from China. While one could argue that given these incidents, a risk to human and animal life and health may arise from imports of poultry products from China, other than the FSIS report itself, the United States has provided no scientifically conducted study which would justify the existence of such risk. The United States has also provided newspaper articles concerning poultry from China which had been smuggled into the United States and thus has illegally entered into the territory of the United States.

6.58 In light of the above comments, the Panel partly agrees with the insertions proposed by the United States in paragraph 7.196 below of the Final Report, which summarizes the arguments put forward by the United States. This paragraph would now read:

> "The United States argues that evidence of China's food safety crises and enforcement problems support Section 727, especially in light of the fact that FSIS's equivalence system places a large reliance on the exporting country to enforce its own laws to ensure that the food being exported is safe. The United States produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. The United States thus contends that it follows scientifically from that evidence, ~~of food safety enforcement problems in China~~ that there was a need to take additional action to ensure that exports from China would be safe."

6.59 In respect to paragraph 7.202 of the Final Report, the Panel does not consider that it is necessary to change the first sentence since the word "generally" does not mean "exclusively". We are however inserting the following sentences in order to take into account the concerns of both parties:

> "... The United States has produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. Apart from the FSIS reports in the framework of the equivalence proceedings, the United States has not submitted to the Panel any specific scientific justification, notably through a risk assessment carried out according to the principles and disciplines in Article 5 and paragraph 4 of Annex A of the *SPS Agreement*, concerning the risk posed by poultry products from China ..."

5. Whether Section 727 is inconsistent with Article 5.5 of the *SPS Agreement*

6.60 With respect to paragraph 7.209 of the Interim Report, the **United States** proposes that the Panel changes the third sentence of such paragraph as follows: "While on the other hand, the ALOP for all other WTO Members' poultry provided in the FSIS procedures ~~or non-poultry food products provided in FDA import procedures~~ tolerates some risk as long as the WTO Members' inspection system has been deemed equivalent to the US system."

6.61 The United States suggests this modification for two reasons. First, the United States argues that it is inaccurate to state that the FDA's import procedures "tolerate risk as long as the WTO Members' inspection system has been deemed equivalent to the US system" because the United States does not operate an equivalence regime for products under FDA's jurisdiction. Second, the United States submits that it cannot find this assertion in China's answer to Panel question No.117 from the Panel, which the Panel cites to support this point.

6.62 **China** does not object to this change in particular.

6.63 The Panel notes that paragraph 7.209 includes a summary of China's arguments concerning Section 727's inconsistency with Article 5.5 of the *SPS Agreement*. It is not the Panel's argumentation. Accordingly, the Panel declines to make the changes suggested by the United States. Concerning the United States' argument on the absence of a reference to the FDA in China's response to Panel question No. 117, the Panel agrees that this reference was incorrect. Therefore the Panel has corrected the citation to reflect where China actually made this argument, which is in China's response to Panel question No.124 in footnote 432 of the Final Report.

6. Miscellaneous

6.64 In addition to the substantive comments presented above, the United States offered a number of typographical and stylistic suggestions. The Panel has accommodated the United States' suggestions where appropriate.

VII. FINDINGS

A. PRELIMINARY ISSUES

1. Terms of reference of the panel

(a) Introduction

7.1 A number of issues that may affect its terms of reference have been put before the Panel in these proceedings. At the outset of the proceedings, the United States requested a preliminary ruling concerning China's SPS claims. Additionally, the issue has arisen whether an alleged moratorium[159]

[159] In its first written submission, China challenged as a measure an alleged moratorium that it contended the United States had been maintaining since 26 December 2007. China described the moratorium as consisting 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. According to China, this alleged moratorium was initiated by the predecessor to Section 727 (i.e. Section 733) and continued by Section 727, as it would be by any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures. China argued that the alleged moratorium was also effectuated by the deliberate failure of the United States 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. China's first written

existed and whether the alleged moratorium and a measure[160] enacted after the establishment of the Panel were within our terms of reference. As explained below, the Panel need not resolve the latter two issues because China has decided not to pursue them within the confines of this dispute. Others, such as the United States' contention that China had not requested consultations on its claims under the *SPS Agreement* and that, therefore, these are not within this Panel's terms of reference, will be addressed below.

7.2 Another issue that pertains to this Panel's terms of reference is whether the Panel can rule on an expired measure given that Section 727 is no longer in force.

(b) Request for a preliminary ruling by the United States

(i) Background

7.3 As indicated above, the United States argues that consultations were not requested under the *SPS Agreement*. China's consultations request reads in the relevant parts as follows:

> "In addition, although China does not believe that the US measures at issue restricting imports of poultry products from China constitute sanitary and phytosanitary measures ('SPS measure') within the meaning of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('*SPS Agreement*'), *if it were demonstrated that any such measure is an SPS measure, China also requests consultations with the US pursuant to Article 11 of the SPS Agreement*. In particular, to the extent any such measure is demonstrated to be an SPS measure, China considers that the measure is in breach of the US obligations under the *SPS Agreement*, including but not limited to Articles 2.1-2.3, 3.1, 3.3, 5.1-5.7, and 8 thereof.
>
> Generally, to the extent it is demonstrated that any such measure is an SPS measure, China is concerned that the US measure may 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. China is also concerned that any such measure, to the extent not applied with respect to similarly situated imports from other Members, may violate Articles 2.3 and 5.5 of the *SPS Agreement*. Moreover, China is concerned that 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 may therefore violate

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submission, para. 24. In response to Panel question No. 12, China confirmed that it was no longer making any claims with respect to the alleged moratorium.

[160] As explained in paragraph 2.29, Section 743 was enacted on 21 October 2009; therefore two days after the deadline for China's first written submission (19 October 2009). In its first written submission, the United States alleged that Section 727 had expired and thus been supplanted by Section 743. The United States further contended that any funding restriction imposed by Section 743 had been lifted as a consequence of the Secretary of Agriculture's issuance of a letter to the US Congress on 12 November 2009. United States' first written submission, paras. 62, 68 and 74. The letter can be found in Exhibit US-45.

At its oral statement at the first substantive meeting of the Panel with the parties, China requested a preliminary ruling from the Panel on whether Section 743 was part of the Panel's terms of reference. China stated that it would refrain from providing substantive arguments regarding what it considered to be the WTO-inconsistencies of Section 743 until the Panel decides whether Section 743 was within its terms of reference. Further to the Panel's letter of 18 December 2009 informing the parties of its decision not to rule on a preliminary basis and thus defer ruling on both these matters until issuance of the Interim Report, China informed the Panel China in a letter dated 7 January 2010 (Exhibit CN-51) that China would not argue the WTO inconsistency of Section 743 in its second written submission, but reserved its rights to challenge Section 743 in separate dispute settlement proceedings.

> Article 8 of the *SPS Agreement.* Additionally, China is unaware of any basis on which any such US measure is justified under international standards, guidelines or recommendations, or otherwise, consistently with Articles 3.1 and 3.3 of the *SPS Agreement*. Finally, China is unaware of any basis on which such US measure is justified by Article 5.7 of the *SPS Agreement*, if applicable." (emphasis added)

7.4 A few days after receiving the request for consultations the United States informed China, via a letter, that based on its understanding of China's consultations request:

> "[I]t appears that China is not requesting consultations pursuant to Article 11 of the [*SPS Agreement*] since China does not believe that the *SPS Agreement* applies to the measures at issue. China provides that it would request consultations under the *SPS Agreement*, only if a particular condition were met. That condition is that "it were demonstrated that any [measure at issue] is an SPS measure." Yet there is no avenue or mechanism for such a demonstration to occur, and China's belief that none of the measures at issue is an SPS measure continues to govern China's request. The United States therefore understands from your letter that China is not, in fact, requesting consultations pursuant to Article 11 of the *SPS Agreement*."[161]

7.5 The next day, China responded with a letter clarifying that the United States' understanding was not correct:

> "Through its request for consultations (WT/DS392/1), China has requested consultations under Article 11 of the *SPS Agreement* to cover a contingency, namely the demonstration that any of the listed measures is an SPS measure. To that end, China will shortly provide the United States with written questions requesting the United States to provide answers during the consultations concerning the nature and status of measures identified in the consultation request. Thus, China has indeed requested, and the United States and China will engage in, a consultation that fully addresses relevant questions concerning whether any of the US measures are SPS measures within the meaning of the *SPS Agreement*. The parties will also consult on the questions regarding the various claims under the *SPS Agreement* applicable to such measures, as stated in China's consultations request."[162]

7.6 Three days before the organizational meeting held on 28 September 2009, the United States addressed a letter to the Panel indicating its intention to request a preliminary ruling by the Panel on whether China's SPS claims are part of its terms of reference. The United States contended that China had failed to request consultations under the *SPS Agreement* and thus the SPS claims put forward by China could not be part of the Panel's terms of reference. In that letter, the United States requested the Panel to include a preliminary ruling stage in its timetable for panel proceedings. China responded in a letter to the Panel dated 28 September 2009 where it argued that, in the light of, in particular, the exchange of letters, China's consultations request was made pursuant to, *inter alia*, the *SPS Agreement* and therefore its SPS claims were well within this Panel's terms of reference.

7.7 Further to the organizational meeting, the Panel sent its working procedures and timetable to the parties on 1 October 2009. Regarding the United States' request that a preliminary ruling stage be included in the Panel's timetable, the Panel informed the parties as follows:

> "Concerning the United States' request for the Panel to include a preliminary ruling stage in its timetable and thus working procedures, the Panel considers that it is not

[161] Letter from the United States to China, 27 April 2009 (Exhibit US-1).
[162] Letter from China to the United States, 28 April 2009 (Exhibit CN-38).

> necessary at this time to modify its proposed timetable and working procedures, which would further delay its proceedings. The Panel is of the view that the procedures foreseen in paragraph 11 of its working procedures provide adequate means to address preliminary ruling requests. If the United States wishes to request a preliminary ruling prior to the deadline for its first written submission, the Panel would then set a deadline for China to respond to the United States' request, and would thereafter dedicate a portion of its first substantive meeting with the parties to discuss the United States' request. If the Panel were to receive a request from the United States and a subsequent response from China, and thereafter determine that an earlier meeting with the parties would be needed, the Panel will inform the parties and amend its timetable accordingly. Having heard the parties at the first substantive meeting (or at an earlier stage if deemed necessary), the Panel would then decide whether to issue a preliminary ruling, or withhold ruling on matters until issuance of the Interim Report."

7.8 On 1 October 2009, the United States submitted a request for a preliminary ruling pursuant to paragraph 11 of the Panel's working procedures. By letter of 7 October 2009, the Panel informed the parties and third parties as follows:

> "Further to the request for a preliminary ruling submitted by the United States to the Panel on 1 October 2009, the Panel invites China to submit its comments on such a request within the deadline for its first written submission (i.e. 19 October 2009). The Panel further invites the third parties to submit their comments on the preliminary ruling request by 26 October 2009. Were the Panel to decide that a preliminary ruling hearing is needed before its first substantive meeting, the Panel will inform the parties and third parties accordingly."

7.9 In response to the Panel's instructions, China submitted its comments in its first written submission. The European Union and Korea were the only third parties that submitted comments on this issue. After the first substantive meeting, the Panel, in a letter to the parties, indicated that it would refrain from ruling on the issue of whether China had requested consultations under the *SPS Agreement* until its Interim Report. The parties were encouraged to make decisions about presenting arguments with respect to the consistency of Section 727 with the *SPS Agreement* bearing that decision in mind.

7.10 In the same letter, the Panel also addressed China's request, made during the first substantive meeting, for a preliminary ruling on whether Section 743[163] was part of this Panel's terms of reference. Specifically, the Panel informed the parties of its decision not to rule on a preliminary basis on this request. The Panel noted that if China were to make arguments with respect to Section 743, the United States would need to be given an opportunity to reply and that this could delay the process. Therefore, China was requested to inform the Panel by 11 January 2010 whether it would argue the WTO inconsistency of Section 743 in its second written submission. On 11 January 2010, China informed the Panel that it would not be pursuing claims against Section 743, although it did not foreclose the possibility of a future dispute on this measure.

(ii) Arguments of the parties

7.11 The **United States** contends that China's claims under the *SPS Agreement* are outside the Panel's terms of reference. In its view, China has failed to request consultations under Article 11 of

[163] We recall in paragraph 2.29, the Panel noted that in the annual appropriations act for 2010 there was a provision, Section 743, which, although worded differently than Section 727, also relates to access to appropriated funds for the FSIS to establish or implement a rule allowing the importation of poultry from China.

the *SPS Agreement*. The United States submits that Article 4.7 of the DSU provides that a request for establishment of a panel may be submitted only after consultations have first been requested and therefore should a "matter" have been left out of the request for consultations, it will be outside the terms of reference of the panel.[164] The United States argues that in order for a Member to bring a dispute under the DSU with respect to the *SPS Agreement*, that Member must, according to Article 1.1 of the DSU bring the dispute "pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding", including the *SPS Agreement*. The United States argues that China's consultations request was only made pursuant to Article 4 of the DSU, Article XXII of the GATT 1994 and Article 19 of the *Agreement on Agriculture*.

7.12 Although China's consultations request does refer to Article 11 of the *SPS Agreement*, the United States argues that China's conditional language means that consultations were not actually requested.[165] The United States explains that China first stated in its consultations request that it does not believe that the measures at issue fall within the *SPS Agreement*. China then stated that if it were demonstrated that any such measure is an SPS measure, it also requests consultations with the United States pursuant to Article 11 of the *SPS Agreement*. The United States argues that as China stated that it does not believe that the relevant measures are SPS measures, China also rendered it clear that the imposed condition for a request for consultations pursuant to Article 11 of the *SPS Agreement* had not been fulfilled. The United States therefore submits that the only conclusion that can be reached is that the condition was not fulfilled and thus that no request pursuant to Article 11 of the *SPS Agreement* was made.[166]

7.13 The United States argues that although China states that it intended to make claims under the *SPS Agreement* in the alternative (that is, if the United States were to invoke Article 2.4 of the *SPS Agreement* as a defence),[167] 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. For the United States, 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 provisions of each covered agreement for which dispute settlement under the DSU is sought.[168] [169]

7.14 According to the United States, it is unclear what entity could be empowered to determine whether the measures at issue had been "demonstrated" to be SPS measures, and thus whether China's purported condition had been fulfilled.[170] The United States insists that the Panel cannot be the entity that determines whether the measures at issue have been "demonstrated" to be SPS measures, for purposes of interpreting China's consultations request, because "if that were the case, then the scope of China's consultations request – and therefore of the Panel's terms of reference – would depend on the substantive findings of the Panel." The United States believes such a role for the Panel is not permitted under the DSU. According to the United States, the Panel cannot alter its terms of reference

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[164] United States' request for a preliminary ruling, para. 14.

[165] Paragraph 6 of China's consultations request reads: "In addition, although China does not believe that the US measures at issue restricting imports of poultry products from China constitute sanitary or phytosanitary measures ('SPS measure') within the meaning of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement'), if it were demonstrated that any such measure is an SPS measure, China also requests consultations with the US pursuant to Article 11 of the *SPS Agreement* ...".

[166] United States' request for a preliminary ruling, para. 20.

[167] The United States refers to China's first written submission, para. 164.

[168] The United States refers the Panel to the Appellate Body Report, *US – Upland Cotton*, 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).

[169] United States' first written submission, para. 160.

[170] United States' request for a preliminary ruling, para. 20.

by its findings; to the contrary, the terms of reference set the boundaries of the Panel's work. They thus cannot be expanded by virtue of findings that the Panel makes. [171]

7.15 The United States contends that the DSU confirms that the complainant must clearly specify the scope of its consultations request and that it cannot make that scope conditional on future events or demonstrations of particular factual and legal conclusions. For the United States, China has failed to comply with Articles 4.3, 4.4 and 4.7 of the DSU. The United States claims that Article 4.3 of the DSU makes it clear that the obligation to consult under a particular covered agreement is based on a request for consultations "made pursuant to" that covered agreement. The United States argues that given the conditional request for consultations under the *SPS Agreement*, no request for consultations was "made pursuant to" that Agreement. The United States also argues that, in accordance with Article 4.4 of the DSU, a Member requesting consultations is required to give the reasons for the request and indicate the legal basis of the complaint. In the present case, the consultations request did not, according to the United States, make any "representations" whether the measures were "affecting the operation" of the *SPS Agreement*. Rather, the United States argues, the consultations request stated the opposite.[172]

7.16 The United States argues that China's letter of 28 April 2009 cannot cure deficiencies in the consultations request. According to the United States, the Appellate Body has ruled that a deficiency in a Panel Request cannot be subsequently cured by a complaining party's argumentation in its first written submission to a panel or statement made later in that proceeding, at least to the extent that the deficiency is one that affects the panel's terms of reference.[173] The United States argues that China's 28 April 2009 letter was not a new or revised consultations request, nor did it meet the requirements set forth in the DSU for consultations requests.[174] Consequently, according to the United States, the absence of consultations pursuant to the *SPS Agreement* on 15 May 2009 was attributable to a failure by China to request such consultations, and not a refusal by the United States to consult.[175] The United States submits that its position is consistent with, and supported by, Articles 3.10 and 4.2 of the DSU.[176] The United States suggests that China may make a new request for consultations under the *SPS Agreement*, and that the two panel proceedings may eventually be harmonized.[177] In response to Panel question No. 7, the United States indicated that adding claims under a different covered agreement cannot be considered an "evolution" of the legal basis for claims; rather, the DSU is clear that in order to bring claims under a covered agreement, the dispute has to be brought under the consultation and dispute settlement provisions of that Agreement.

7.17 **China** argues that its consultations request was fully in accordance with Article 11 of the *SPS Agreement* and Article 4 of the DSU. In China's view, not only was Article 11 of the *SPS Agreement* invoked in the consultations request, but a number of potential violations of specific provisions of that Agreement were included in both paragraph 6 and paragraph 7 of its consultations request. China also states that it even anticipated and rejected a number of the potential defences of the United States under the *SPS Agreement* in paragraph 7 of its Request. China submits that it has made an alternative claim, and that an argument in the alternative is not a proper basis for disrupting the ability of China to achieve a "prompt settlement" of this dispute.[178] China stresses that over 30 per cent of its consultations request was dedicated to claims under the *SPS Agreement.*[179]

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[171] United States' request for a preliminary ruling., para. 21.
[172] United States' request for a preliminary ruling, para. 23.
[173] Appellate Body Report, *EC – Bananas III*, para. 143.
[174] United States' request for a preliminary ruling, para. 28.
[175] United States' request for a preliminary ruling, para. 9.
[176] United States' request for a preliminary ruling, paras. 23, 24, 26 and 37.
[177] United States' request for a preliminary ruling, paras. 33, 34 and 39.
[178] China's first written submission, para. 163.
[179] China's first written submission, para. 161.

7.18 According to China, its letter of 28 April 2009 addressed to the United States should have eliminated any doubts that the United States could possibly have had as to whether the upcoming consultations would include issues relating to the *SPS Agreement*. This letter, it argues, was not, as argued by the United States, an attempt to cure a deficiency in the consultations request but rather an attempt to clarify and re-state the basis of consultations in light of the letter China received from the United States on 27 April 2009. China further argues that, consistent with its letter, it provided the United States with numerous questions in another letter of 8 May 2009, seeking to determine whether the United States considered the measures at issue to be SPS measures.[180]

7.19 China argues that even if there was a flaw in the consultations request, by the time the actual consultations were held on 15 May 2009, the United States cannot claim that it did not understand that China's consultations request expressed intent to consult pursuant to Article 11 of the *SPS Agreement*. The letter dated 28 April 2009 and the consultations request demonstrate that it had always been China's intent to actively consult pursuant to Article 11 of the *SPS Agreement*. China argues that a responding party cannot unilaterally control the jurisdiction of a panel by simply refusing to consult on measures or violations properly raised in a consultations request.[181]

7.20 China argues that the United States' reading of the consultations request must also be rejected as it fails to accord "sympathetic consideration" to "any representations" made by China as required by Article 4.2 of the DSU. China states that the provision is not limited to representations framed as direct challenges rather than arguments in the alternative or conditional arguments. China states that the core of the US critique of China's consultations request is the phrase "if it were demonstrated that any such measure is an SPS measure". China argues that the US argument fails to appreciate the role of consultations in WTO dispute settlement, and the fact that, as the Appellate Body explained, "the claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process".[182] According to China, one of the legitimate purposes of the consultations was to give the United States the opportunity to provide its views, together with requested factual information, that may have demonstrated a basis upon which it could be concluded that the measures at issue were SPS measures.[183] The wording chosen shows, according to China, that China was contemplating a bilateral diplomatic dialogue to clarify and better delineate the dispute, thus precisely what the United States asserts it understands as the purpose of consultations.[184]

7.21 China refers to *Mexico – Anti-Dumping Measures on Rice* where the Appellate Body stated that it was entirely appropriate that during the consultation process, a "reformulation" of the complaint and legal claims may occur, that "takes into account new information".[185] The Appellate Body explained further that "the claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process".[186] China thus submits that one type of such "evolution" that can take place pursuant to consultations is the evolution from a claim in the alternative to a less conditional (or unconditional) claim. China indicated that it had anticipated receiving new information and greater clarity about the measures pursuant to the consultations.

7.22 In China's view, a comparison of the requirements of Article 4.4 of the DSU with those of Article 6.2 of the DSU provides a helpful context confirming that China has fully met its obligations under Article 4.4. China states that the relevant part of Article 4.4 of the DSU holds that a consultations request "shall give the reasons for the request, including identification of the measures

[180] China's first written submission, para. 184.
[181] China's first written submission, para. 187.
[182] China refers to the Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[183] China refers to the Appellate Body Report, *Brazil – Aircraft*, para. 132.
[184] China's first written submission, para. 177.
[185] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[186] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

at issue and an indication of the legal basis for the complaint". In contrast, Article 6.2 of the DSU provides, in relevant part, that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Accordingly, China argues, Article 4.4 of the DSU requires merely an "indication" of the legal basis of the complaint. China suggests that the lesser requirement in Article 4.4 of the DSU compared to that in Article 6.2 of the DSU reflects the understanding that the legal bases of claims often evolve during the course of consultations. China argues that it satisfied the burden of providing an "indication" with the consultations request submitted. Thus, China argues that even if formulating the legal basis for a claim as a conditional claim were not "sufficient to present the problem clearly", as required for the panel request and Article 6.2 of the DSU, it would certainly meet the threshold of providing an "indication" of the legal basis for the complaint as required by Article 4.4 of the DSU.[187]

7.23 China argues that, in any event, given that many of the same questions that relate to China's claims under the GATT 1994 also impact upon China's alternative claims under the *SPS Agreement*, it is China's understanding that the United States did, in fact, consult on SPS-related measures. Also, China argues that this is clear considering the explicit reference to this effect in the Request for establishment.[188]

7.24 China also argues that to the extent that the Panel finds it necessary to look beyond the scope of the consultations request to confirm the inclusion of claims under the *SPS Agreement*, the existence of the questions posed by China to the United States for the purposes of the consultations has significant evidentiary value. To support its contention, China refers to what it claims is an analogous situation in the *Korea – Commercial Vessels* dispute. In those proceedings, the complainant put forward a list of questions that had been supplied to the respondent prior to consultations as evidence. The Panel found that the very fact that the measure appeared in the questions was, along with the brief reference to available evidence, "alone … sufficient for us to conclude that the parties consulted on the entirety of the KEXIM Act, including any implementing decrees and other regulations, and that the European Communities was therefore entitled to include those measures in its request for establishment of a panel".[189]

(iii) Analysis by the Panel

7.25 The Panel is therefore called upon to determine whether China's use of the conditional tense in its consultations request means that China has *not* requested consultations under the *SPS Agreement* and whether that would deprive the Panel of jurisdiction to hear China's claims under the *SPS Agreement.* We note that there is substantial jurisprudence on the relevance of the consultations request and the holding of consultations to a panel's terms of reference. However, the implications of using the conditional tense in a consultations request have never been considered by previous panels or the Appellate Body.

[187] China's first written submission, para. 179.
[188] China refers to its Panel Request, WT/DS392/2, para. 2.
[189] Panel Report, *Korea – Commercial Vessels*, para. 7.2, subparagraphs 8 and 11.

The relevance of the consultations request and the holding of consultations to a panel's terms of reference

7.26 A panel's terms of reference, as provided for in Article 7.1 of the DSU[190], are generally set in the Panel Request which must follow the rules set forth in Article 6.2 of the DSU.[191] Additionally, the Appellate Body has explained that "as a general matter, consultations are a prerequisite to panel proceedings"[192] and has underscored the importance and benefits of consultations. In particular the Appellate Body has pointed out that consultations serve to help the parties assess the strengths and weaknesses of the case, narrow the scope of differences between them and reach a mutually agreed solution. In addition, consultations provide the parties with an opportunity to define and delimit the scope of the dispute.[193]

7.27 Consultations are regulated in Article 4 of the DSU. Article 4.2 of the DSU provides that "[e]ach Member undertakes to ... afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former".

7.28 The Appellate Body also observed in *Brazil – Aircraft,* that "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".[194] In that same proceeding, the panel had considered that because the DSU essentially requires the DSB to establish a panel automatically upon request of a party, a panel cannot rely upon the DSB to ascertain that requisite consultations have been held and to establish a panel only in those cases.[195] Accordingly, the panel determined "that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute**.**"[196]

7.29 The requirements that apply to consultations requests are set out in Article 4.4 of the DSU, which provides, in relevant part, that "[a]ny request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."

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[190] Article 7.1 of the DSU states that the standard terms of reference, unless otherwise agreed by the Parties shall be:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)"

[191] Appellate Body Report, *Guatemala – Cement I*, paras. 69-76; see also Appellate Body Report, *US – Carbon Steel*, paras. 125-127.(explaining that the identification of the specific measure and the legal basis of the complaint in the Panel Request comprise the "matter referred to the DSB".)

[192] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

[193] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[194] Appellate Body Report, *Brazil – Aircraft*, para. 131. We note that in certain instances panels and the Appellate Body have recognized that a responding party may be considered to have waived its objection to a lack of consultations if it does not object in a timely manner. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 63 (dealing with a lack of consultations request under Article 21.5 of the DSU); Appellate Body Report, *US – FSC*, paras. 165-166. However, the United States objected to China's consultations request upon receipt of the request for consultations, at the DSB meeting where the panel was established, and directly to the Panel during the timeframe set forth for requesting preliminary rulings. Therefore we do not consider "waiver" as a possible basis for why China's claims under the *SPS Agreement*, might be included in our terms of reference.

[195] Panel Report, *Brazil – Aircraft,* para. 7.10 *(citing)* Appellate Body Report, *EC – Bananas III*, para. 142.

[196] Panel Report, *Brazil – Aircraft,* para. 7.10.

7.30 We note that the term "legal basis of the complaint" has not been interpreted in respect of Article 4.4 of the DSU. The Appellate Body has, however, interpreted the same term as used in Article 6.2 of the DSU to mean the claim made by the complaining party.[197] The Appellate Body has also clarified that a claim sets forth the complainant's view "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement." [198] Given the nearly identical language in Article 4.4 of the DSU, we consider that this understanding could also be applied to the term "legal basis for the complaint" in Article 4.4.

7.31 Article 4.4 of the DSU however requires the consultations request to include an "indication of the legal basis of the complaint" while Article 6.2 of the DSU requires the panel request to "provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly".

7.32 In this respect, **China** argues that "indication" of the legal basis of the complaint under Article 4.4 requires significantly less than what is required under Article 6.2, i.e. "identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly". In China's view, an "indication" under Article 4.4 is a "hint suggestion, or piece of information from which more may be inferred" while Article 6.2 requires a description that is "sufficient" meaning adequate for a certain purpose, enough, to present the problem clearly.[199] China considers that this difference reflects the heightened burden of panel requests under Article 6.2 of the DSU and the understanding that the legal basis of a claim often evolve during the course of consultations.[200] China thus submits that it had met the burden of providing as "indication" in terms of Article 4.4 of the DSU.[201]

7.33 The **United States** agrees that an "indication" of the legal basis does not require that all the claims be spelled out in the consultations request. However, the United States argues that this distinction is not pertinent to the issue of whether claims under the *SPS Agreement* are within the Panel's terms of reference, because, in its view, China's consultations request plainly states China's view that the United States' measure is not subject to the *SPS Agreement*.[202]

7.34 In describing how a panel must examine a panel request for consistency with the obligations in Article 6.2 of the DSU, the Appellate Body has noted that the panel request must be examined as a whole and in light of attendant circumstances.[203] Given the relationship between the consultations request and the panel request, the shared language in Article 4 and Article 6.2 of the DSU, the similar purposes of the two requests, i.e. to delimit the scope of the dispute, and the need to interpret both provisions in a harmonious way[204], we find the Appellate Body reasoning pertinent for the analysis of the consistency of consultations requests with the obligations of Article 4.4 of the DSU as well.

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[197] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[198] Appellate Body Report, *Korea – Dairy*, para. 139.
[199] China's response to Panel question No. 6.
[200] China's response to Panel question No. 6.
[201] China's response to Panel question No. 6.
[202] United States' response to Panel question No. 6.
[203] Appellate Body Report, *Korea – Dairy*, paras. 124-127; *also* Appellate Body Report, *US – Carbon Steel*, para. 127.
[204] The Appellate Body has recognized the applicability of the principle of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of the covered agreements. This principle was first discussed in *Japan – Alcoholic Beverages II*, para. 24. In *US – Gasoline*, the Appellate Body noted that this principle obliges a treaty interpreter to give meaning and effect to all the terms of a treaty. (Appellate Body Report, *US – Gasoline*, p. 23). In light of the interpretative principle of effectiveness, the Appellate Body in *Argentina – Footwear (EC)* ruled that it is the duty of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously." (Appellate Body Report, *Argentina – Footwear (EC)*, para. 81). The Appellate Body further held in *Korea – Dairy* that Article II:2 of the *WTO Agreement* expressly

7.35 The Panel is aware that in making its analysis of whether a particular claim was included in the consultations request, it should not inquire as to what actually occurred during consultations. The panel in *Korea – Alcoholic Beverages* correctly noted that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel".[205] The Appellate Body explained in *US – Upland Cotton* that examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Finally, the Appellate Body noted that, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed.[206]

7.36 Therefore, the Panel will inquire whether China indicated the *SPS Agreement* as a legal basis for its complaint in its consultations request and in doing so will look at that consultations request as a whole and in light of the attendant circumstances. However, the Panel will not use as a basis for its determination what either party alleges took place during consultations.[207] Therefore, while we will consider the exchange of letters in April 2009 – which are precisely about the scope of China's consultations request – we will not consider any questions posed or answers given during the consultations.

Whether China has requested consultations pursuant to the *SPS Agreement*

7.37 The United States focuses its argumentation on China's statement that it does not believe that the United States' measures are SPS measures and that it is requesting consultations with the United States pursuant to Article 11 of the *SPS Agreement* "if it were demonstrated that any such measure is an SPS measure".

7.38 According to the United States, a "conditional" request for consultations under Article 11 of the *SPS Agreement* does not amount to an "actual" request for consultations pursuant to Article 11 of the *SPS Agreement*.[208] Most importantly, the United States contends that it would have no way of knowing whether the condition had been satisfied and that China's request had become operative.

7.39 Although the language in China's consultations request and, in particular, the reference to a "demonstration" that the measures in question are SPS measures, is not the most artful, the Panel, further to the above-mentioned jurisprudence, should not look at one phrase in the consultations request in isolation, but rather examine the consultations request as a whole and in light of the "attendant circumstances." This means that the Panel needs to consider the consultations request in its entirety and place the SPS references in the context of the rest of the consultations request. Additionally, the Panel will consider whether the exchange of letters are part of the "attendant circumstances" of the consultations request.

7.40 With respect to the rest of the consultations request, the Panel notes that China's consultations request deals with US measures affecting the importation of poultry products from China into the United States.[209] Additionally, in paragraph 1 of the consultations request, China states that it "is concerned that Section 727, in conjunction with the overall US regime for regulating imports of

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manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. (Appellate Body Report, *Korea – Dairy)*, para. 81).

[205] Panel Report, *Korea – Alcoholic Beverages*, para. 10.19.

[206] Appellate Body Report, *US – Upland Cotton*, para. 287.

[207] Although China, in its first written submission, refers to its questions to the United States and what actually took place during consultations, given the Appellate Body findings in *US – Upland Cotton*, we will not base our decision on what one party or another says occurred during consultations.

[208] United States' Preliminary Ruling Request, para. 19.

[209] China's consultations request, WT/DS392/1, opening paragraph.

poultry products places restrictions on the import from China of poultry products that are inconsistent with the United States' WTO obligations."[210] The Panel is of the view that it is reasonable to interpret this reference to the overall regime for the importation of poultry products to be a reference to the PPIA as well as its implementing regulations, especially given China's reference, in the immediately succeeding paragraph to 9 CFR §381.196[211] as one of several US regulations that cannot be implemented because of Section 727. There is no dispute among the parties that the PPIA and the regulatory regime set up pursuant to its mandate are SPS measures.

7.41 China's consultation request, after outlining the legal basis for its complaint with respect to Articles I and XI of the GATT 1994, includes, in paragraphs 6 and 7, controversial language where it specifically references the *SPS Agreement.*

7.42 It appears to the Panel that China was attempting to challenge Section 727 under the GATT 1994 and the *Agreement on Agriculture*, and, in the alternative, under the *SPS Agreement* in the event the United States argued that Section 727 is an SPS measure within the scope of the *SPS Agreement.* It thus seems to the Panel that China wanted to ensure that the *SPS Agreement* was within the Panel's terms of reference in such a case. Rather than being confusing, this seems consistent with the panel's reasoning in *Korea – Commercial Vessels* that "if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it *permitted* by Article 6.2 of the DSU to refer to all of those provisions in its request for establishment, but it is *required* to do so."[212] The Panel is of the view that the same logic should also apply to consultations requests.

7.43 Given the surrounding context, the Panel is of the view that China's consultations request did "indicate" an SPS basis for its complaint, even if that basis, seen in isolation, was qualified in somewhat unclear conditional language.[213] In that respect, it is important to note that although there are many similarities between Articles 4.4 and 6.2 of the DSU and they should be interpreted in an harmonious way, the obligation on a Member in its consultations request is to "indicate" the legal basis for the complaint whereas the obligation in the panel request is to provide a "brief legal summary of the legal basis of the complaint sufficient to present the problem clearly." Therefore, an indication is something less than a summary sufficient to present the problem clearly. While the Panel does not wish to be perceived as encouraging WTO Members to present their problems confusingly in their consultations request, it does seem that there is a bit more leeway in how WTO Members phrase complaints in a consultations request *vis-à-vis* the clarity required in a panel request which is the final word on the scope of the dispute.[214]

7.44 Additionally, if we move beyond the consultations request itself to an examination of the "attendant circumstances" and include in that examination the exchange of letters between the

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[210] China's consultations request, WT/DS392/1, para. 1.

[211] Code of Federal Regulations, 9 Ch. III, Food Safety and Inspection Service, USDA (1-1-08 Edition).

[212] Panel Report, *Korea – Commercial Vessels,* subparagraph 29 of para. 7.2. Recall our discussion above on the relevance of Article 6.2 jurisprudence to an understanding of similar obligations in Article 4.4.

[213] We do note that upon receipt of the United States' letter, China could have filed an amended or supplemental consultations request which would have eliminated any doubt on the part of the United States and avoided spending time and resources on this matter.

[214] We note that China also brings up whether the United States was "prejudiced" by the supposed confusion in the consultations request (China's first written submission, para. 173). Although some panels and indeed even the Appellate Body have delved into the issue of prejudice, we note that the Appellate Body has also found that jurisdiction is a fundamental prerequisite for lawful panel proceedings. (Appellate Body Report, *US – Carbon Steel,* para. 127.) Therefore it is our view that non-compliance with the various provisions that set forth how to establish a panel and its terms of reference cannot be overcome by a lack of prejudice to the respondent.

United States and China, China's intentions and the United States' understanding thereof, becomes even clearer.

7.45 We note that China's letter advises the United States that its understanding is not correct and goes on to say that:

> "Through its request for consultations (WT/DS392/1), China has requested consultations under Article 11 of the *SPS Agreement* to cover a contingency, namely the demonstration that any of the listed measures is an SPS measure. To that end, China will shortly provide the United States with written questions requesting the United States to provide answers during the consultations concerning the nature and status of measures identified in the consultation request. Thus, China has indeed requested, and the United States and China will engage in, a consultation that fully addresses relevant questions concerning whether any of the U.S. measures are SPS measures within the meaning of the *SPS Agreement.* The parties will also consult on the questions regarding the various claims under the *SPS Agreement* applicable to such measures, as stated in China's consultations request."[215]

7.46 As noted by the United States itself, the Appellate Body has concluded that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them."[216] Accordingly, if through consultations the complaining party obtains a better understanding of the operation of a challenged measure such that additional provisions of the covered agreements become relevant, it may reformulate its complaint to include these other provisions, even from covered agreements not mentioned in the consultations request, so long as the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.

7.47 We also recall the reasoning of the panel in *China – Publications and Audiovisual Products*, pursuant to the Appellate Body's conclusions in *Mexico – Anti-Dumping Measures on Rice*, that:

> "[I]n some circumstances, a claim based upon a WTO provision of a covered agreement which was not contained in the request for consultations, can nevertheless be considered to be within a panel's terms of reference. If through consultations the complaining party obtains a better understanding of the operation of a challenged measure such that additional provisions of the covered agreements become relevant it may reformulate its complaint to include these other provisions so long as the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.[217]

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[215] China's letter of 28 April 2009. Exhibit CN-38.

[216] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[217] Panel Report, *China – Publications and Audiovisual Products*, para. 7.115 citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138 where it stated:

"A complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations—namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably

7.48 It seems to us that what has happened in this case is that China merely forecasted its expectation of obtaining a better understanding of the operation of the challenged measures and that the *SPS Agreement* might be relevant in the consultations request rather than simply waiting to reveal the possibility of an SPS claim in the Panel Request. The Panel finds it difficult to sustain a reading of Articles 4 and 6 of the DSU whereby a complainant could make no reference to the possibility of an evolution of its claims in its consultations request and nevertheless have those claims included in the terms of reference of the panel, yet a complainant who did mention them would have them excluded.

7.49 In light of the above, the Panel therefore concludes, examining the consultations request as a whole, that China, in its Consultation Request, indicated that the *SPS Agreement* would serve as the basis of its claims, albeit in a conditional manner. Additionally, an examination of the attendant circumstances, most notably the exchange of letters prior to consultations taking place, supports the conclusion that the *SPS Agreement* was indicated as a basis for China's claims. Accordingly, the Panel finds that China did request consultations *inter alia* pursuant to Article 11 of the *SPS Agreement* and that, therefore, China's SPS claims are within its terms of reference.

(iv) Conclusion

7.50 The Panel therefore disagrees with the United States' contention that China did not request consultations under the *SPS Agreement* and finds that China did request consultations pursuant to Article 11 of the *SPS Agreement*, indicated the various provisions of that Agreement that were the basis for its claims, and that, therefore, China's SPS claims are within its terms of reference.

2. Whether the Panel may rule on an expired measure

(a) Background

7.51 The United States has contended, and China agreed[218], that Section 727 expired on 30 September 2009, i.e. two days after the deadline for China's first written submission. This raises the question of whether the Panel should make findings on a measure that is no longer in force. We note that the United States has not requested the Panel not to make findings on an expired measure.[219] Nevertheless, the Panel believes that before going ahead and examining the WTO consistency of Section 727 pursuant to China's various claims, we need to decide whether we may make rulings and recommendations on a measure that is no longer in force.

(b) Arguments of the parties

7.52 The **United States** alleges that Section 727 has expired[220] and thus has been supplanted by Section 743.[221] The United States further argues that any funding restriction imposed by Section 743 has been lifted as a consequence of the Secretary of Agriculture's issuance of a letter to the US Congress on 12 November 2009.[222] As indicated above, the United States has not requested the Panel not to rule on Section 727.

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be said to have evolved from the 'legal basis' that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."

[218] United States' first written submission, para. 2; China's response to Panel question No. 11.

[219] *See* United States first written submission, para. 93. The United States argues that the Panel only needs to consider China's claims under Article XI:1 of the GATT 1994 and any needed defence under Article XX(b) in order to resolve this dispute.

[220] United States' first written submission, para. 62.

[221] United States' first written submission, para. 68.

[222] United States' first written submission, para. 74. The letter can be found in Exhibit US-45.

7.53 **China** does not contest that Section 727 is no longer in force. For China, though, the expiration of Section 727 has no bearing on the Panel's terms of reference, as Section 727 expired after the Panel was established and its terms of reference were set. China contends that measures expiring after the establishment of a panel or during the panel process have repeatedly been found by panels and the Appellate Body to be within a panel's jurisdiction. As an example, China argues, in *Indonesia – Autos*, the panel rejected Indonesia's argument that the National Car program was a moot issue because it had expired. In doing so, China explains, the panel referenced several GATT and WTO disputes where measures included in the terms of reference were terminated after the commencement of the panel proceedings, and where panels nevertheless went on to make findings in respect of those measures.[223] China submits that this approach has been followed in subsequent disputes, such as *EC – Selected Customs Matters* and *US – Upland Cotton.* China stresses that, in *US – Upland Cotton*, the Appellate Body noted that "GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel [and] [i]n none of these cases has a panel or the Appellate Body premised its decision on the view that, *a priori*, an expired measure could not be within a panel's terms of reference".[224]

(c) Analysis by the Panel

7.54 The Panel will therefore determine whether it should rule on an expired measure. The Appellate Body explained in *EC – Bananas III* (*Article 21.5 – Ecuador II)*, "once a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference." The Appellate Body thus concluded that it is "within the discretion of the panel to decide how it takes into account … a repeal of the measure at issue."[225] It is therefore within our discretion to decide whether to make findings on Section 727.

7.55 We note that, in the past, panels have decided to make rulings on expired measures where the respondent Member had not conceded the WTO inconsistency of the measure and the repealed measure could be easily re-imposed.[226] In our view, this is precisely the case of Section 727 since the United States does not concede the alleged WTO inconsistency of Section 727 and the appropriations legislation in the United States is of an annual nature. As explained in Section II.D above, Section 727 reiterated the language of a previous annual appropriations provision with identical wording, Section 733, and it has now expired and a new provision, Section 743, has been adopted to address FSIS access to appropriated funds for activities regarding China's equivalence application. Although we acknowledge that Section 743 does not share the same language as Section 727 and its predecessor, Section 733, we consider that if we were to refuse to make findings on the expired measure – Section 727 – the Panel might be depriving China of any meaningful review of the consistency of the United States' actions with its WTO obligations, while allowing the repetition of the potentially WTO-inconsistent conduct. This would certainly call to mind the "moving target" scenario which the Appellate Body in *Chile – Price Band System* stated that a complainant should not have to face.

7.56 The Panel will thus proceed to make findings on the WTO consistency of Section 727 which is within its terms of reference. Nevertheless, the Panel recognizes that it would not be appropriate to

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[223] China refers to the Panel Report, *Indonesia – Autos*, para. 14.9, citing Panel Report, *US – Wool Shirts and Blouses* and GATT disputes *EEC – Dessert Apples*, *EEC – Apples (US)*, *EEC – Apples I (Chile)*, *US – Canadian Tuna*, *EEC – Animal Feed Proteins* and *US – Section 337*. China's response to Panel question No. 11.

[224] China refers to the Appellate Body Report, *US – Upland Cotton*, footnote 214. China's responses to Panel question No. 11.

[225] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 270.

[226] Panel Report, *India – Additional Import Duties*, paras. 7.69-7.70.

make recommendations pursuant to Article 19 of the DSU with respect to a WTO-inconsistent repealed measure that has ceased to have legal effect.[227] Indeed, if the Panel finds that Section 727 was inconsistent with any of the provisions of the covered agreements within its terms of reference, it would be pointless to ask the United States to bring Section 727 into conformity with those covered agreements since the measure is no longer in force.

(d) Conclusion

7.57 The Panel therefore concludes that it will proceed to make findings on the WTO-consistency of Section 727 which is within its terms of reference.

3. European Union's request for enhanced third party rights

7.58 In Section V of its third-party submission, the European Union requested the Panel to amend its working procedures and provide enhanced third-party rights to all third parties to these proceedings. The Panel consulted the parties which were both against the Panel granting such a request.[228] The Panel also consulted the third parties which – except for Korea – were all in favour of the European Union's request.[229] On 22 January 2010, the Panel informed the European Union of the following decision:

> "Further to the European Union's request for enhanced third party rights and after having heard the parties' views, the Panel considers that the views and interests of the third parties have been fully taken into account during the Panel proceedings. The Panel does not believe that the current proceedings demand that the panel deviate from the rights embodied in Article 10.2 of the DSU. Accordingly, the Panel has decided not to grant the European Union's request for enhanced third party rights."

B. ORDER OF ANALYSIS OF CHINA'S CLAIMS AND THE UNITED STATES' DEFENCE

7.59 China has put forward claims under Articles I and XI of the GATT 1994, Article 4.2 of the *Agreement on Agriculture* and, Articles 2.3, 5.5, 5.1, 2.2, 5.6 and 8 of the *SPS Agreement.* [230] The United States has made an affirmative defence under Article XX(b) of the GATT 1994.[231] The United States invokes this provision as a defence of a violation of Articles I:1 and XI of the GATT 1994.[232]

7.60 Because the Panel has found that all of China's claims are within our terms of reference[233], we need to decide the appropriate order of analysis of China's claims and the United States' defence.

7.61 We note that **China** has not told the Panel its preferred order of analysis. It has however drawn our attention to the ruling of the panel in *EC – Hormones*, where it was said that the

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[227] Appellate Body Report, *US – Certain EC Products*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 272; and Appellate Body Report, *EC – Bananas III* (*Article 21.5 – Ecuador II)*, para. 271.

[228] *See* parties responses to Panel question No. 1. Both China and the United States disagreed with the European Union's request for enhanced third party rights.

[229] *See* third parties responses to Panel question No. 1. All of the third parties to this dispute agreed with the request by the European Union.

[230] *See* China's Panel Request, WT/DS392/2.

[231] We note that the United States also argues that Section 727 satisfies the exception in the footnote to Article 4.2 of the *Agreement on Agriculture* because it is justified under Article XX(b) of the GATT 1994. See United States' first written submission, para. 105.

[232] United States' first written submission, paras. 99, 102-103.

[233] See Section VII.A.1(b)(iv).

SPS Agreement provides specific "obligations which are not already imposed by GATT",[234] and which are "additional" to the requirements of Article XX of GATT.[235] For China, there is no presumption of consistency with the *SPS Agreement* for measures that are found to be consistent with Article XX(b) of the GATT 1994. On the contrary, China argues that measures such as Section 727 must comply with the requirements in both the GATT *and* the *SPS Agreement*. Therefore, in China's view, even if the United States were successful in demonstrating that Section 727 "falls squarely within the Article XX(b) exception"[236], this would not be sufficient defence against China's SPS claims.[237]

7.62 In response to China's arguments, the **United States** submits that the Panel has the discretion with regard to how it structures its analysis and that it is for the Panel to decide whether to consider the GATT 1994 claims before the SPS claims or *vice versa*. For the United States, this is not a situation where either the *WTO Agreement* requires or the Appellate Body has found that there must be a particular order of analysis.[238] The United States argues that although there is no general rule requiring that GATT 1994 claims be analysed prior to SPS claims, the appropriate order of analysis in this case is to start with Article XI because China claimed that Section 727 was a budgetary measure and that, in any case, "China's SPS arguments are primarily a rephrasing of its fundamental argument under GATT 1994 Article XX – namely, that Section 727 was not 'necessary' because FSIS procedures were sufficient to meet the U.S. goal of ensuring the safety of poultry imports from China".[239]

7.63 The Panel notes that this is not a case of conflict between provisions of different covered agreements[240]; but rather of deciding in which order we are going to examine the various provisions at issue. In doing so, the panel in *India – Autos* explained that it is important to first consider if a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute an error of law.[241] The panel also pointed out that the order selected for examination of the claims may also have an impact on the potential to apply judicial economy.[242]

7.64 We recall that, in *EC – Bananas III*, the Appellate Body enunciated the test that should be applied in order to decide the order of analysis where two or more provisions from different covered Agreements appear *a priori* to apply to the measure in question. According to the Appellate Body, the provision from the Agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[243]

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[234] Panel Report, *EC – Hormones*, para. 8.40.
[235] Panel Report, *EC – Hormones*, para. 8.38.
[236] China refers to the United States' second written submission, para. 124.
[237] China's opening oral statement at the second substantive meeting of the Panel, para. 50.
[238] United States' response to Panel question No. 88, para. 7.
[239] United States' response to Panel question No. 88, para. 9.
[240] As put by the panel in *Turkey – Textiles*, "a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. ... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another." Panel Report, *Turkey – Textiles*, para. 9.92. In the WTO context, conflict may, for example, arise between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, such as the *SPS Agreement*, "where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time", or "where a rule in one agreement prohibits what a rule in another agreement explicitly permits." Panel Report, *EC – Bananas III*, para. 7.159.
[241] Panel Report, *India – Autos*, para. 7.154.
[242] Panel Report, *India – Autos*, para. 7.161.
[243] Appellate Body Report, *EC – Bananas III*, para. 204.

7.65 In *EC – Hormones*, where claims under both the GATT 1994 and the *SPS Agreement* were raised by the complainant, the panel, in a finding not reviewed by the Appellate Body, considered that the *SPS Agreement* was to be addressed first because it "specifically addresses the type of measure in dispute".[244] This approach was also followed by the panel in *Australia – Salmon.*[245]

7.66 The order of analysis of the claims would therefore depend on whether the Panel finds that Section 727 is an SPS measure. If so, the *SPS Agreement* would be *lex specialis* as it "deal[s] specifically, and in detail" with the type of measure at issue, i.e. an SPS measure. Therefore, if the Panel finds that Section 727 is an SPS measure and we were to follow the order of analysis as set out in *EC – Hormones* and *Australia – Salmon*, we should start by analysing China's SPS claims.

7.67 The Panel draws further guidance from Article 2.4 of the *SPS Agreement* which provides that SPS measures which conform to the provisions of the *SPS Agreement* shall be presumed to be in accordance with the provisions of the GATT 1994 which relate to the use of SPS measures, in particular the provisions of Article XX(b).[246] Therefore, if the Panel were to find that Section 727 is an SPS measure, a finding that it is not inconsistent with the *SPS Agreement*, would yield a presumption that Section 727 is in accordance with Article XX(b) of the GATT 1994. Accordingly, the Panel would not need to consider the GATT claims because the measure would be presumed to be consistent with Article XX(b). However, we agree with China in that there is no presumption of consistency with the *SPS Agreement* for measures that are found to be consistent with Article XX(b) of the GATT 1994. Hence, if the Panel were to start with the claims under GATT 1994 and find Section 727 to be consistent with that Agreement, then the Panel would still have to look at the SPS claims, because a measure consistent with the GATT 1994 is not presumed necessarily to be consistent with the *SPS Agreement*.

7.68 The Panel will therefore commence by examining whether Section 727 is an SPS measure within the scope of the *SPS Agreement*. If we find that Section 727 is indeed an SPS measure, we will proceed to examine China's claims under the *SPS Agreement*, by first addressing the arguments of the United States that China has raised claims under provisions of the *SPS Agreement* that are not applicable to Section 727.

7.69 If we find that Section 727 is inconsistent with one or more provisions of the *SPS Agreement* within our terms of reference, this Panel could conclude that it has provided a positive solution to this dispute and therefore finalize its legal analysis without entering into an examination of China's claims under Articles I:1 and XI:1 of the GATT 1994, the United States' defence pursuant to Article XX(b) of that same Agreement and China's claim under Article 4.2 of the *Agreement on Agriculture*. However, given that the United States has focussed its defence solely on the claims under the GATT 1994 and the *Agreement on Agriculture* by invoking the general exception under Article XX(b) of the GATT 1994, the Panel finds it appropriate for due process reasons to go forward with an analysis of China's claims under those Agreements and evaluate the United States' defence on its own merit.

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[244] Panel Report, *EC – Hormones*, paras. 8.41-8.42.

[245] Panel Report, *Australia – Salmon*, para. 8.39. *See also* Panel Report, *EC – Sardines*, para. 7.16, in context of the *TBT Agreement.*

[246] Panel Report, *US – Continued Suspension*, para. 7.327 footnote 471. The panel stated that the reference to presumption in Article 2.4 of the *SPS Agreement* is to a legal presumption that is intended to address potentially conflicting interpretations between two provisions.

C. WHETHER SECTION 727 IS AN SPS MEASURE WITHIN THE SCOPE OF THE *SPS AGREEMENT*

1. Background

7.70 As explained in Section VII.B above, a crucial issue in this dispute is whether Section 727 is an SPS measure. Indeed, determining whether Section 727 is an SPS measure will not only dictate whether the *SPS Agreement* is applicable but also, as we explained, in which order we will analyse China's claims.

7.71 China's characterization of Section 727 as an SPS measure has, during the proceedings, evolved from one extreme to the other. Following the language in both its consultations and Panel requests, China had argued in its first written submission that based on its text and legislative context, Section 727 was but a *budgetary* measure which resulted in the banning of imports of poultry products from China, and thus would not appear to be an SPS measure.[247] Therefore, China's SPS claims were conditionally made *to the extent* that Section 727 may be considered to be an SPS measure within the meaning of the *SPS Agreement*.[248]

7.72 During the first substantive meeting, China radically changed its position and argued for the first time that Section 727 *is* an SPS measure. China justified its new approach on the assertion by the United States that the policy objective for enacting Section 727 was the protection of human and animal life and health from the risk posed by the importation of poultry products from China.[249]

7.73 The United States first notes that the burden is on China, in establishing its claim, to prove that Section 727 is an SPS measure. Further, the United States argues that the mere fact that a measure implicates food safety does not dictate whether a measure is covered by the *SPS Agreement*. Additionally, for the United States, even if a measure is covered by the definition of SPS measures in Annex A, it does not necessarily follow that all of the obligations in the *SPS Agreement* apply to that particular measure.[250]

7.74 The Panel will therefore examine whether Section 727 is an SPS measure within the scope of the *SPS Agreement*.

2. Arguments of the parties

7.75 After having initially argued that Section 727 was only a budgetary measure as opposed to an SPS measure[251], **China** changed its position and argued at the first substantive meeting that the United States had demonstrated that Section 727 *is* an SPS measure.[252]

7.76 Concerning the definition of an SPS measure, China argues that SPS measures are defined in Annex A(1) of the *SPS Agreement* based on their purpose and legal form.[253] In its view, this conclusion is reached when interpreting Annex A(1) on the basis of the Vienna Convention on the

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[247] China's first written submission, para. 116.

[248] China's first written submission, para. 117.

[249] Specifically, China said that: "[b]ecause the United States has stated repeatedly in its first written submission that the purpose of Section 727 is the protection of human life and health, there is no doubt that the United States has demonstrated that Section 727 is an SPS measure as defined by the *SPS Agreement*" (footnote omitted). China's opening oral statement at the first substantive meeting of the Panel, para. 37, citing the United States' first written submission at paras. 119, 121, 122.

[250] United States' first oral statement, para. 9, citing the Panel Report, *EC – Approval and Marketing of Biotech Products* at paras. 7.1326–7.1448.

[251] China's first written submission, para. 116.

[252] China's opening oral statement at the first substantive meeting of the Panel, para. 39.

[253] China's opening oral statement at the first substantive meeting of the Panel, para. 38.

Law of the Treaties ("VCLT").[254] According to China, "SPS measures are defined in Annex A(1) as measures enacted for one of the purposes enumerated in paragraphs (a) through (d) – including the protection of 'human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease causing organisms in food, beverages or feedstuffs"[255], "and the 'form' of which are 'laws, decrees, regulations, requirements or procedures.'"[256]

7.77 China refers to the statements made by the United States in its first written submission that "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"[257], and to the Joint Explanatory Statement accompanying Section 727 which in its view "defines the alleged risk to human health addressed by the measure in the broadest of terms, namely "concerns about contaminated foods" originating in China.[258] China points out that, in the United States' first written submission, the United States refers to the risk posed by Salmonella, Listeria, and Campylobacter to illustrate the inherent danger of consuming poultry that is not produced under sanitary conditions or thoroughly inspected for contaminants and the FSIS audit procedures that were suspended due to Sections 727 include rigorous assessment of the testing methods for Salmonella, Listeria, and E. coli in production facilities.[259] China argues that "[b]ased on the description of the purpose of Section 727 in the Explanatory Statement and the representations made in the United States' first written submission, Section 727 clearly falls within the confines of the definition of an SPS measure, as stated in Annex A(1)(b)."[260] Further, it notes that the form of Section 727 – a legal provision – clearly falls within the illustrative list in Annex A(1). China concludes by stating that because Section 727 affects international trade, it is subject to the *SPS Agreement* under Article 1.1.[261]

7.78 China notes that the United States has never denied, rebutted or otherwise responded to the Panel's question on whether the United States considers that Section 727 satisfies the definition of an SPS measure in Annex A of the *SPS Agreement*.[262]

7.79 The **United States** notes that China, as the complaining party, bears the burden of proving that Section 727 meets the definition in the *SPS Agreement* of an SPS measure and of explaining how and why each SPS provision cited applies to Section 727 including a consideration of the nature of the measure.[263] Moreover, China also has the burden of explaining precisely what has changed from its first written submission where it claimed that Section 727 was simply a "budgetary" measure to the first substantive meeting when China argued that Section 727 is an SPS measure.[264] According to the United States, China has not met its burden to prove how the measure meets each element of the definition in the *SPS Agreement*.[265]

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[254] China's response to Panel question No. 43.
[255] China's response to Panel question No. 42, para. 97 citing Annex A(1)(b) of the *SPS Agreement*.
[256] China's response to Panel question No. 42.
[257] China's opening oral statement at the first substantive meeting of the Panel, para. 39 referring to the United States first written submission, paras. 199, 121, 122.
[258] China's opening oral statement at the first substantive meeting of the Panel, para. 40, citing the Joint Explanatory Statement of the *Agriculture Appropriations Act* 2009 (Exhibit CN-33).
[259] China's response to Panel question No. 96, para.21 citing the Final Report of an Initial Equivalence Audit Covering China's Poultry Inspection p. 11 (Exhibit CN-13).
[260] China's opening oral statement at the first substantive meeting of the Panel, para. 42.
[261] China's opening oral statement at the first substantive meeting of the Panel, para. 42.
[262] China's comments on United States' response to Panel question No. 95, paras. 22 and 25.
[263] United States' response to Panel question No. 95.
[264] United States' response to Panel question No. 93.
[265] United States' second written submission, para. 86.

3. Analysis by the Panel

7.80 The Panel will thus examine whether the measure at issue, i.e. Section 727, is an SPS measure within the scope of the *SPS Agreement*. We will first review the provisions of the *SPS Agreement* setting forth what an SPS measure is and how they have been interpreted by panels and the Appellate Body. We will then look into whether Section 727 falls within the definition of an SPS measure under the *SPS Agreement*. In doing so, we acknowledge that it is China's burden to prove that Section 727 is indeed an SPS measure.

(a) The concept of SPS measure under the *SPS Agreement*

7.81 Article 1 of the *SPS Agreement* provides for the scope of application of the Agreement as follows:

> "1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
>
> 2. For the purposes of this Agreement, the definitions provided in Annex A shall apply."

7.82 Therefore, there are two conditions for the application of the *SPS Agreement* to a given measure; namely, (i) the measure must be an SPS measure as defined in Annex A of the *SPS Agreement*, and (ii) the measure has to directly or indirectly affect international trade. We turn to examine these two conditions.

(i) Definition of SPS measures

7.83 Annex A of the *SPS Agreement* defines SPS measures in the following manner:

> "1. *Sanitary or phytosanitary measure* – Any measure applied:
>
> ...
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> ...
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety."[266]

[266] We note that Annex A(1)(a) defines as an SPS measure, any measure taken to protect animal or plant life or health from the establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms and that Annex A(1)(c) defines as an SPS measure, any measure taken to protect human life or health from risks arising from diseases carried by animals. The United States has referred in its argumentation

7.84 The Panel notes that there have been six completed disputes, to date, which have dealt with SPS issues.[267] In all of these cases, with the exception of *EC – Approval and Marketing of Biotech Products*, determining whether the measure at issue is an SPS measure has been straight forward.[268]

7.85 The first dispute where the panel examined the definition of an SPS measure in depth was *EC – Approval and Marketing of Biotech Products*. In that case, the panel examined whether various EC actions constituted SPS measures that would fall under the *SPS Agreement*. In particular, the panel looked at the definition of an SPS measure set out in Annex A(1) and explained that in determining whether a measure is an SPS measure, regard must be had to elements such as the purpose of the measure, its legal form and its nature. The panel considered that the purpose element is addressed in Annex A(1)(a) through (d) ("any measure applied to"); the form element is referred to in the second paragraph of Annex A(1) ("laws, decrees, regulations") and the nature of the measure is addressed by the second paragraph of Annex A(1) "requirements and procedures".[269] The panel thus took the phrase "laws, decrees, regulations, requirements and procedures including ...," and divided it into two components: "Laws, decrees and regulations," it said, referred to the "form" of the measure; and "requirements and procedures" referred to its "nature". The panel found that one of the measures at issue, a moratorium[270], did not have the "nature" of an SPS measure – because it did not provide for requirements or procedures – and therefore could not be considered an SPS measure for purposes of Annex A(1) of the *SPS Agreement*.[271]

7.86 The panels in *US/Canada – Continued Suspension* followed the approach of the panel in *EC – Approval and Marketing of Biotech Products* to the extent that they indicated that they were examining the purpose, form and nature of the measure but did not examine the meaning of the term "nature".[272] The panels first determined whether the purpose of the measure fell within Annex A(1)(b), then they considered whether the measure fell within "laws, decrees and regulations as well as requirements and procedures'."[273] Thus, the panels found that the measure at issue was adopted for the purpose of protecting human life from contaminants in food and took the form and nature contemplated in the second paragraph of Annex A, hence an SPS measure pursuant Annex A(1)(b) of the *SPS Agreement*.[274]

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to the purpose of the measure being to also protect from Avian influenza. However, since China has only referred to the types of measures described in Annex A(1)(b) in its argumentation, we will not address the types of measures described in Annex A(1)(a) and (c) in detail.

[267] *EC – Hormones*, *Australia – Salmon*, *Japan – Agricultural Products II*, *Japan – Apples*, *EC – Approval and Marketing of Biotech Product* and *US/Canada – Continued Suspension*. We note that for some of these disputes, there is more than one complainant.

[268] Panel Report, *EC – Hormones*, para. 8.22 (where the panel saw no need to further examine if the measures were "applied to protect human ... life or health" because both parties agreed that the EC measures were "sanitary measures"); Panel Report, *Australia – Salmon*, para. 8.30 (noting that the parties agreed that the measures fell under the SPS Agreement and that the main issue was whether they were applied to serve the purposes outlined in either Annex A(1)(a) or Annex A(1)(b)); Panel Report, *Japan – Agricultural Products II*, para. 8.12 (where the panel noted that the parties agreed that the measures at issue were SPS measures); Panel Report, *Japan – Apples*, para. 8.9 (where the panel noted that the parties agreed that the measures at issue were SPS measures).

[269] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.149.

[270] The so-called moratorium consisted of a decision taken by the EU and its member States to delay the final approval decisions for the marketing of biotech products. Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1355.

[271] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1334.

[272] Panel Report, *US – Continued Suspension*, para. 7.429. We note that the panel in that case was examining a measure that was the successor to the one challenged in the *EC – Hormones* case and it was not disputed that it was an SPS measure.

[273] Panel Report, *US – Continued Suspension*, para. 7.433.

[274] Panel Report, *US – Continued Suspension*, para. 7.434.

(ii) Directly or indirectly affect[s] international trade

7.87 Even if a measure falls within the definition of an SPS measure in Annex A(1) of the *SPS Agreement*, further to Article 1.1 of the *SPS Agreement*, such measure still needs to be a measure that directly or indirectly affect[s] international trade to be covered by the disciplines of the *SPS Agreement*.

7.88 If we look at the previous SPS disputes, in *Australia – Salmon*, neither of the parties to the dispute contested that the measure at issue affected international trade. The panel indicated that it agreed it affected international trade.[275] In *EC – Hormones*, the panel agreed with the parties that the measure at issue affected international trade, and added that it could not be contested that an import ban affects international trade.[276]

7.89 The panel in *EC – Approval and Marketing of Biotech Products* stated that, consistent with panels interpreting other provisions of the WTO agreement, it determined that "it is not necessary to demonstrate that an SPS measure has an *actual effect* on trade" (emphasis added). It further noted that Article 1.1 of the *SPS Agreement* merely requires that an SPS measure "may, directly or indirectly, affect international trade."[277] The panel thus concluded that measures which caused delays or imposed information and documentation requirements on applicants affected international trade.[278]

(b) Whether Section 727 is an SPS measure under the *SPS Agreement*

7.90 The Panel therefore needs to determine whether Section 727: (i) falls within the definition of Annex A(1) of the *SPS Agreement* and (ii) affects directly or indirectly international trade. We begin by recalling the measure at issue. We will then analyse whether Section 727 is an SPS measure within the definition of Annex A(1) of the *SPS Agreement*, and if so, turn to see whether it directly or indirectly affects international trade.

(i) The measure at issue

7.91 The Panel recalls that Section 727 was enacted on 11 March 2009[279] and that it expired on 30 September 2009.[280] We further recall that the AAA of 2009, in which Section 727 appears, is a regular appropriations bill that provides the necessary funding for the FSIS to carry out, *inter alia*, the functions foreseen by the PPIA.[281]

7.92 Section 727 reads as follows:

> "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[282]

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[275] Panel Report, *Australia – Salmon*, para. 8.30.
[276] Panel Report, *EC – Hormones*, para. 8.23.
[277] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.435. We note that the panels in *Japan – Apples* and *Japan – Agricultural Products II* and *US/Canada – Continued Suspension*, did not assess whether the measures at issue directly or indirectly affected international trade.
[278] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.435.
[279] China's response to Panel question No. 19.
[280] United States' first written submission, para. 62. The Panel's ability to make findings on an expired measure, and the wisdom of doing so, is analysed in Section VII.A.2 above.
[281] Omnibus Appropriations Act of 2009, p. 12.
[282] Section 727, Agriculture Appropriations Act 2009 (Exhibit CN-1).

7.93 We recall that the AAA of 2009 was accompanied by a Joint Explanatory Statement (JES) which explains why the Congress restricted the funds for establishing or implementing rules allowing the import of poultry products from China. The JES provides the following:

> "There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to more 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 laws. 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 for action to the 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 systemic 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 from China 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."[283]

(ii) Whether Section 727 falls within the definition of Annex A(1)

7.94 The Panel will thus consider whether Section 727 falls within the definition of Annex A(1) of the *SPS Agreement.* We recall that the panel in *EC – Approval and Marketing of Biotech Products*, later followed by the panels in *US/Canada – Continued Suspension*, explained that, in determining whether a measure is an SPS measure within the definition in Annex A(1) of the *SPS Agreement*, regard must be had to elements such as the purpose of the measure, its legal form and its nature. The panel in *EC – Approval and Marketing of Biotech Products* considered that the purpose element is addressed in Annex A(1)(a) through (d) ('any measure applied to'); the form element is referred to in the second paragraph of Annex A(1) ('laws, decrees, regulations') and the nature of the measure is addressed by the second paragraph of Annex A(1) "requirements and procedures".[284]

7.95 We have asked the parties for their views on whether the Panel should follow the above three-pronged test elaborated by the panel in *EC – Approval and Marketing of Biotech Products.*[285] The parties have opposing views; while China wants us not to follow the test instituted by the panel in *EC – Approval and Marketing of Biotech Products*, the United States requests that we do so. For China, interpreting the definition of Annex A(1)(b) in light of the rules in the VCLT, SPS measures are defined on the basis of their purpose and legal form but claims that the third element, "nature", is not

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[283] Joint Explanatory Statement, Division A of AAA of 2009, p. 82. (Exhibit CN-33).

[284] The panel in *EC – Approval and Marketing of Biotech Products* reasoned as follows:

"Annex A(1) indicates that for the purposes of determining whether a particular measure constitutes an 'SPS measure' regard must be had to such elements as the purpose of the measure, its legal form and its nature. The purpose element is addressed in Annex A(1)(a) through (d) ('any measure applied to'). The form element is referred to in the second paragraph of Annex A(1) ('laws, decrees, regulations'). Finally, the nature of the measures qualifying as SPS measures is also addressed in the second paragraph of Annex A(1) ('requirements and procedures, including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; [etc.]')."

Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.149. See also para. 7.1334.

[285] The question posed by the Panel was the following: "The panel in *EC – Approval and Marketing of Biotech Products* explained that in determining whether a measure is an SPS measure, regard must be had to such elements as the *purpose* of the measure, its *legal form* and its *nature*. This approach was followed by the panel in *US – Continued Suspension*. Should the Panel follow the same approach? Please elaborate." Panel question No. 43.

mentioned in the definition. The United States, however, argues that it is essential for the Panel to review carefully all aspects of a measure, including its nature, purpose and form, in order to determine how, if at all, a food safety measure fits under any particular provision of the *SPS Agreement*.[286] The United States, however, did not elaborate on how the nature of the measure should be determined, or how the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* applies to the facts of this case.

7.96 The Panel must therefore decide which approach to follow; i.e. look into the purpose, form and nature of Section 727, or just into the purpose and form.

7.97 We note that the text of Annex A(1) does not mention the term "nature" but neither does it mention the terms "purpose" and "form" . This does not mean that an analysis of the ordinary meaning of the wording of Annex A(1) in its context and in light of its object and purpose, would not lead us to examining both the purpose and form of Section 727 in order to determine whether it is an SPS measure.

7.98 We note that the first part of Annex A(1) (a) to (d) refers to an SPS measure as "any measure applied ... to protect ... to prevent". Both parties and the Panel agree that this language refers to the "purpose" of a measure.

7.99 The second part of Annex A(1), after having enunciated the possible purposes for which an SPS measure could be applied, goes on to provide a list of the types of SPS measures. It reads "[SPS] measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia* ..." This wording is followed by a list of possible types of SPS measures such as:

> "[E]nd product criteria; process and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging labelling requirements directly related to food safety."

7.100 The Panel has carefully examined the panel's findings in *EC – Approval and Marketing of Biotech Products* as regards the legal basis for distinction of "form" and "nature" and has difficulty with following the reasoning. The rationale for dividing the phrase "laws, decrees, regulations, requirements and procedures including ...," into "form" and "nature" is not clear to us as the panel did not elaborate on this point. The panel did not explain how "requirements and procedures" were somehow fundamentally different from "laws, decrees, regulations" or why it believed that all SPS measures somehow have the nature of a "requirement" or "procedure". If we examine the text of Annex A(1), we note that there is no such separation and a plain reading might lead one to believe that "requirements and procedures" are also descriptions of the possible types or "forms" of an SPS measure while the substantive descriptions following "including *inter alia*" are just illustrative examples of the types of SPS measures Members have imposed.

7.101 While we do not see the examination of whether a particular measure is an SPS measure as a rigid three-part test, as seems to have been adopted by the panel in *EC – Approval and Marketing of Biotech Products*, we do agree that the Panel is to review carefully all aspects of a measure in order to determine whether it is an SPS measure. In our view, the nature of a measure is an intrinsic element of its form. Therefore, reading the second part of Annex A(1) as a whole, means that an examination of whether a measure is of the type set forth in Annex A(1) will encompass an holistic examination of the measure, including, both its form and nature.

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[286] United States' response to Panel question No. 43.

7.102 We will therefore examine whether Section 727 is an SPS measure by looking at whether it serves one of the purposes set forth in Annex A(1)(a) through (d) and whether it is of the type listed in the second part of Annex A.

Annex A(1)(a) through (d)

7.103 According to the panel in *EC – Approval and Marketing of Biotech Products*, the purpose element is addressed in Annex A(1)(a) through (d) ("any measure applied to").[287]

7.104 As explained by the panel in *Colombia – Ports of Entry*[288], municipal law is to be approached as a "factual issue".[289] In making an objective assessment of municipal legislation, a panel should consider the very terms of the law[290], in their proper context[291], and complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.[292] The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[293]

7.105 We recall that it is China who bears the burden of adducing evidence as to the scope and meaning of the relevant US legislation to substantiate its assertion that it is WTO-inconsistent. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instrument, which China has done. In this case, China has produced not only the text of Section 727, but also the JES which explains the purpose of Section 727.[294] In addition, China has argued that the exhibits produced by the United States including a number of statements from the US Congress, support the premise that the purpose of Section 727 is the protection against the risk to human and animal life and health from contaminated food.

7.106 The Panel will begin its analysis by considering the very terms of Section 727 to ascertain its purpose.[295] As we recall, Section 727 reads:

> "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[296]

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[287] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.149; Panel Report, *US – Continued Suspension*, para. 7.429.

[288] Panel Report, *Colombia – Ports of Entry*, para. 7.93.

[289] Appellate Body Report, *India – Patents (US)*, para. 66; See also Panel Report, *US – Section 301 Trade Act*, para. 7.18. See also PCIJ, *Certain German Interests in Polish Upper Silesia*, PCIJ, 1926, Rep., Series A, No. 7, p. 19. The Panel is aware that the Appellate Body has explicitly stated that when a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU. Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

[290] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112; See also Panel Report, *US – 1916 Act (EC)*, para. 6.48.

[291] Panel Report, *US – Section 301 Trade Act*, para. 7.27.

[292] Appellate Body Report, *US – Carbon Steel*, para. 157.

[293] Appellate Body Report, *US-Carbon Steel*, para. 157; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[294] Exhibit CN-33. We note that the United States also relies on the JES to support its view of the intended purpose of the legislation.

[295] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112; See also Panel Report, *US – 1916 Act (EC)*, para. 6.48.

[296] Exhibit CN-1.

7.107 Hence, on its face, Section 727 is a measure which purely relates to the appropriated funds for the activities of an Executive Branch agency of the United States Government. There is nothing in its specific text which addresses the purposes embodied in Annex A(1)(a) through (d).

7.108 As China has pointed out[297], the United States itself has argued that the policy objective underlying Section 727 was to protect against the risk to human and animal life and health arising from the importation of poultry products from China.[298] It has further argued that this policy objective is reflected in the legislative history of the measure.[299]

7.109 We recall that we are to consider the very terms of the law[300], in its proper context[301], and complemented, whenever necessary, with additional sources.[302] We will therefore examine both the JES and the relevant statements on the Congressional Record to ascertain whether they are helpful in determining the purpose of Section 727. Both parties agree that, under United States law, the JES is considered part of the legislative history of the AAA 2009.[303] [304]

7.110 As explained in Section II.B above, appropriation bills are sometimes enacted with a JES which serves to explain the purposes of the provisions in the bill.[305] The JES to Section 727 reads in pertinent part:

> "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."[306]

7.111 The Panel notes that the JES plainly states that the purpose of Section 727 was to prohibit the FSIS from taking actions which the Congress felt would be contrary to its concerns about contaminated food from China.

7.112 The United States has drawn the Panel's attention to a number of statements from the US Congress showing that the objective of Section 727 was to address concerns about the risk to human and animal life and health posed by the prospect of importation of poultry products from China. The legislative history of the measure appears to reflect the policy objective referred to by the United States. The United States provided the Panel with the FY 2008 Omnibus Appropriations Act Committee Report which refers to the barring of the funds due to food contamination episodes 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

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[297] China's opening oral statement at the first substantive meeting of the Panel, para. 39.
[298] United States' first written submission, para. 119. Exhibit CN-33.
[299] United States' first written submission, paras. 119-121 citing the JES accompanying Section 727.
[300] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112; See also Panel Report, *US – 1916 Act (EC)*, para. 6.48.
[301] (*footnote original*) Panel Report, *US – Section 301 Trade Act*, para. 7.27.
[302] (*footnote original*) Appellate Body Report, *US – Carbon Steel*, para. 157.
[303] China's response to Panel question No. 20; United States' response to Panel question No. 20.
[304] Both China and the United States agree that, under US law, legislative history is relevant when interpreting a statute. See China's response to Panel's question 20, United States' response to Panel's question 20.
[305] Congressional Research Service, Conference Reports and Joint Explanatory Statements, 1 December, 2004. p. 7. Exhibit US-58.
[306] Joint Explanatory Statement, Division A of AAA of 2009, p. 82. (Exhibit CN-33).

> 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."[307]

7.113 The United States also cites the statements of Representative Rosa DeLauro, the author of Section 727, where she said that the objective of Section 727 was to address concerns about the health risks posed by the importation of poultry products from China.[308] These statements could be seen to reflect the legislative intent of Section 727.

7.114 We note that China asserts that, according to the JES, the purpose of Section 727 is to protect human life and health and not animal health.[309] It states that the JES refers to "serious concerns about contaminated food' without mentioning any animal diseases at all."[310] The United States argues that the policy objective of Section 727 was to protect human and animal life and health from the risk posed by the importation of poultry products from China.[311] We note that the House Committee Report also refers to the protection of animal life and health.

7.115 In the Panel's view, Section 727 was enacted for the purpose of protecting human and animal life and health from the risk posed by the prospect of the importation of contaminated poultry products from China. Accordingly, the Panel concludes that Section 727 is a measure applied for the purpose set forth in Annex A(1)(b).

Second part of Annex A(1)

7.116 The second part of Annex A(1) provides that SPS measures "include all relevant laws, decrees, regulations, requirements and procedures ... ."

7.117 China argues that Section 727 is a budgetary measure under the legal system of the United States.[312] The Panel understands this to be a fact not contested by the United States. According to China, the obvious conclusion is that, given that Section 727 is a provision of a *law*, it falls within the illustrative list of measures in Annex A(1).[313]

7.118 We recall that we have concluded that the nature of a measure may be of relevance as an intrinsic part of the form to determine whether such measure is an SPS measure. The Panel notes that

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[307] House Report 110-258, at 54 (July 24, 2007) (Exhibit US-42).
[308] Exhibit US-50.
[309] China's opening oral statement at the first substantive meeting of the Panel, para. 41.
[310] China's opening oral statement at the first substantive meeting of the Panel, para. 41.
[311] United States' first written submission, para. 119, United States second written submission, para. 12.
[312] China's first written submission, para. 116; China's opening oral statement at the first substantive meeting of the Panel, para. 42 We note that China often refers to Section 727 as a budgetary provision. We note however that the law is appropriations legislation, which allocates funds for an Executive Branch agency, in this case the FSIS, to use according to the manner authorized in separate legislation. In this case Section 727 included a limitation on how the appropriated money could be utilized. We recall that the US Congress enacts annual appropriation bills which provide funding for the agencies and programmes previously authorized. The US Congress can determine the terms and conditions under which an appropriation may be used. Provisions in appropriations acts may be intended to prevent or restrict federal agencies from taking certain rulemaking or regulatory actions. See Exhibits US-2 and 4.
[313] China's opening oral statement at the first substantive meeting of the Panel, para. 42.

Section 727 is a provision of a law, the AAA of 2009[314], dealing with appropriations relating to the activities of an Executive Branch agency of the United States Government.

7.119 The fact that Section 727 deals with monetary appropriations concerning the activities of an Executive Branch agency of the United States Government, instead of directly regulating sanitary and phytosanitary issues, could be viewed as signifying that Section727 is not an SPS measure. Indeed, a legal provision dealing with monetary appropriations which will affect the activities of a given government agency does not appear to fit the common perception of an SPS measure. The Panel has thus carefully pondered this approach, being the first time that a measure such as Section 727 has been challenged under the *SPS Agreement*. Although, Section 727 is an appropriations bill, it is Congress' way of exerting control over the activities of an Executive Branch agency responsible for implementing substantive laws and regulations on SPS matters. Thus the fact that it is an appropriations bill does not exclude it from the scope of the types of SPS measures set forth in the second part of Annex A(1).

7.120 Given that Section 727 is a measure applied to achieve the purpose set forth in subparagraph (b) of Annex A(1) and it is a measure of the type described in the second part of Annex A(1), the Panel concludes that Section 727 falls within the definition of an SPS measure in Annex A(1) of the *SPS Agreement*.

(iii) Whether Section 727 affects directly or indirectly international trade

7.121 Once we have concluded that Section 727 falls within the definition of an SPS measure in Annex A(1) of the *SPS Agreement*, we need to look at the second element of the test to decide whether Section 727 is an SPS measure within the scope of the *SPS Agreement*, i.e. whether it affects directly or indirectly international trade.

7.122 In this respect, China argues that by preventing China from exporting poultry products to the United States, Section 727 directly or indirectly affects international trade within the meaning of Article 1.1 of the *SPS Agreement*" and therefore Section 727 is a measure subject to the *SPS Agreement*.[315] We note that the United States has not contested this statement by China.

7.123 In the Panel's view, Section 727 did affect international trade because it prohibited the FSIS from using appropriated funds for the establishment and implementation of a rule allowing the importation of poultry products from China. Whether a measure affects international trade directly or indirectly depends on how one views it. The Panel notes that regardless of whether one considers the effect of Section 727 as direct or indirect, the effect of the measure was such that while it was in force poultry exports from China to the United States could not commence. Therefore, Section 727 directly or indirectly affected international trade in poultry products. Thus, the Panel concludes that Section 727 also satisfies the second condition in Article 1 of the *SPS Agreement*.

(c) Conclusion

7.124 Having concluded that Section 727 falls within the definition of an SPS measure in Annex A(1) of the *SPS Agreement* and that it directly or indirectly affected international trade, the Panel finds that Section 727 is an SPS measure within the scope of the *SPS Agreement*.

[314] The AAA of 2009 is a regular appropriation bill that provides the necessary funding for the FSIS to carry out, *inter alia*, the functions foreseen by the PPIA.

[315] China's opening oral statement at the first substantive meeting of the Panel, para. 42. China's response to Panel question 42.

D. WHETHER ARTICLE 4 IS THE ONLY PROVISION OF THE *SPS AGREEMENT* APPLICABLE TO SECTION 727

1. Background

7.125 The United States has argued that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding.[316] In this context, the United States contends that Section 727 would be subject to the provisions of Article 4 of the *SPS Agreement* instead of the various claims presented by China because Article 4 is specifically addressed to regulate equivalence-based measures. We note that Article 4 of the *SPS Agreement* is not part of our terms of reference. Pursuant to our obligation under Article 11 of the DSU to determine the applicability of the cited provisions, before entering into an examination of China's claims, we are going to examine the United States' contention that the provisions of the *SPS Agreement* China cited do not apply to Section 727 and that only Article 4 of the *SPS Agreement* is the applicable provision.

2. Arguments of the parties

7.126 The **United States** argues that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding.[317] It continues to explain that action by Congress was not separate and apart from the system in the United States to ensure the safety of imported food, but rather, part of the system.[318] It states that Section 727 is part of the equivalence regime itself.[319] In this respect, it characterizes Section 727 as a "procedural requirement adopted in the course of an ongoing equivalency review".[320] The United States further explains that the requirement imposed by Section 727 was that FSIS could not use appropriated funds to establish or implement equivalence rules related to Chinese poultry during fiscal year 2009.[321]

7.127 The United States further argues that Article 4 is the only Article in the *SPS Agreement* that is specifically addressed to regulate equivalence-based measures.[322] The United States argues that to determine which SPS provisions apply to a measure adopted in the context of an equivalence proceeding, one must carefully evaluate the specific measure, and the specific arguments regarding the alleged breach.[323] Accordingly, it submits that China has not met its burden of explaining how each SPS provision cited by China applies to Section 727.[324]

7.128 The United States recognizes that Articles 2.2, 2.3, and 5.1 could apply to a measure – such as the PPIA – that establishes an equivalence-based regime.[325] However, it notes that it would be difficult to see how these provisions necessarily apply to every measure adopted in the context of an equivalence proceeding.[326] Based on the panel on *EC – Approval and Marketing of Biotech Products*, the United States argues that a scientific basis is required for substantive SPS measures only – such as product ban or a requirement to quarantine or border testing – which provides protection from an SPS risk, and not to intermediate measures used in assessing risk and deciding on what substantive

[316] United States' opening oral statement at the second substantive meeting of the Panel, para. 9.
[317] United States' opening oral statement at the second substantive meeting of the Panel, para. 9.
[318] United States' opening oral statement at the second substantive meeting of the Panel, para. 9.
[319] United States' response to Panel question No. 109.
[320] United States' second written submission, para. 99.
[321] United States' response to Panel question No. 107.
[322] United States response to Panel question No. 99. United States' second written submission, paras. 89-92.
[323] United States' responses to Panel question No. 99.
[324] United States' second written submission, para. 86.
[325] United States' response to Panel question No. 99, para. 27, United States' response to Panel question No. 100, para. 29.
[326] United States' response to Panel question No. 100, para. 29.

measures should be applied.[327] In its view, "it would be difficult to see why there would be a need to be scientific evidence for, or a basis in scientific principles for, any number of measures adopted in the context of an equivalence proceeding, such as the language, form, means of delivery, or number of copies of information submitted."[328] Accordingly, the United States' argues that Section 727 is a procedural requirement adopted in the course of an ongoing equivalency review, and as such, cannot be required to be based on sufficient scientific evidence or a risk assessment separate from that of the PPIA.[329]

7.129 As for Articles 5.5 and 5.6, the United States argues that it would not appear that these provisions apply to an equivalence regime.[330] It argues that an equivalence regime is aimed at determining if another Member's measures achieve the importing Member's ALOP, hence, in its view, by definition there would be only one ALOP at issue. It continues to argue then, that as Article 5.5 regulates distinctions in the ALOP, Article 5.5 would not appear to apply.[331] As for Article 5.6, the United States argues that this provision is about the measures that a Member itself adopts rather than the measures another Member has adopted. An equivalence proceeding on the other hand is aimed at determining if the exporting Member's measures meet the importing Member's ALOP. Accordingly, it concludes that Article 5.6 does not appear to apply.[332]

7.130 **China** challenges the United States' characterization of Section 727. It argues that the measure is not an "intermediate step" or a "procedural requirement" in the standard FSIS equivalency process and that rather, it prevented FSIS from performing any science-based analysis of the equivalence of China's poultry safety and inspection regime.[333] To that end, China notes that neither the CFR nor the FSIS handbook refer to Congressional action blocking the application of procedures for one applicant country.[334] China further argues that Section 727 is a "law" enacted as part of the AAA 2009 which is separate and legally distinct from the PPIA and the FSIS regulations.[335] Accordingly, China submits that Section 727 is a distinct SPS measure reflecting a separate ALOP that is applied only to China[336], and that it must comply with all of the provisions of the *SPS Agreement*.[337]

3. Analysis by the Panel

7.131 The parties have argued vigorously about the legal characterization that the Panel should assign to Section 727, and the implications it has for the application of several provisions of the *SPS Agreement*. The parties dispute two main issues: first, whether Section 727 is part of an equivalence regime, and second, whether it is the type of SPS measure subject to the obligations embodied in Articles 2 and 5 of the *SPS Agreement* or rather only subject to Article 4 of the *SPS Agreement.*

7.132 In the Panel's view, the paramount question is to determine whether Section 727 is an SPS measure subject to the provisions of the *SPS Agreement* claimed by China. The Panel will commence its analysis by addressing the United States' argument that Article 4 is the only provision

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[327] United States' second written submission, para. 98 citing the Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1388.
[328] United States' response to Panel question No. 99.
[329] United States' second written submission, para. 99.
[330] United States' response to Panel question No. 100.
[331] United States' response to Panel question No. 100.
[332] United States' response to Panel question No. 100.
[333] China's opening oral statement at the second substantive meeting of the Panel, paras. 9-10.
[334] China's opening oral statement at the second substantive meeting of the Panel, para. 10.
[335] China's opening oral statement at the second substantive meeting of the Panel, para. 11.
[336] China's opening oral statement at the second substantive meeting of the Panel, para. 11.
[337] China's comment to United States' to Panel question No. 106.

in the *SPS Agreement* that is applicable to equivalence-based measures, such as, in its view Section 727.[338] We recognize that China has made no claim with respect to the consistency of Section 727 with Article 4 and thus Article 4 is outside our terms of reference. Therefore, we are not going into an analysis of what is required to comply with the obligations in Article 4. Rather, our examination of this provision, simply concerns a determination of whether it is the *only* provision in the *SPS Agreement* that could apply to Section 727.

7.133 The Panel will first turn to the text of Article 4 which provides as follows:

> "1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.
>
> 2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures."

7.134 We note that equivalence regimes adopted pursuant to Article 4 have never been the subject of a dispute before the DSB. There is however, a decision from the SPS Committee entitled "*Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*" (the Decision).[339] This Decision was adopted under the authority of the SPS Committee to carry out the functions necessary to implement and further the objectives of the *SPS Agreement* under Article 12.1. Its preamble provides that the Decision was adopted "[d]esiring to make operational the provisions of Article 4" of the *SPS Agreement*.

7.135 The Decision sets out guidelines for any Member who requests the recognition of equivalence of their SPS measures and for the importing Member who is the addressee of such request. As contemplated in the Decision, upon a request for equivalence, the importing Member should explain the objective and rationale of the SPS measure and identify clearly the risks that the relevant measure is intended to address.[340] The Decision further explains that the importing Member should indicate the ALOP which its SPS measure is designed to achieve.[341] Such an explanation should be accompanied by a copy of the risk assessment on which the SPS measure is based or a technical justification based on a relevant international standard, guideline or recommendation.[342] The exporting Member should then provide appropriate science-based and technical information to support its objective

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[338] United States response to Panel question No. 99.

[339] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, document G/SPS/19/rev. 2, dated 23 July 2004.

[340] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, document G/SPS/19/rev. 2, dated 23 July 2004, para. 2.

[341] Footnote 3 of the Decision states that "[i]n doing so, Members should take into account the *Guidelines to Further the Practical Implementation of Article 5.5* adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 21-22 June 2000 (document G/SPS/19/rev. 2, dated 23 July 2004).

[342] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, document G/SPS/19/rev. 2, dated 23 July 2004, para. 2.

demonstration that its measure achieves the ALOP identified by the importing Member.[343] The importing Member should analyse such information with a view to determining whether the exporting Member's SPS measure achieves the ALOP provided by its own relevant SPS measure.[344]

7.136 The Panel notes, that while this decision is not binding and does not determine the scope of Article 4, we do consider that this Decision expands on the Members' own understanding of how Article 4 relates to the rest of the *SPS Agreement* and how it is to be implemented.[345] The Panel sees nothing in Article 4 or the Decision which suggests that Article 4 is the only provision in the *SPS Agreement* which regulates the operation of equivalence regimes, including their "procedural requirements" or that it should be applied in isolation from other relevant provisions of the *SPS Agreement*. In fact, the Decision states that the importing Member should explain its SPS measures by identifying the risk and provide a copy of the risk assessment or technical standard on which the measure is based. Further, it requires the importing Member to analyse the science-based and technical information provided by the exporting Member with respect to that Member's own SPS measure(s) to examine if the measure achieves the importing Member's ALOP.

7.137 The Decision refers *inter alia* to risk assessments, international standards and ALOPs, which are governed by Article 2 which embodies the "Basic Rights and Obligations"[346], Article 3 governing harmonization with international standards and Article 5 which regulates the assessment of risk and determination of the ALOP. The Decision, therefore, implies that measures taken as part of an equivalence regime, subject to Article 4, should also comply with the other relevant provisions of the *SPS Agreement*.

7.138 In addition, there is nothing in the text of Article 4 that suggests that it should be applied in a vacuum, isolated from other relevant provisions of the *SPS Agreement*. This is further reinforced by the fact that, as stated by the panel in *Japan – Apples*, Article 4 is not a defence against violations of other provisions of the *SPS Agreement*.[347]

7.139 The Panel does not intend to exhaustively explain the relationship between Article 4 and other provisions of the *SPS Agreement*. Suffice it to say that we do not believe that Article 4 is to be applied to the exclusion of other relevant provisions of the *SPS Agreement*. A determination of which particular provisions are applicable to a given measure, must be done on a case-by-case basis. It is the Panel's view that nothing in Article 4 *a priori* precludes a given measure from being subject to the disciplines of Article 2, 4 and 5 at the same time.

7.140 As the United States notes, Section 727 is a measure related to the equivalence regime set up by the United States. In particular, Section 727 is an expression of the US Congress role in overseeing Executive Branch agencies. As noted above, we do not accept that Article 4 is *ipso facto* the only provision applicable to measures adopted in the context of an equivalence regime. In our view, a determination of what provisions of the *SPS Agreement* may apply to a given measure should be done on a case-by-case basis. Consequently, we will examine the particular features of Section 727 and

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[343] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, document G/SPS/19/rev. 2, dated 23 July 2004, para. 4.

[344] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, document G/SPS/19/rev. 2, dated 23 July 2004, para. 7.

[345] We note that typically, decisions of the SPS Committee indicate that they are not meant to affect the rights and obligations of the Members under the *SPS Agreement*. Such language is not present in this particular Decision.

[346] Specifically, Article 2.2 applies to "any measure", and Article 2.3 states that "their sanitary or phytosanitary measures", which suggests that no SPS measure is outside the scope of this provisions.

[347] Panel Report, *Japan – Apples*, para. 8.107.

determine whether the provisions cited by China, namely Articles 2 and 5 of the *SPS Agreement* are applicable to it.

7.141 The Panel notes that prior panels have discussed the scope of both Articles 2 and 5 by making a distinction between "substantive" SPS measures taken to achieve a Member's ALOP and "procedural requirements". In particular, the panel in *Australia – Salmon (Article 21.5 – Canada)*, made a distinction between risk reduction measures allegedly needed to achieve a WTO Member's ALOP, which it called "substantive SPS measures in their own right" and procedures or information requirements to check and ensure the fulfilment of sanitary measures that are subject to Annex C(1)(c) of the *SPS Agreement*.[348]

7.142 We note that Article 2 is entitled "Basic Rights and Obligations". The overarching and encompassing title of this Article, leads the Panel to conclude that the obligations in Article 2 inform all of the *SPS Agreement*. We find support for our understanding in the prior decisions of panels and the Appellate Body with respect to the relationship between Articles 2 and 5. In particular, the Appellate Body has explained that the obligations in Article 2 and Article 5 should be constantly read together. The Appellate Body stated that Article 2.2 informs and imparts meaning to Article 5.1, and that similarly, Article 2.3 informs Article 5.5.[349] Further, the panel in *Japan – Agricultural Products II* stated that the more specific language of Article 5.6 should be read in light of the more general language in the first requirement of Article 2.2.[350]

7.143 Article 2.2 provides that:

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

7.144 The panel in *EC – Approval and Marketing of Biotech Products* explained that Article 2.2 contains three separate requirements: (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) the requirement that SPS measures be based on scientific principles; and (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence.[351] We note that China's claim relates only to the third requirement of Article 2.2 of the *SPS Agreement*.[352] Therefore, the Panel will only focus on whether this third requirement, is applicable to Section 727. We recall that the text of Article 2.2 plainly states that it applies to "any" SPS measure. We, thus see nothing in the language of Article 2.2 that would somehow exempt an SPS measure from its scope. We have found that Section 727 is an SPS measure, regardless of whether it relates to equivalence. Accordingly, we conclude that the disciplines of Article 2.2 apply to Section 727 and China may pursue a claim on this basis.

7.145 The Panel now turns to Article 2.3. This provision provides that:

> "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members.

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[348] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.156.

[349] Appellate Body Report, *Australia – Salmon*, para. 130, Appellate Body Report, *EC – Hormones*, para. 250.

[350] Panel Report, *Japan – Agricultural Products II*, para. 8.71. This statement was endorsed by the Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1433.

[351] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1424.

[352] China's first written submission, paras. 144-147. China's opening oral statement at the first substantive meeting of the Panel, paras. 69-70.

> Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."

7.146 The United States argues that "it is unclear whether Article 2.3 is intended to apply to a procedural requirement, rather than a substantive SPS measure, and China has presented no explanation of how Article 2.3 would apply."[353] China contests this assertion by arguing that the text of Article 2.3 refers to SPS measures without distinguishing between different types or forms, and that all SPS measures are disciplined by Article 2.3.[354]

7.147 The text of Article 2.3 obliges Members to ensure non-discrimination in "their SPS measures" without making any distinction between possible types of SPS measures. Given that it embodies a non-discrimination obligation, the Panel sees no reason to conclude that Article 2.3 of the *SPS Agreement* would be inapplicable to procedural requirements as the United States argues. Indeed, both "substantive" SPS measures as well as procedural and information requirements can be applied in a manner which arbitrarily or unjustifiably discriminates between Members or constitutes a disguised restriction on international trade. We do not see why such arbitrary or unjustifiable discrimination or disguised restrictions on trade would be prohibited for one type of SPS measure and yet allowed for another. The broad wording of Article 2.3 of the *SPS Agreement* and the nature of the obligations it contains is bound to be applicable to all SPS measures. Because we have found that Section 727 is an SPS measure, regardless of whether it relates to equivalence, we conclude that the disciplines of Article 2.3 apply to Section 727 and China may pursue a claim on this basis.

7.148 With respect to China's claims under Article 5, we note that the panel in *EC – Approval and Marketing of Biotech Products* assessed the scope of Articles 5.1, 5.5, and 5.6 of the *SPS Agreement* and determined that that these provisions apply to measures aimed at achieving the relevant Member's ALOP.[355] The type of measure referred to by the panel in *EC – Approval and Marketing of Biotech Products* as being subject to Article 5 appears to be the same as the "substantive SPS measure in its own right" referred to by the panel in *Australia – Salmon (Article 21.5 – Canada)*. We find the reasoning of these prior panels to be persuasive and make it our own.[356]

7.149 Because the provisions in Article 5 cited by China apply to "substantive" SPS measures, we turn now to assess whether Section 727 is a "substantive" SPS measure which must comply with the obligations in Articles 5.1, 5.2, 5.5 and 5.6.

7.150 We recall the United States' argument that there is a risk to human and animal life and health from the importation of poultry products from China.[357] In its view, "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

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[353] United States' second written submission, para. 102, United States' comment to China's response to Panel question No. 99.

[354] China's opening oral statement at the second substantive meeting of the Panel, para. 24.

[355] Panel Report, *EC – Approval and Marketing of Biotech Products*. paras. 7.1388, 7.1402, 7.1416, 7.1433, 7.1439.

[356] We believe a close examination of the types of measures which satisfy the definition of an SPS measure in Annex A(1) supports our view that not all SPS measures are subject to the disciplines of Article 5 on risk assessment and determining the ALOP. For example, it would not make sense for a Member to be required to conduct a risk assessment, as defined in Annex A(4), for determining its risk assessment methodology (which is one of the identified types of SPS measures in the second part of Annex A(1)).

[357] United States' first written submission, para. 113.

history of food safety scandals and longstanding systemic issues with smuggling, corruption, and the inadequate enforcement of its food safety laws."[358]

7.151 The United States thus contends that Section 727 ensured that no Chinese poultry would be imported during 2009 by ensuring that equivalence rules for Chinese poultry would not be established and thus protect life and health.[359] The United States further argues that this is one of the ways in which Section 727 contributed to poultry products from China being considered "safe"[360], and it had already mentioned that "safe" was the ALOP enshrined in the PPIA.[361] In addition, the United States argues that Section 727 and its JES also contributed to the protection of life and health by ensuring that FSIS would take additional steps to evaluate China's food safety inspection system in light of its recent food safety crises, enforcement issues, and new food safety law.[362]

7.152 We note that the establishment and implementation of a rule by FSIS in the Federal Register allowing the importation of poultry products from a given country is a prerequisite for the importation of such products.[363] Without the establishment or implementation of this rule, countries are prohibited from importing poultry products to the United States.

7.153 Section 727 thus forbids the FSIS to use appropriated funds to "establish" or "implement" a rule allowing the importation of poultry products from China. This funding restriction, although not directly prohibiting the importation of Chinese poultry products, has the effect of prohibiting the importation of poultry products from China because without a rule being established / implemented, Chinese poultry products are banned from entering the US market.

7.154 It is through this ban, as well as the related activity that the USDA was urged to undertake, that Section 727 would be contributing to combating the risks highlighted by the United States. The United States has referred to certain risks that Chinese poultry might entail – contaminants and avian influenza – and the need to prevent them entering its territory through a prohibition on importation. The United States has sought to achieve its ALOP – poultry products in the market being safe – through a ban on the importation of Chinese poultry products. We therefore conclude that Section 727 is a "substantive SPS measure in its own right"[364] because it was enacted to achieve the United States' ALOP for poultry products from China.[365] Section 727 is therefore subject to the obligations under Articles 5.1, 5.2, .5.5, 5.6, 2.2 and 2.3 of the *SPS Agreement*.

7.155 Having concluded that China has raised claims regarding the consistency of Section 727 with provisions that are applicable to it, we thus proceed to examine the claims presented by China under the *SPS Agreement*.

E. ORDER OF ANALYSIS OF CHINA'S CLAIMS UNDER THE *SPS AGREEMENT*

7.156 The Panel notes that China has presented its claims under the *SPS Agreement* starting with the basic obligation in, Article 2.3 not to arbitrarily or unjustifiably discriminate between Members and Article 5.5 of the *SPS Agreement*, which prohibits distinctions in ALOPs that result in arbitrary or

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[358] United States' first written submission, para. 113.
[359] United States' response to Panel question No. 110.
[360] United States' response to Panel question No. 110.
[361] United States' second written submission, para. 57.
[362] United States' second written submission, paras. 17-30.
[363] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 12 (Exhibit CN-7), 9 CFR § 381.196(a)(1) and § 381.196 (b) (Exhibit CN-6).
[364] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.156.
[365] We recall the findings of the panel in *EC – Approval and Marketing of Biotech Products*. paras. 7.1388, 7.1402, 7.1416, 7.1433, 7.1439, where it found that measures adopted to achieve a Member's ALOP are subject to these provisions.

unjustifiable discrimination. Next, China focuses on the provisions requiring that SPS measures be based on scientific evidence: Articles 5.1, 5.2 and 2.2 of the *SPS Agreement*, and then moving to Article 5.6 of the *SPS Agreement*, which relates to the extent the measure is applied to achieve the ALOP. Finally, China concludes with the operation of control, inspection and approval procedures, in Article 8 of the *SPS Agreement*.

7.157 Although the *SPS Agreement* does not provide any guidance on a sequence for analysing its provisions, the Panel prefers to follow a different order of analysis to that chosen by China. In our view, it would be preferable to start the analysis by looking at whether Section 727 is based on scientific evidence, before examining how Section 727 is applied. Accordingly, we will start by analysing Articles 5.1, 5.2 and 2.2 of the *SPS Agreement*. We will commence with Article 5.1 and 5.2 because any inconsistency that the Panel finds with these provisions would by implication lead to a finding of inconsistency with Article 2.2 of the *SPS Agreement*.[366]

7.158 We will next examine whether Section 727 is inconsistent with the prohibition against arbitrarily or unjustifiable discrimination among Members in Article 2.3 and whether the application of different ALOPs in different, but comparable situations, results in arbitrary or unjustifiable discrimination that is inconsistent with Article 5.5 of the *SPS Agreement*. Similarly to the analysis of the relationship between Articles 2.2 and 5.1, the Appellate Body has found that Article 5.5 may be seen to mark out and elaborate a particular route leading to the same destination set out in Article 2.3. Therefore, a finding of a violation of Article 5.5 necessarily implies a violation of Article 2.3.[367]

7.159 In those disputes, the Appellate Body was faced with a situation where the discrimination resulting from distinctions in ALOPs was discrimination between Members. However, we note that Article 5.5 does not contain the phrase "between Members" and it is conceivable that a case could arise where the distinction in ALOPs in different situations was between products coming from the same Member. In such a case while an inconsistency with Article 5.5 could be established, there would be no discrimination between Members. Therefore, a violation of Article 2.3 would not necessarily follow.

7.160 In this dispute, China has presented two "different situations" for the purposes of analysis under Article 5.5. One of those "different situations" involves an allegation of discrimination between the same product, poultry, coming from different Members. Given that in cases of an allegation of discrimination between Members a violation of Article 5.5 necessarily implies a violation of Article 2.3, we will follow the practice of prior panels and begin with the more specific obligation in Article 5.5, before moving on to Article 2.3.

7.161 We will then consider whether Section 727 is more trade-restrictive than required pursuant to Article 5.6 of the *SPS Agreement*. Finally, we will analyse whether Section 727 is inconsistent with Article 8 by failing to observe the provisions of Annex C(1)(a) of the *SPS Agreement*.

F. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLES 2.2, 5.1 AND 5.2 OF THE *SPS AGREEMENT*

1. Arguments of the parties

7.162 **China** argues that Section 727 is not supported by a risk assessment and, therefore, it is inconsistent with Articles 2.2, 5.1 and 5.2 of the *SPS Agreement.* China notes that there is no indication in any publicly available documentation that Section 727 was enacted on the basis of

[366] Appellate Body Report, *Australia – Salmon*, para. 151.
[367] Appellate Body Report, *EC – Hormones*, para. 212; See also Appellate Body Report, *Australia – Salmon*, para. 252.

scientific evidence demonstrating that Chinese poultry products posed any specific health threat as required by Article 2.2, or on the basis of a risk assessment as required by Article 5.1 of the *SPS Agreement*.[368]

7.163 China submits that the legislative history of Section 727 does not indicate that there was any scientific evidence underpinning the provision sufficient to meet the standards of Article 2.2 of the *SPS Agreement*.[369] It points to the fact that the JES does not mention any specific health threat posed by Chinese products that Section 727 was meant to address. Further, that the JES does not provide an explanation why poultry products are targeted in order to address undefined concerns about contaminated foods in general.[370] In response to the evidence the United States proffered regarding China's food safety crises, China argues that the "newspaper stories and USDA reports alleging 'contamination' and food safety crisis in China" are not referenced by the JES, and that none of the evidence submitted by the United States indicates that there has been even one food safety crisis related to Chinese poultry.[371] China submits that newspaper stories and reports are irrelevant to the question of whether Section 727 was enacted on the basis of specific, scientific evidence related to Chinese poultry.

7.164 Further, China argues that the funding restriction would eventually impede the elaboration of a risk assessment because the FSIS' expert scientists were prohibited from investigating the risk by the very terms of Section 727.[372]

7.165 Finally, China notes that had the United States conducted a proper risk assessment, it would not have resulted in a total ban of Chinese poultry. It finds support for its contention in the FSIS 2004 and 2006 audit reports of China's poultry inspection system as part of its equivalency application which conclude that China's food safety regulatory system for poultry products achieves food safety results which are "equivalent" to those achieved under the United States system .[373]

7.166 As explained in Section VII.D above, the **United States** argues that Articles 2.2, 5.1 and 5.2 of the *SPS Agreement* do not apply to Section 727 because it is a procedural requirement adopted in the course of an equivalence determination.[374] In response to a question by the Panel, the United States argued that Section 727 was based on science and that it is intended to address food safety problems identified with respect to China and that there was a need to ensure that exports from China would be safe.[375]

2. Analysis by the Panel

(a) Relationship between Articles 2.2, 5.1 and 5.2 of the *SPS Agreement* – Order of analysis

7.167 We note that Articles 2.2, 5.1 and 5.2 of the *SPS Agreement* are provisions that deal with the scientific foundation of SPS measures. We note that the Appellate Body has ruled that Articles 2.2 and 5.1 of the *SPS Agreement* should "constantly be read together", because Article 5.1 of the *SPS Agreement* may be viewed as a specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*.[376] Therefore, according to the Appellate Body, Article 2.2 informs

[368] China's first written submission, para. 137, China's opening oral statement at the first substantive meeting of the Panel, para. 69.
[369] China's first written submission, para. 146.
[370] China's opening oral statement at the first substantive meeting of the Panel, para. 70.
[371] China's opening oral statement at the first substantive meeting of the Panel, para. 71.
[372] China's opening oral statement at the first substantive meeting of the Panel, para. 72.
[373] China's opening oral statement at the first substantive meeting of the Panel, para. 73.
[374] United States' second written submission, para. 101.
[375] United States' response to Panel question No. 114.
[376] Appellate Body Report, *EC – Hormones*, para. 180.

Article 5.1 and thus the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1.[377]

7.168 The Panel further notes that prior panels and the Appellate Body have reasoned that in the event that an SPS measure is not based on a risk assessment conducted according to the requirements in Article 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence.[378] Nonetheless, given the more general character of Article 2.2 of the *SPS Agreement* not all violations of Article 2.2 are covered by Article 5.1 and 5.2 of the *SPS Agreement*.[379]

7.169 Consistent with prior rulings of panels and the Appellate Body, the Panel will therefore begin its consideration of China's claims under Articles 2.2, 5.1 and 5.2 of the *SPS Agreement* by examining the two latter "more specific" provisions first.[380]

(b) Article 5.1 and 5.2 of the *SPS Agreement*

7.170 We note that Article 5.1 of the *SPS Agreement* enunciates the basic principle that SPS measures must be based on a risk assessment. This provision reads as follows:

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

7.171 Article 5.2 of the *SPS Agreement* further instructs WTO Members on how to conduct a risk assessment. Specifically, Article 5.2 states that:

> "In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine and other treatment."

7.172 The panel in *Japan – Apples* noted that Article 5.1 and 5.2 of the *SPS Agreement* "directly inform each other, in that paragraph 2 sheds light on the elements that are of relevance in the assessment of risks foreseen in paragraph 1".[381] Therefore, because Article 5.2 imparts meaning to the general obligation contained in paragraph 1 to base measures on an "assessment...of risks", we may also consider elements contained in Article 5.2 in the course of our analysis under Article 5.1.[382]

7.173 Accordingly, an analysis under Article 5.1 of the *SPS Agreement* would consist of answering two fundamental questions: first, was a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the elements listed in Article 5.2, conducted? Second, is the SPS measure based on that risk assessment?

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[377] Appellate Body Report, *EC – Hormones*, para. 250.

[378] Appellate Body Report, *Australia – Salmon*, para. 138; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; and Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3399.

[379] Panel Report, *Australia – Salmon*, para. 8.52. "Article 5.1 and 5.2 – in the words of the Appellate Body in *EC – Hormones* when dealing with the relationship between Articles 2.3 and 5.5 – 'may be seen to be marking out and elaborating a particular route leading to the same destination set out in' Article 2.2.

[380] Appellate Body Report, *Australia – Salmon*, para. 137.

[381] Panel Report, *Japan – Apples*, para. 8.230.

[382] Panel Report, *Japan – Apples*, para. 8.232.

7.174 In determining whether a measure is based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*, one needs to first determine whether a risk assessment was conducted at all. In order to do so it is helpful to start by looking into what a risk assessment is, in light of the definition in Annex A(4).

(i) The concept of risk assessment pursuant to Annex A(4) of the SPS Agreement

7.175 The concept of risk assessment is defined in Annex A(4) of the *SPS Agreement* as follows:

> "The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; *or* the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs." (Emphasis added).

7.176 Annex A(4) therefore provides for two different types of risk assessment depending on whether the imposing Member is analysing the "likelihood"of entry, establishment or spread of a pest or disease" or rather analysing "the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins, or disease-causing organisms in food, beverages or feedstuffs".

7.177 As noted in Section VII.C above, Section 727 satisfies the definition of an SPS measure under Annex A(1)(b) of the *SPS Agreement*. It would seem that SPS measures under Annex A(1)(a) and (c) would require risk assessments conducted pursuant to the definition under the first sentence of Annex A(4), while those which satisfy the definition of an SPS measure under Annex A(1)(b) would require that the risk assessment be conducted pursuant to the second sentence of Annex A(4).[383]

7.178 With respect to the second sentence of Annex A(4) of the *SPS Agreement*, the panels in *US/Canada – Continued Suspension* held that such a risk assessment required the imposing Member to: (i) identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs at issue (if any); (ii) identify any possible adverse effect on human or animal health; and (iii) evaluate the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[384]

7.179 We note that the Appellate Body has found that the requirement to conduct a risk assessment is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of

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[383] See Panel Report, *Canada – Continued Suspension*, para. 7.461. We note that the distinction between the two types of assessment is not merely academic. In *Australia – Salmon*, the Appellate Body further elaborated on the distinction between the two standards for risk assessment contained in Annex A(4) and the need for a substantive distinction between the evaluation of "likelihood" in the first sentence and the evaluation of "potential" in the second sentence. Specifically, the Appellate Body stated:

"We note that the first type of risk assessment in paragraph 4 of Annex A is substantially different from the second type of risk assessment contained in the same paragraph. While the second requires only the evaluation of the potential for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the likelihood of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences. In view of the very different language used in paragraph 4 of Annex A for the two types of risk assessment, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments..."

Appellate Body Report, *Australia – Salmon*, footnote 69.

[384] Panel Report, *Canada – Continued Suspension*, para. 7.479.

an SPS measure.[385] Rather the risk assessment must address the specific risk at issue.[386] We also note that, in *Japan – Apples*, the Appellate Body clarified that a risk assessment should refer in general to the harm concerned as well as to the precise agent that may possibly cause the harm.[387] More recently, in *US/Canada – Continued Suspension*, the Appellate Body also clarified that the risk assessment cannot be entirely isolated from the appropriate level of protection.

(ii) When is a measure "based" on a risk assessment?

7.180 The Appellate Body in *EC – Hormones* explained that "Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake."[388] In other words, there must be a "rational relationship" between the SPS measure and the risk assessment.[389] The Appellate Body went on to explain that this requirement is a substantive one.[390] However, the Appellate Body has clarified that while Article 5.1 requires that SPS measures be "based on" a risk assessment, this does not mean that the SPS measures have to "conform to" the risk assessment.[391]

7.181 Moreover, the risk assessment need not "come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure", nor does the risk assessment have to "embody only the view of a majority of the relevant scientific community."[392] While recognizing that, in most cases, WTO Members "tend to base their legislative and administrative measures on 'mainstream' scientific opinion", the Appellate Body has observed that, "[i]n other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources."[393] The Appellate Body added that an approach based on a divergent opinion from a qualified and respected source, "does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety."[394]

7.182 Finally, we note that the Appellate Body in *EC – Hormones* determined that "Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment

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[385] Appellate Body Report, *Japan – Apples*, para. 202.

[386] Appellate Body Report, *US/Canada – Continued Suspension*, para. 559. Specifically, in *EC – Hormones*, the Appellate Body concluded that a risk assessment in this instance required not a general evaluation of the carcinogenic potential of entire categories of hormones, but rather should include an examination of residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes. Appellate Body Report, *EC – Hormones*, para. 200.

[387] Appellate Body Report, *Japan – Apples*, para. 202. In a footnote, the Appellate Body explained:

"Indeed, we are of the view that, as a general matter, 'risk' cannot usually be understood only in terms of the disease or adverse effects that may result. Rather, an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause. For example, the abstract reference to the 'risk of cancer' has no significance, in and of itself, under the *SPS Agreement*, but when one refers to the 'risk of cancer from smoking cigarettes', the particular risk is given content."

Appellate Body Report, *Japan – Apples*, at footnote 372.

[388] Appellate Body Report, *EC – Hormones*, paras. 193-194.

[389] Appellate Body Report, *EC – Hormones*, para. 193.

[390] Appellate Body Report, *EC – Hormones*, para. 193.

[391] Appellate Body Report, *US/Canada – Continued Suspension*, para. 528.

[392] Appellate Body Report, *EC – Hormones*, para. 194.

[393] Appellate Body Report, *EC – Hormones*, para. 194.

[394] Appellate Body Report, *EC – Hormones*, para. 194.

… The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization".[395]

(c) Whether the United States has conducted a risk assessment and whether Section 727 is based on such a risk assessment

7.183 The Panel will therefore examine whether the United States has based Section 727 on a risk assessment.[396]

7.184 **China** argues that the evidence demonstrates that Section 727 is not based on any risk assessment that specifically addresses risks posed by poultry products from China, let alone one that meets the requirements of Article 5.1 and 5.2.[397] Additionally, China argues that the available evidence suggests that Section 727 would not be supported by the likely scientific conclusions of a risk assessment consistent with the requirements of the *SPS Agreement*.[398]

7.185 The **United States** does not dispute that no risk assessment was conducted. In fact, the United States has not presented any risk assessment to this Panel. The United States has merely responded to a question from the Panel that there was a scientific basis underlying Section 727 as required by Article 2.2 of the *SPS Agreement.*[399]

7.186 In the context of its defence under Article XX(b) of the GATT 1994, though, the United States does present some evidence with respect to increased health and safety concerns with respect to China.

7.187 In particular, the United States has argued, in the context of its defence under Article XX(b) of the GATT 1994, that 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, such as an Asian Development Bank Policy Note, and some United Nations bodies reports, where it was stated that enforcement in China of food control places an excessive reliance on end-product testing with very little use of auditing as an inspection tool.[400]

7.188 The United States also cites to a 2009 USDA report which elaborates on the problems with China's food safety system and cites some of the specific safety risks posed by imports from China[401] The USDA report indicates that China accounts for a disproportionate percentage of import refusals 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 labelling, and lack of proper manufacturer registrations." 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.[402] The United States contends that 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

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[395] Appellate Body Report, *EC – Hormones*, para. 190, *followed by* Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3024.

[396] We understand that it is not our role to conduct our own risk assessment based on scientific evidence gathered by us or submitted by the parties during the Panel proceedings. Panel Report, *EC – Hormones (Canada)*, para. 8.104; Panel Report, *EC – Hormones (US)*, para. 8.101. Likewise, we acknowledge that we are not to impose any scientific opinion on the United States. Panel Report, *Australia – Salmon*, para. 8.41.

[397] China's first written submission, para. 141.

[398] China's first written submission, para. 142.

[399] United States' response to Panel question No. 114.

[400] United States' first written submission, paras. 50-51.

[401] United States' first written submission, para. 52 *citing* Exhibit US-24.

[402] United States' first written submission, paras. 53-54 *citing* Exhibit US-24.

as corruption.[403] The United States stresses that numerous high-profile scandals have threatened the health of consumers and have led to bans on products from China.[404]

7.189 The United States has drawn our attention to some other incidents related to China's food safety problems that had a direct impact on the United States, including smuggled poultry from China which potentially put consumers at risk for avian influenza.[405]

7.190 The United States also presented China's Ministry of Health statement in a March 2009 news release that "China's food security situation remains grim, with high risks and contradictions".[406]

7.191 We recall that the Appellate Body has held that the risk assessment need not be conducted by the WTO Member imposing the SPS measure.[407] So the fact that some of the studies have not been carried out by United States authorities does not mean they cannot constitute the risk assessment. However, the United States has *not* contended that these various studies form the "risk assessment" upon which Section 727 is based. Because the United States has not presented any arguments or evidence to prove the existence of a risk assessment, we can only conclude that the United States has not based Section 727 on any risk assessment, whether conducted by its authorities or by any other entity.

7.192 Having examined the evidence presented by the parties, the Panel thus concludes that China has made a prima facie case that the United States has not conducted a risk assessment in respect of Section 727, within the terms of Articles 5.1, 5.2 and Annex A(4) of the *SPS Agreement*. The Panel further concludes that the United States has not rebutted the presumption of inconsistency. Therefore, the Panel finds that Section 727 is not based on a risk assessment and is therefore inconsistent with the obligations in Article 5.1 and 5.2 of the *SPS Agreement.*

(d) Whether Section 727 is based on scientific principles and is not maintained without sufficient scientific evidence as required by Article 2.2 of the *SPS Agreement*

(i) Arguments of the parties

7.193 **China** argues that Section 727 is not based on any scientific evidence let alone that which would be sufficient to meet the standards of Article 2.2 of the *SPS Agreement*.[408] Additionally, China argues that the legislative history of Section 727 does not indicate that there was any scientific evidence underpinning the provision nor does it mention any specific health threat posed by Chinese poultry products that Section 727 is meant to address.[409]

7.194 With respect to the United States' references, in its submission, to newspaper stories and USDA reports alleging "contamination" and China's food safety crises, China argues that none of this evidence is referenced in the JES, none describes any specific health threat posed by poultry products, and none indicates that there has been even one food safety crisis related to Chinese poultry. Thus, China concludes that for purposes of Articles 2.2 and Article 5.1 claims, these newspaper stories and

[403] United States' first written submission, para. 55 *citing* Exhibit US-25.
[404] United States' first written submission, para. 56.
[405] United States' first written submission, para. 57.
[406] United States' first written submission, para. 58.
[407] Appellate Body Report, *EC – Hormones*, para. 190, *followed by* Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3024.
[408] China's first written submission, paras. 144-147.
[409] China's opening oral statement at the first substantive meeting of the Panel, para. 70.

reports are irrelevant to the question of whether Section 727 was enacted on the basis of specific, scientific evidence related to Chinese poultry.[410]

7.195 The **United States** first argues that Section 727, which is not a substantive SPS measure designed to achieve the United States' ALOP, is not subject to the obligation in Article 2.2 to be based on scientific principles and not maintained without sufficient scientific evidence.[411] Additionally, the United States argues that China has failed to address another difficulty in attempting to apply Articles 2.2 and 5.1 to the measure at issue, namely, that the process of determining equivalence for an exporting Member's SPS measures is not the same as the process of performing a risk assessment of products imported from another Member. In particular, the United States notes that:

> "The determination that poultry products pose a risk of being unsafe, and therefore that measures are needed to protect against that risk, pre-dates Section 727 and applies regardless of origin (whether imported or domestically produced). Indeed, it is not contested in this dispute that imported poultry products can pose a risk of being unsafe."[412]

7.196 The United States argues that evidence of China's food safety crises and enforcement problems support Section 727, especially in light of the fact that FSIS's equivalence system places a large reliance on the exporting country to enforce its own laws to ensure that the food being exported is safe. The United States produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. The United States thus contends that it follows scientifically from that evidence that there was a need to take additional action to ensure that exports from China would be safe.[413]

(ii) Analysis by the Panel

7.197 We start our analysis by looking at the text of Article 2.2 of the *SPS Agreement* which reads as follows:

> "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."[414]

7.198 We note that Article 2.2 not only requires that measures be based on scientific principles, but that they not be maintained without sufficient scientific evidence, except as provided for in Article 5.7. The Appellate Body has interpreted the obligation in Article 2.2 to require that there be a rational or objective relationship between the SPS measure and the scientific evidence.[415]

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[410] China's opening oral statement at the first substantive meeting of the Panel, para. 71.

[411] United States' second written submission, paras. 98-99.

[412] United States' second written submission, para. 100.

[413] United States' response to Panel question No. 114, para. 236.

[414] Article 5.7 of the *SPS Agreement* provides for the provisional adoption of SPS measures on the basis of available pertinent information, where it is not possible to conduct a full risk assessment. If a Member imposes a measure pursuant to Article 5.7 it is required to seek to obtain additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time. We note in this respect that the United States has not invoked Article 5.7 as a justification for why it did not conduct a risk assessment prior to imposing the prohibition on the use of funds which prevented the FSIS from establishing or implementing a rule enabling the importation of processed poultry products from China into the United States.

[415] Appellate Body Report, *Japan – Agricultural Products II*, para. 84 upholding the Panel Report, *Japan – Agricultural Products II*, paras. 8.29 and 8.42.

Additionally, the panel in *Japan – Apples (Article 21.5 – US)*, noted that in order for scientific evidence to support a measure sufficiently, it seems logical to us that such scientific evidence must also be sufficient to demonstrate the existence of the risk which the measure is supposed to address.[416]

7.199 We also recall that the Appellate Body explained that Articles 3.3, 5.1 and 5.7 provide relevant context for understanding the extent of the obligation in Article 2.2 not to maintain a measure without sufficient scientific evidence.[417] We find relevant context in the reference in Article 3.3 to "scientific justification" which is defined in the footnote to that Article as "examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement." It is our understanding, pursuant to the Appellate Body's reasoning in *EC – Hormones*, that this language implies that "scientific justification" is of the nature of a risk assessment required under Article 5.1.[418] With respect to Article 5.7, which permits provisional measures when there is "insufficient scientific evidence", the Appellate Body has reasoned that the relevant scientific evidence will be considered "insufficient" for purposes of Article 5.7 "if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*."[419]

7.200 Given the foregoing, it is the Panel's view that for the United States to maintain Section 727 with sufficient scientific evidence, the scientific evidence must bear a rational relationship to the measure, be sufficient to demonstrate the existence of the risk which the measure is supposed to address, and be of the kind necessary for a risk assessment.[420]

7.201 As explained above, in paragraph 7.168, where an SPS measure is not based on a risk assessment as required in Article 5.1 and 5.2 of the *SPS Agreement*, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence.[421]

7.202 Additionally, with respect to the evidence the United States refers to, we note that while it deals generally with food safety issues in China, it does not specifically address China's poultry inspection system. We also note that the evidence does not address the existence of the risk which the measure is supposed to address.[422] The United States has produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. Apart from the FSIS reports in the framework of the equivalence proceedings, the United States has not submitted to the Panel any specific scientific justification, notably through a risk assessment carried out according to the principles and disciplines in Article 5 and paragraph 4 of Annex A of the *SPS Agreement*, concerning the risk posed by poultry products from China. We accept the United States' point that the general science on the safety of poultry products was well established prior to the imposition of Section 727. However, the evidence referred to by the United States does not establish the existence of a risk of consuming unsafe poultry from China. Therefore, the Panel finds that the evidence of food safety enforcement problems presented by the United States is not

[416] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.45.
[417] Appellate Body Report, *Japan – Agricultural Products*, paras. 74-80.
[418] Appellate Body Report, *EC – Hormones*, para. 175.
[419] Appellate Body Report, *Japan – Apples*, para. 179; Appellate Body Report, *US/Canada – Continued Suspension*, para. 674.
[420] The Panel notes that Article 5.2 of the *SPS Agreement* includes relevant scientific evidence as one of several factors Members are to take into account in their assessment of the risks.
[421] Appellate Body Report, *Australia – Salmon*, para. 138; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; and Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3399.
[422] We note that the evidence submitted by the United States on China's food safety enforcement issues does *not* concern the safety of Chinese poultry products. The evidence presented by the United States rather refers to other food products such as seafood or pork.

"sufficient" within the meaning of Article 2.2.[423] The Panel thus concludes that Section 727 was maintained without sufficient scientific evidence in contravention of the obligation in Article 2.2 of the *SPS Agreement*.

7.203 Hence, having found that Section 727 is not based on a risk assessment in violation of Article 5.1 and 5.2 of the *SPS Agreement*, and further, finding that the United States has not maintained Section 727 with sufficient scientific evidence, the Panel finds that Section 727 is not consistent with Article 2.2 of the *SPS Agreement*.

(e) Conclusion

7.204 In the absence of a risk assessment, the Panel finds that the Section 727 is inconsistent with Article 5.1 and 5.2 of the *SPS Agreement* because it is not based on a risk assessment which took into account the factors set forth in Article 5.2. Additionally, the Panel finds that Section 727 is inconsistent with Article 2.2 of the *SPS Agreement* because it was maintained without sufficient scientific evidence.

G. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE 5.5 OF THE *SPS AGREEMENT*

1. Arguments of the parties

7.205 Relying on the Appellate Body Report in *EC – Hormones*, **China** claims that Section 727 is inconsistent with Article 5.5 of the *SPS Agreement* because the United States applies different ALOPs to comparable situations, the application of such different ALOPs is arbitrary and the distinction in ALOPs leads to discrimination.[424]

7.206 In particular, China claims that Section 727 resulted in distinctions in levels of protection "in different but comparable situations" because the United States imposes a different and stricter ALOP to Chinese poultry products compared to other WTO Members' poultry or to Chinese non-poultry food products which share a common risk of potential contaminants, namely Salmonella, Campylobacter and Listeria. China also refers to E. coli and Highly Pathogenic Avian Influenza (HPAI) virus.[425]

7.207 With respect to the comparison of Chinese poultry to poultry from other WTO Members, China argues that it is one of just ten WTO Members that have obtained FSIS authorization to export poultry to the United States. However, it contends that, under Section 727, its poultry products are, in effect, treated as more dangerous than those originating in Members that have never obtained an equivalence determination from the FSIS. China thus argues that, regardless of the possibility of improving its food safety system for poultry, China is prevented by Section 727 from having such authorization considered, granted or implemented.[426]

7.208 With respect to the comparison of Chinese poultry to other food products from China, China notes that neither the text nor the legislative history of Section 727, nor FSIS documentation asserts or

[423] The Panel is not, however, saying that evidence of the type adduced by the United States could not be considered in an adequate assessment of the risks. Indeed, we recall that the Appellate Body has explained that evidence of risk is not limited to that which is susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, but also includes "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die." Appellate Body Report, *EC – Hormones*, para. 187.

[424] China's comment to the United States' response to Panel question No. 121.

[425] China's opening oral statement at the second substantive meeting of the Panel para.36-37, China's response to Panel question No. 123.

[426] China's first written submission, para. 131.

otherwise provides contemporaneous evidence that *poultry* is more likely to be "contaminated" than other types of food products.[427] China asserts that these contaminants are within the meaning of footnote 4 and are not unique to China as well as not only found in poultry products.[428]

7.209 Moreover, China agrees with the United States that its ALOP for poultry is normally expressed by Section 466(a) of the PPIA[429] of which the implementing regulations are the FSIS procedures.[430] However, China submits that Section 727 is legally distinct from the PPIA since it targets only China. China further claims that Section 727 constitutes "less than zero risk" tolerance which eliminates any opportunity for only China to export its poultry to the United States even if Chinese poultry had been scientifically confirmed to meet the United States' ALOP.[431] While on the other hand, the ALOP for all other WTO Members' poultry provided in the FSIS procedures or non-poultry food products provided in FDA import procedures tolerates some risk as long as the WTO Members' inspection system has been deemed equivalent to the US system.[432] Therefore, China concludes that the ALOP applied to Chinese poultry is thus "different" from – and much stricter than – the ALOP normally applied by the United States for imported poultry.[433]

7.210 In response to questions from the Panel, China admitted that the relevant point of analysis is not whether the FDA measures that are applied to non-poultry products are "different" from the FSIS procedures applied to poultry products but rather whether the difference in ALOPs is arbitrary. According to China, the United States has violated Article 5.5 by applying a different and much stricter ALOP to Chinese poultry (compared to poultry from other countries, or compared to other non-poultry Chinese products) which share common risk of potential contamination[434] without scientific or other justification.[435] China argues that Section 727 was not necessary to ensure the compliance with the US ALOP because Section 727 prevents the only US Government employees capable of evaluating the safety of Chinese poultry products by means of budget restriction from conducting scientific audits, investigations and rule making in and for China.[436]

7.211 China further argues that the distinction in ALOPs is arbitrary.[437] China submits that there is no legitimate justification why the FSIS procedures cannot be applied to China to determine whether its poultry products may be exported to the United States. China contends that given the absence of any scientific evidence or risk assessment, the United States has provided no publicly available justification for applying such a disparate level of sanitary protection to China.

7.212 China argues that, by forbidding the consideration, granting or implementation of authorization for Chinese poultry products, while offering the possibility to every other WTO Member to seek and obtain FSIS authorization to export poultry products to the United States, Section 727 discriminates against China.[438] China further argues that the distinction in ALOPs leads to discrimination because Section 727 blocks the importation of only Chinese poultry while other Chinese food products posing the same health risks may be imported.[439]

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[427] China's opening oral statement at the first substantive meeting of the Panel, para. 55.
[428] China's response to Panel question No. 123.
[429] China refers to 21 USC §466 which is where the PPIA is codified.
[430] China's response to Panel question No. 116.
[431] China's response to Panel question No. 116.
[432] China's responses to Panel questions Nos. 117 and 124.
[433] China's response to Panel question No. 116.
[434] China's response to Panel question No. 123.
[435] China's response to Panel question No. 123.
[436] China's comment to the United States' response to Panel question No. 121.
[437] China's first written submission, para. 132.
[438] China's first written submission, para. 121.
[439] China's comment to the United States' response to Panel question No. 121.

7.213 The **United States** contends that, for both situations, China has not demonstrated a difference in the ALOPs applied. The United States submits that there is only one ALOP and thus there is no distinction in its ALOP for poultry from China as opposed to that of the United States or other WTO Members.[440] Moreover, the United States argues that Section 727 does not impose an "import ban" or preclude a finding of equivalence on Chinese poultry; rather it is just a procedural measure meant to ensure that China's food safety problems are fully considered in the process of determining equivalence due to the heightened risk posed by Chinese poultry.[441] The United States explains that the FSIS operates under an equivalence regime while the FDA relies on "import alerts" and more rigorous border measures so such a comparison is inappropriate.[442]

7.214 With respect to China's comparison of Chinese poultry to other food products from China, the United States asserts that China has not established that the types of risks addressed by the PPIA are the same as the risks associated with other types of food products and that poultry has a different ALOP than other food products.[443]

7.215 The United States further argues that China has not put forward an argument showing that the alleged distinction in ALOPs results in international trade discrimination and that China has not established that any distinction in ALOPs is arbitrary or unjustifiable.[444]

7.216 The United States points out that China's food safety enforcement problems and food safety crises have been the subject of reports and articles by numerous well-regarded international organizations (including the WHO) and academics.[445] Moreover, to justify whether there was discrimination in an arbitrary and unjustifiable manner between China and other WTO Members because of Section 727, the United States contends that China's proposed situations are not comparable to other WTO Members. This is because the United States argues, first, most Members have never attempted to export poultry products to United States; second, many of the equivalent WTO Members have been exporting to the United States for many years without any significant incident resulting in confidence and familiarity with their inspection system including their ability to resolve any problems that may arise such as in the case of Mexico.[446]

2. Analysis by the Panel

7.217 We are therefore called upon to examine whether Section 727 is inconsistent with Article 5.5 of the *SPS Agreement*. We shall start by looking at the text of Article 5.5 of the *SPS Agreement* and how it has been interpreted by previous panels and the Appellate Body.

(a) Article 5.5 of the *SPS Agreement*

7.218 Article 5.5 of the *SPS Agreement* embodies a non-discrimination principle in respect of the application of the appropriate level of sanitary or phytosanitary protection ("ALOP"). This provision reads as follows:

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[440] United States' response to Panel question No. 120.

[441] United States' comment to China's response to Panel question No. 116 and United States' response to Panel question No. 118.

[442] United States' comment to China's response to Panel question No. 124.

[443] United States' response to Panel question No. 121.

[444] China's comment to the United States' response to Panel question No. 121.

[445] United States' opening oral statement at the second substantive meeting of the Panel, paras. 39 and 42.

[446] United States' opening oral statement at the second substantive meeting of the Panel, paras. 43-44 and 48.

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

7.219 Annex A(5) further defines the concept of ALOP as "the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".

7.220 We note that the Appellate Body has explained that there is an implicit obligation for Members to determine their ALOP.[447] Although it need not be determined in quantitative terms, the ALOP cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement* ... becomes impossible".[448] Precisely, the Appellate Body has ruled that if a Member fails to determine its ALOP, or does so with insufficient precision, then the ALOP "may be established by [the panel] on the basis of the level of protection reflected in the SPS measure actually applied."[449]

7.221 The Appellate Body in *EC – Hormones* identified three conditions that must *all* be satisfied in order to establish a violation of Article 5.5 of the *SPS Agreement*, which are that: (i) the Member has set different levels of protection in "different situations"; (ii) the levels of protection show "arbitrary or unjustifiable" differences in their treatment of different situations; and (iii) these arbitrary or unjustifiable differences lead to "discrimination or disguised restrictions" on trade.[450]

7.222 Additionally, we note that the panel in *EC – Hormones* held that "in order to give effect to all three elements contained in Article 5.5 and giving full meaning to the text and context of this provision, we consider that all three elements need to be distinguished and addressed separately."[451] We also note that the panel on *Australia – Salmon (Article 21.5 – Canada)* held that the complainant "bears the burden of demonstrating that the comparisons it refers to meet all three elements under Article 5.5."[452]

7.223 The Panel must therefore determine whether China has met its burden of proof with respect to its claim of violation of Article 5.5 of the *SPS Agreement*. Our first step will be to ascertain whether China has presented any such comparisons to demonstrate that the three elements of Article 5.5 are met. In this respect, we note that China has presented two possible comparisons: (i) a comparison of Chinese poultry *vis-à-vis* poultry from other WTO Members and (ii) a comparison of Chinese poultry *vis-à-vis other* Chinese food products.

7.224 We will address whether each of the three elements are satisfied for each of the comparisons China refers to, in turn.

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[447] Appellate Body Report, *Australia – Salmon*, para. 206.
[448] Appellate Body Report, *Australia – Salmon*, para. 206.
[449] Appellate Body Report, *Australia – Salmon*, para. 207.
[450] Appellate Body Report, *EC – Hormones*, paras. 214-215.
[451] Panel Report, *EC – Hormones (Canada)*, para. 8.187.
[452] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.88.

(b) The importation of Chinese poultry products *vis-à-vis* that of poultry products from other WTO Members

(i) Whether Section 727 results in distinctions in ALOPS in different yet comparable situations

7.225 As we explained above, the Appellate Body has identified the first of the three elements to be assessed under Article 5.5 of the *SPS Agreement* as "the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations."[453] Thus, the first element of Article 5.5 appears to have two, closely related aspects: (1) the existence of different situations; and (2) and the existence of different ALOPs in such situations.

7.226 The Appellate Body, in *EC—Hormones*, noted that, although the situations must be "different", the situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable.[454] According to the Appellate Body, if the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in ALOP cannot be examined for arbitrariness. [455]

7.227 We note that several panels have addressed the question of what constitutes "common elements" or "elements sufficient to render" the different situations comparable. The panel in *EC – Hormones*, for example, considered that for the purposes of its dispute, which dealt with an SPS measure to protect human health from contaminants in food, "different" yet comparable situations in the sense of Article 5.5 were those where the same substance or the same adverse health effect is involved.[456]

7.228 With respect to an SPS measure imposed to protect plant or animal life or health from pests or disease, the Appellate Body in *Australia – Salmon* held that a "common element" can be "*either* a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar associated potential biological and economic consequences.[457]

7.229 We shall therefore examine whether poultry products from China and poultry products from other WTO Members are such "different situations" that are comparable. If we conclude in the affirmative, we will then examine whether the United States has made distinctions in ALOPs in that "different situation".

Whether different yet comparable situations exist

7.230 The Panel therefore needs to decide whether we agree with China that the importation of Chinese poultry products and that of poultry products from other WTO Members are two different but comparable situations within the meaning of Article 5.5 of the *SPS Agreement*.

7.231 **China** argues that the establishment or implementation of a rule allowing importation cannot occur while the funding restriction remains in place, whereas other WTO Members may (if their

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[453] Appellate Body Report, *EC – Hormones*, paras. 214-218; see also Appellate Body Report, *Australia – Salmon*, paras. 140, 143 *citing* Panel Report, *Australia – Salmon*, para. 8.108.

[454] Appellate Body Report, *EC – Hormones*, para. 217.

[455] Appellate Body Report, *EC – Hormones*, para. 217.

[456] Panel Report, *EC – Hormones*, para. 8.176 also referenced in Appellate Body Report, *EC – Hormones*, para. 217.

[457] Appellate Body Report, *Australia – Salmon*, para. 146 (emphasis in original); *confirmed by* Document G/SPS/15, Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 5.5, 18 July 2000, para. A.2.

regimes are deemed equivalent by FSIS) have a rule established and implemented allowing imports of poultry products into the United States from those Members. Therefore, according to China, poultry products from China, which are subject to Section 727, is a "different situation" within the meaning of Article 5.5 of the *SPS Agreement* to poultry products from other WTO members, who have access to the regular FSIS procedures. In respect to the United States' position that there are no different situations since the ALOP is the same, China disagrees with the United States' narrow interpretation of "different situations" by quoting the Appellate Body decision in *Australia – Salmon* stating different situations may be compared if they have just one risk factor in common.[458]

7.232 The **United States** argues that there is no distinction in its ALOP for poultry from China as opposed to that of the United States or other WTO Members and therefore there is no "different situation".[459]

7.233 We recall that Section 727 specifically provides that "[n]one of the funds made available in this Act may be used to establish or implement a rule allowing *poultry products to be imported into the United States from the People's Republic of China*" (emphasis added). It is thus clear that the funding restriction imposed through Section 727 applies *only* to poultry products from China, and not to poultry products from other WTO Members. Hence, the funding restriction in Section 727 results in a differentiation being made between the measure applied to poultry products from China, i.e. Section 727, *vis-à-vis* the measures applied to poultry products from other WTO Members, i.e. FSIS procedures. We therefore agree with China that the importation of Chinese poultry products and that of poultry products of other WTO Members qualify as different situations.

7.234 In addition to being different, though, we recall that the Appellate Body has called for the situations to be comparable. In this respect, China identifies the common element between its "different" situations as the risk of the same contaminants being present in the poultry.[460] To that end, China references some of the pathogenic bacteria noted by the United States in its defence under Article XX(b) of the GATT 1994, most notably Salmonella, Campylobacter and Listeria.[461] Based on China's answers to our questions[462], we understand that China believes that the purpose of Section 727 is to protect human health from contaminants in food as defined by Annex A(1)(b).

7.235 We note that the crux of the United States' arguments seems to be that Section 727 is a supplement to the PPIA and is meant to further its goals of ensuring that poultry is wholesome, unadulterated, and fit for human consumption. We further note that the three pathogenic bacteria identified by China are not only identified by the United States as a concern with respect to Chinese

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[458] China's comment to the United States' response to Panel question No. 120.

[459] United States' response to Panel question No. 120.

[460] China's response to Panel question No. 47.

[461] During the second substantive meeting, the Panel asked China whether what China had identified as the common element – *Salmonella*, *Campylobacter*, and *Listeria*, would not rather be "disease causing organisms", which are also addressed by the definition of SPS measures in Annex A(1)(b), instead of "contaminants", as defined in footnote 4. This footnote provides that "'contaminants' include pesticide and veterinary drug residues and extraneous matter." China explained to the Panel that its argument is that *Salmonella*, *Campylobacter*, and *Listeria* are pathogenic bacteria that can be considered as "extraneous matter" within the scope of the definition of contaminants under footnote 4. For China, "extraneous" means "of external origin, introduced or added from without; foreign to the object to which it is attached or which contains it". China, nevertheless, argued that, in the alternative, pathogenic bacteria may also be considered as disease-causing organism. See China's response to Panel question No. 123.

Because both "disease causing organisms" and "contaminants" are addressed in the definition of SPS measures in Annex A(1)(b), the Panel accepts that China has identified as a common element the risk of *Salmonella*, *Campylobacter*, and *Listeria* being present in the poultry, irrespective of their classification as contaminants or disease-causing organisms.

[462] China's response to Panel questions Nos. 42(d) and 43.

poultry products, but are also identified as a basis for the implementation of the PPIA regime as a whole.

7.236 We therefore agree that the risk of Salmonella, Campylobacter and Listeria being present in respect to both the poultry products from China and those from other WTO Members makes the different situations – the importation of poultry products from China *vis-à-vis* that of poultry products from other WTO Members – comparable for the purposes of Article 5.5 of the *SPS Agreement*.[463]

7.237 The Panel therefore concludes that the importation of Chinese poultry products is a different yet comparable situation to that of poultry products from other WTO Members. Having made this conclusion, and as explained by the Appellate Body in *EC – Hormones*, the Panel now turns to consider whether the United States has applied distinctions in ALOPs in these two different yet comparable situations.

Whether distinctions in ALOPs exist

7.238 The second aspect of the first element of Article 5.5 of the *SPS Agreement* thus refers to the existence of different ALOPs being applied in different but comparable situations.

7.239 We note that the Appellate Body in *EC – Hormones*, stated that "[c]learly, comparison of *several* levels of sanitary protection deemed appropriate by a Member is necessary if a panel's inquiry under Article 5.5 is to proceed at all."[464] The Appellate Body also referred to "situations exhibiting *differing levels of protection*."[465] Finally, the panel in *Australia – Salmon* reasoned that a substantial difference in the measures applied could reflect a distinction in the ALOPs applied in two different but comparable situations.[466]

7.240 We recall that **China** claims that Section 727 constitutes "less than zero risk" tolerance which eliminates any opportunity for only China to export its poultry products to the United States, even if Chinese poultry had been scientifically confirmed to meet the United States' ALOP.[467] While on the other hand, the ALOP for all other WTO Members' poultry provided in the FSIS procedures tolerates some risk as long as the specific WTO Member's inspection system has been deemed equivalent to the US system.[468] Therefore, China concludes that the ALOP applied to Chinese poultry is thus "different" from – and much stricter than – the ALOP normally applied by the United States for imported poultry.[469] China submits that Section 727 was not necessary to ensure the compliance with the United States' ALOP since Section 727 prevents the only US Government employees capable of

[463] Additionally, the Panel takes note that China has made significant arguments with respect to Avian Influenza without specifically identifying it as one of the "common elements" which may render different situations comparable or by alleging that Section 727 satisfies the definitions of an SPS measure set forth in Annex A(1)(a) or (c) (China's opening oral statement at the second substantive meeting of the Panel paras. 36-37, China's response to Panel question No. 123, paras. 90 and 93). China has therefore not specifically identified how the two situations – the importation of poultry products from China *vis-à-vis* that of poultry products from other WTO Members – involve a risk of entry, establishment or spread of the same or a similar disease, or a risk of the same or similar associated potential biological and economic consequences, as would be required for an SPS measure consistent with the definition in Annex A(1)(a) or (c). Therefore, the Panel is not taking into account China's arguments on this point in its analysis of whether the mentioned different situations are comparable.

[464] Appellate Body Report, *EC – Hormones*, para. 217.

[465] Appellate Body Report, *EC – Hormones*, paras. 215 and 217.

[466] Panel Report, *Australia – Salmon*, paras. 8.123-8.124, 8.129.

[467] China's response to Panel question No. 116.

[468] China's response to Panel question No. 117.

[469] China's response to Panel question No. 116.

evaluating the safety of Chinese poultry products by means of budget restriction from conducting scientific audits, investigations and rule making in and for China.[470]

7.241 The **United States** disagrees and argues that China is confusing the ALOP with the measures applied and that the PPIA sets the same ALOP for all poultry; it is just that the ALOP for poultry is achieved through a different mechanism, Section 727, with respect to China.[471] The United States submits that Section 727 does not impose an "import ban" or preclude a finding of equivalence on Chinese poultry; rather it is a procedural measure meant to ensure that China's food safety problems are fully considered in the process of determining equivalence due to the heightened risk posed by Chinese poultry.[472]

7.242 We therefore need to asses whether the United States is applying a different ALOP to imports of poultry products from China than the ALOP it applies to imports of poultry products from other WTO Members. In this respect, the United States has identified a single ALOP for all poultry products as set forth in Section 466 of the PPIA as follows:

> "The PPIA contains a more specific definition with regard to slaughtered poultry, which states that 'no slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, un wholesome, adulterated, or unfit for human food.' PPIA, Sec. 466 (Exhibit CN-04)."[473]

7.243 The essence of the United States' requirement is that all poultry products must be "safe".[474] China agrees with the United States that its ALOP for poultry is normally expressed by Section 466 of the PPIA of which implementing regulations are the FSIS procedures[475] but argues that Section 727 is legally distinct from the PPIA because it targets only China.

7.244 The Panel recognizes that the United States is free to decide its own ALOP and thus accepts that the United States' ALOP for poultry, in general, is embodied in Section 466 of the PPIA. This however does not mean that we will not examine whether the ALOP actually being applied by the United States to poultry products from China differs from that in the PPIA. We note that the Appellate Body in *Australia – Salmon* explained that a panel may deduce an unexpressed ALOP from the measure being applied.[476] In our view, even in a case where a Member has expressed a particular ALOP, a panel should nevertheless examine the measure in question to determine whether that ALOP is the one actually being applied via that measure. To ignore the measure and rely solely on a Member's declared ALOP could permit a Member to evade the disciplines of Article 5.5 by simply declaring one generic ALOP for all SPS-related matters.[477]

7.245 The United States correctly notes that the panel in *Australia – Salmon* concluded that the application of different measures does not necessarily mean that there is an application of different

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[470] China's comment to the United States' response to Panel question No. 118.
[471] United States' response to Panel question No. 49.
[472] United States' comment to China's response to Panel question No. 116 and United States' response to Panel question No. 118.
[473] United States' second written submission, footnote 59.
[474] United States' second written submission, para. 62.
[475] China's response to Panel question No. 16.
[476] Appellate Body Report, *Australia – Salmon*, para. 207.
[477] We do not mean to infer that the United States has attempted to hide behind a generic ALOP in this case. However, we believe that we cannot ignore Section 727 in our analysis of what ALOP is being achieved through the measure itself.

ALOPs.[478] However, the United States cannot expect the Panel to completely divorce the determination of whether different ALOPs are being applied from the measures adopted. As noted above, substantial differences in the SPS measures applicable in different yet comparable situations may demonstrate that the ALOPs are different.[479]

7.246 We will therefore assess whether we can deduce from the measures applied – Section 727 *vis-à-vis* FSIS procedures – different ALOPs for poultry products from China and poultry products from other WTO Members. To that end, the Panel will determine whether the differences in those measures are substantial.

7.247 Through the PPIA, the United States prohibits the importation of poultry from any WTO Member who cannot affirmatively demonstrate that its internal SPS measures result in the equivalent ALOP applied to domestic US poultry, i.e. the ALOP expressed in the quotation from Section 466 of the PPIA above. Through Section 727, the US Congress prohibited the FSIS from establishing or implementing a rule allowing the importation of poultry from China because it had concluded that the poultry was not "safe" within the meaning set forth in the PPIA. Therefore, it could be concluded that the same ALOP is applied in both measures.

7.248 However, while both measures – Section 727 *vis-à-vis* the FSIS procedures – result in a prohibition on the importation of poultry products that the United States fears may be "unsafe", Section 727 prohibits not only the importation of allegedly "unsafe" poultry, it also prohibits one branch of the US Government establishing or implementing a rule permitting the importation of poultry products from China. Such a prohibition is not applied to any other WTO Member. China argues that it is this prohibition which demonstrates that a different ALOP is applied to its poultry products. For China, the FSIS procedures allow for some minimal and inherent risk that contaminated poultry could enter the United States[480] and it compares this acceptance of some risk with Section 727's prohibition on China obtaining FSIS approval to export poultry to the United States. China argues that pursuant to Section 727, "[e]ven if China's food safety regime could guarantee 100% safety for all Chinese poultry, Section 727 would still prevent China from obtaining FSIS approval to export poultry to the United States."[481]

7.249 We acknowledge that an import ban does not necessarily reflect a different ALOP than an equivalence regime, as even an import ban accepts some minimal and inherent risk that contaminated poultry could enter the United States. However, we do note that the panel in *Australia – Salmon* found that an import ban for salmon was substantially different from permitting the importation of ornamental fish after control and therefore reflected a difference in the levels of protection considered

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[478] In particular, the panel in *Australia – Salmon* concluded that:

"[T]he level of protection achieved by a specific sanitary measure will also depend on the degree of risk against which that measure is intended to protect. In that sense,… imposing the same sanitary measure for different situations does not necessarily result in the same level of protection. Indeed, in many situations (e.g., situations representing different risks) the same sanitary measure might result in different levels of protection. On the other hand, different sanitary measures for different situations might ensure the same level of protection. Indeed, one given situation might only represent a small risk for which a lenient sanitary measure will achieve a high level of protection, whereas another situation might pose very high risks requiring a very strict and different sanitary measure in order to meet that same high level of protection."

Panel Report, *Australia – Salmon*, para. 8.123.

[479] Panel Report, *Australia – Salmon*, para. 8.129; See also Appellate Body Report, *Australia – Salmon*, para. 232.

[480] Specifically, China argues that "although the FSIS procedures are extensive, their application nevertheless involves some minimal and inherent risk that contaminated poultry could enter the United States. This is because, even if a country has been deemed equivalent, there is some minimal risk that it could export unsafe poultry to the United States." China's response to Panel question No. 48.

[481] China's response to Panel question No. 48.

to be appropriate in the sense of the first element of Article 5.5.[482] We find similarities in the present dispute to the one examined by the panel in *Australia – Salmon.* The regular FSIS procedures prohibit importation of poultry products from a particular country only until that country has demonstrated that its SPS measures can achieve the ALOP expressed in the PPIA. However, the effect of Section 727 was to prohibit the importation of poultry from China in any instance, regardless of whether China demonstrated that its own SPS measures could achieve the ALOP expressed in the PPIA. The absolute import ban imposed by Section 727 reflects an ALOP substantially different from the conditional import ban under the regular FSIS procedures, because the regular FSIS procedures at least allow an avenue for an exporting Member to gain access to the United States market, which is not available in any case for Chinese poultry products.

7.250 We agree with the panel in *Australia – Salmon* that the determination of the ALOP is not dependent on the performance of a risk assessment.[483] However, the Panel is of the view that to prove that such substantially different measures were needed to achieve the same ALOP, the United States would have to demonstrate that poultry products from China presented a greater risk than poultry products from other WTO Members.

7.251 The United States attempts to meet its burden by pointing out that no other WTO Members with the same systemic issues with respect to food safety were as far along in the equivalency process as China. Therefore, according to the United States, the measures applied to China were necessary to achieve the ALOP set forth in the PPIA that poultry imports be "safe". The United States seems to leave open the option that if the FSIS was about to establish or implement a rule permitting another country with the same systemic issues exhibited in China to import poultry products, the US Congress would have contemplated similar action. However, the Panel considers this to be a purely speculative argument.

7.252 To counter this premise, China notes that Mexico had similar systemic problems yet the US Congress did not step in and order the FSIS to suspend Mexico's equivalency status or deny funding for the regular annual equivalency audits necessary to maintain Mexico's status as eligible to export to the United States.[484]

7.253 In our view, as the panel in *Australia – Salmon* reasoned, a substantial difference in the measures applied such as, in this case, Section 727 *versus* standard FSIS procedures, do reflect a distinction in the ALOPs applied in two different but comparable situations; i.e. the importation of poultry products from China and that of poultry products from other WTO Members.[485] We therefore find that the standard FSIS procedures are so substantially different from Section 727 such that they reflect a distinction in ALOPs.

Conclusion

7.254 Having found that the importation of poultry products from China and that of poultry products from other WTO Members are different yet comparable situations and that the United States is applying different ALOPs to such situations, we conclude that the first element of Article 5.5 of the *SPS Agreement* is satisfied, with respect to this comparison. Therefore, we will proceed with our analysis of whether the distinction in ALOPs is arbitrary or unjustifiable.

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[482] Panel Report, *Australia – Salmon*, para. 8.129; See also Appellate Body Report, *Australia – Salmon*, para. 232.

[483] Panel Report, *Australia – Salmon*, paras. 8.125-8.126.

[484] China's response to Panel question No. 48.

[485] Panel Report, *Australia – Salmon*, paras. 8.123-8.124 and 8.129.

(ii) Arbitrary or unjustifiable differences in ALOPs

7.255 We recall that the second element of Article 5.5 involves the consideration of whether there is an "arbitrary or unjustifiable" distinction between the relevant ALOPs.[486]

7.256 In this respect, **China** argues that it is one of just ten WTO Members that have obtained the FSIS authorization to export poultry to the United States. However, it contends, under Section 727, its poultry products are, in effect, treated as more dangerous than those originating in WTO Members that have never obtained an equivalence determination from the FSIS. Regardless of the possibility of China improving its food safety system for poultry, it says, it is prevented by Section 727 from having such authorization considered, granted or implemented.[487] China further argues that there is no legitimate justification why the FSIS procedures cannot be applied to China to determine whether its poultry products may be exported to the United States and thus, the distinction in levels of sanitary protection is arbitrary and unjustifiable.[488]

7.257 The **United States** responds that China has not established that any distinction in ALOPs is arbitrary or unjustifiable.[489] The United States points out that China's food safety enforcement problems and food safety crises have been the subject of reports and articles by numerous well-regarded international organizations (including WHO) and academicians.[490] Moreover, to justify whether there was discrimination between China and other WTO Members because of Section 727 in an arbitrary and unjustifiable manner, the United States contends that China's proposed situations are not comparable to other WTO Members. This is because, in its view, first, most Members have never attempted to export poultry products to United States; and second, many of the equivalent WTO Members had been exporting to the United States for many years without a significant incident resulting in confidence and familiarity with their inspection system. This includes the ability to resolve any problems that may arise, such as in the case of Mexico.[491]

7.258 The Panel will therefore need to assess whether there is an arbitrary or unjustifiable distinction between the ALOPs that the United States applies to poultry products from China, on the one hand, and poultry products from other WTO Members, on the other.

7.259 In examining the terms "arbitrary or unjustifiable", we recall the customary rules of interpretation set out in the VCLT. Article 31 of the VCLT prescribes that a treaty has to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The starting point for determining the ordinary meaning of the terms is, of course, the dictionary. A dictionary definition of the term "arbitrary" is "based on mere opinion or preference as opp. to the real nature of things, capricious, unpredictable, inconsistent."[492] In turn, the term "unjustifiable" is defined as "not justifiable, indefensible", with "justifiable" meaning "[c]apable of being legally or morally justified, or shown to be just, righteous, or innocent; defensible"[493] and "[c]apable of being maintained, defended, or made good."[494]

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[486] See, for example, the Appellate Body Report, *EC – Hormones*, para. 214.
[487] China's first written submission, para. 131.
[488] China's first written submission, para. 132.
[489] United States' response to Panel question No. 121.
[490] United States' opening oral statement at the second substantive meeting of the Panel, paras. 39 and 42.
[491] United States' opening oral statement at the second substantive meeting of the Panel, paras. 43-44 and 48.
[492] Oxford English Dictionary Online, accessed on 29 August 2008.
[493] Oxford English Dictionary Online, accessed on 29 August 2008.
[494] Oxford English Dictionary Online, accessed on 29 August 2008.

7.260 The Appellate Body has also clarified that its findings with respect to the ordinary meaning of "arbitrary or unjustifiable" from the chapeau of Article XX of the GATT 1994 are relevant and provide guidance in interpreting the terms "arbitrary or unjustifiable discrimination" in Article 2.3 of the *SPS Agreement*. Although the Appellate Body's conclusions were with respect of the use of the terms in Article 2.3[495], we believe that they are equally relevant for an interpretation of the obligation in Article 5.5 which is, after all, a more specific enunciation of the basic obligation in Article 2.3.[496]

7.261 Turning, therefore, to the prior reasoning on the chapeau of Article XX of the GATT 1994, we note that the Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.[497] In *Brazil – Retreaded Tyres*, the Appellate Body's analysis of the measures at issue under the chapeau of Article XX focused on whether discrimination that might result from the application of the measures at issue had a *legitimate cause or rationale* in the light of the objectives listed in the paragraphs of Article XX.[498] Futher, the Appellate Body explained that the assessment of whether discrimination is "arbitrary or unjustifiable" should be made in light of the objectives of the measure and whether the discrimination bears a rational connection to the stated objective of the measure.[499] It is important thus to remember that not all discrimination in the application of measures is necessarily "arbitrary or unjustifiable" and it is only the arbitrary or unjustifiable inconsistencies that are to be avoided.[500]

7.262 Following the analysis conducted under the chapeau of Article XX, we must focus on the justification for the distinction and whether that justification bears a rational relationship to the objective of the measures. In this line, we agree with the panel in *Australia – Salmon* when, in assessing the second element of Article 5.5 of the *SPS Agreement*, looked at the measures applied in the specific context of the relevant risks and asserted that if there is no justification for the distinction in sanitary measures and corresponding levels of protection, this distinction could be considered to be "arbitrary or unjustifiable" in the sense of the second element of Article 5.5.[501] These findings were later upheld by the Appellate Body.[502]

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[495] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227; see also Appellate Body Report, *Australia – Salmon*, para. 251 (recognizing that Article 2.3 assembles obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and that it incorporates part of the chapeau to Article XX of the GATT 1994.)

[496] We do recognize that Article 5.5 refers to "arbitrary or unjustifiable distinctions" in the ALOPs whereas Article 2.3 and the chapeau of Article XX refer to "arbitrary or unjustifiable discrimination". However, we also recognize that this "distinction" is only forbidden if it results in discrimination or a disguised restriction on trade.

[497] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.

[498] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

[499] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

[500] The Appellate Body in *EC – Hormones* clarified that: "We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided." Appellate Body Report, *EC – Hormones*, para. 213.

[501] Panel Report, *Australia – Salmon*, para. 8.133. "[W]e… recall that Australia effectively bans the import of the salmon products further examined, but allows the import of the other four categories of fish or fish products. It might, therefore, be expected that some justification for this distinction in sanitary measures and corresponding levels of protection exists, such as a *higher* risk related to imports of the salmon products further examined. If not, these distinctions could be considered to be 'arbitrary or unjustifiable' in the sense of the second element of Article 5.5."

[502] Appellate Body Report, *Australia – Salmon*, para. 158.

7.263 Given that the measures involved in the comparison – Section 727 and the FSIS procedures – are SPS measures[503], and must therefore necessarily be based on scientific principles and not maintained without sufficient scientific evidence, we are of the view that the scientific support, or lack thereof, for the difference between the ALOPs the measures seek to achieve should have a bearing on an analysis of whether such a difference is arbitrary or unjustifiable under Article 5.5 of the *SPS Agreement*. Indeed, in the context of Article 5.5 to show that the distinction in ALOPs is not arbitrary or unjustifiable, a Member must demonstrate that there are differing levels of risk between the comparable situations. We are of the view that such a demonstration requires scientific evidence.

7.264 We shall therefore examine whether there is any justification based on scientific evidence for the distinction in ALOPs achieved by the measures used to address the risk of potentially unsafe poultry – Section 727 for poultry products from China and the FSIS procedures for poultry products from other WTO members – and corresponding ALOPs.

7.265 We recall again that the United States points out that China's food safety enforcement problems and food safety crises have been the subject of reports and articles by numerous well-regarded international organizations (including WHO) and academics.[504] The United States contends that China is not comparable with other WTO Members because most other Members have never attempted to export poultry products to the United States. The United States further argues that many of the WTO Members who the FSIS has determined to be equivalent to the United States had been exporting to the United States for many years without a significant incident resulting in confidence and familiarity with their inspection systems. This includes the ability to resolve any problems that may arise, such as in the case of Mexico.[505]

7.266 Nonetheless, as China points out, the FSIS had determined that China's poultry inspection system was equivalent to that of the United States for processed foreign poultry products and had made a preliminary decision also finding China's inspection system for domestically slaughtered poultry products equivalent to that of the United States. Therefore, China argues that it is one of the ten WTO Members that have obtained FSIS authorization to export poultry to the United States. However, China explains, under Section 727, its poultry products are, in effect, treated as more dangerous than those originating in WTO Members that have never obtained an equivalence determination from the FSIS.

7.267 The United States seeks to justify the different ALOP applied in Section 727 as opposed to that in the PPIA, by arguing that poultry products from China pose a higher risk that those from other WTO Members because of China's food safety enforcement problems and food safety crises. As indicated above, we will examine such a justification by verifying whether it is based on scientific principles and founded on scientific evidence. In this respect, we recall our findings that Section 727 is not based on a risk assessment in violation of Article 5.1 and 5.2 of the *SPS Agreement*. We have also found that the United States has not provided sufficient scientific evidence underlying Section 727 and thus we have concluded that Section 727 was maintained without sufficient scientific evidence in violation of Article 2.2 of the *SPS Agreement*.

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[503] We agree with the panel in *EC – Approval and Marketing of Biotech Products* which found that :

"In the light of this, we consider that although Article 5.5 does not explicitly refer to "SPS measures", implicitly it envisages that the "measure complained of" is an "implementing measure". In other words, the measure complained of must be an SPS measure applied for achieving a particular level of sanitary or phytosanitary protection. In this respect, there is therefore no difference between Article 5.5, on the one hand, and Articles 5.1 and 5.6, on the other hand." (footnote omitted)

Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1416.

[504] United States' opening oral statement at the second substantive meeting of the Panel, paras. 39 and 42.

[505] United States' opening oral statement at the second substantive meeting of the Panel, paras. 43-44 and 48.

7.268 Because Section 727 is not based on a risk assessment and was maintained without sufficient scientific evidence, we can only conclude that there is no justification based on scientific principles and founded in scientific evidence for the distinction in ALOPs, as reflected in the differences between the measures used to tackle the risk of potentially unsafe poultry – Section 727 for poultry products from China and the FSIS procedures for poultry products from other WTO Members.

7.269 We therefore find that the distinction in ALOPs for poultry products for China and for poultry products from other WTO members is "arbitrary or unjustifiable" within the terms of Article 5.5 of the *SPS Agreement*. We thus conclude that the second element of Article 5.5 of the *SPS Agreement* is satisfied, with respect to the importation of Chinese poultry products *vis-à-vis* that of poultry products from other WTO members.

(iii) Discrimination or disguised restriction on international trade

7.270 Having found that both the first and the second elements of Article 5.5 of the *SPS Agreement* are met, we proceed to examine the third element of this provision, i.e. whether the distinction in ALOPs in different yet comparable situations results in discrimination or a disguised restriction on international trade.

7.271 Relying on the Appellate Body Report in *Australia – Salmon*, **China** argues that the Section 727 evinces all three "warning signals" that indicate discrimination is present. China also contends that an additional factor which demonstrates discrimination which was discussed by the Panel in *Australia – Salmon*, is also present. Specifically, China asserts that the distinction between the two ALOPs is arbitrary and unjustifiable, that the difference is significant, and there was a substantial difference in official conclusions about the two situations without scientific justification.[506] China, therefore, concludes that the warning signals and additional factor suggest that Section 727 results in "discrimination", the third cumulative element establishing a violation of Article 5.5.[507]

7.272 China refers to its arguments under Article 2.3 of the *SPS Agreement*, where it affirms that the measures at issue restrict only China from seeking and obtaining authorization to export poultry products to the United States, which ultimately limits competitive opportunities and restrict imports of poultry products originating in China. Therefore, according to China, by forbidding the consideration, granting or implementation of authorization for Chinese poultry products, while offering the possibility to every other WTO Member to seek and obtain FSIS authorization to export poultry to the United States, Section 727 discriminates against China.[508]

7.273 China also considers that "identical or similar" conditions prevail in China, on the one hand, and in all other poultry-exporting WTO Members, on the other, based on the scope and effectiveness of FSIS procedures, as applied to poultry products from all WTO Members. These comprehensive rules are capable of determining whether poultry products from any Member are safe for importation into the United States. China further bases its claim on the fact that FSIS has demonstrated before the imposition of the measures at issue, that Chinese rules are fully applicable to and adequate to address any risks posed by poultry products from China.[509]

7.274 China asserts that the discrimination against China is "arbitrary or unjustifiable", as there is no scientific evidence, risk assessment or other justification for treating Chinese poultry products differently from those of other WTO Members. Furthermore, FSIS procedures are comprehensive and able to address risks arising from poultry products produced anywhere in the world, including China.

[506] China's opening oral statement at the first substantive meeting of the Panel, paras. 56 and 66.
[507] China's first written submission, paras. 133-135.
[508] China's first written submission, para. 121.
[509] China's first written submission, para. 122.

China, once again recalls that, China was one of only ten WTO Members that had successfully obtained authorization to export poultry to the United States under FSIS approval procedures, and due to Section 727, its poultry products are treated worse than those originating in WTO Members that have never been granted FSIS authorization.[510]

7.275 The **United States** contends that China relies solely on the panel and Appellate Body reports in *Australia – Salmon* which are not applicable in this case because China has not even alleged any factors that might show a disguised trade restriction.[511] The United States chooses to focus on the lack of distinction in the ALOPs applied.

7.276 We shall therefore examine whether the distinction in ALOPs applied to the importation of poultry products from China and that of poultry products from other WTO Members which we have found to be different but comparable situations, results in discrimination or a disguised restriction on international trade.

7.277 We note that the panel on *Australia – Salmon* identified three "warning signals" which indicate whether the application of distinctions in ALOPs in different situations results in discrimination or a disguised restriction on international trade, but explained that none of these "is … conclusive in its own right"[512]:

(a) the arbitrary and unjustifiable character of differences in the levels of protection[513];

(b) the "rather substantial" difference in the levels of protection; and

(c) the inconsistency of the SPS measure at issue with Articles 5.1 and 2.2 of the *SPS Agreement*.

7.278 The panel and Appellate Body in *Australia – Salmon*, also considered additional factors specific to the facts of that case.[514] One of the additional factors in that case, which China references in its submissions, is that there were substantial differences in the conclusions concerning the measures required to address the perceived risk in a particular situation, in sequential reports issued by the importing Member government only one year apart.

7.279 It seems to us that the reasoning of the panel in *Australia – Salmon* may be somewhat circular and appears to defeat the purpose of the conclusion that the three elements in Article 5.5 are cumulative and must all be present. Essentially, what the panel is saying is that proof of the other two elements as well as inconsistency with Article 5.1 and 2.2 *ipso facto* equates to discrimination or a disguised restriction on trade with no further analysis being required.

7.280 The Appellate Body seems to have recognized that the analysis in *Australia – Salmon* did not fully address the third element of Article 5.5 when it noted in *EC – Hormones* that "the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade."[515]

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[510] China's first written submission, paras. 123-124.

[511] United States' comment to China's response to Panel question No. 125.

[512] Panel Report, *Australia – Salmon*, para. 8.151.

[513] The panel held that "[i]n this dispute, we do consider that the arbitrary character of the differences in levels of protection is a 'warning signal' that the measure at issue results in 'a disguised restriction on international trade'." Panel Report, *Australia – Salmon*, para. 8.149.

[514] Appellate Body Report, *Australia – Salmon*, paras. 167-176.

[515] Appellate Body Report, *EC – Hormones*, para. 240.

7.281 The Appellate Body added that:

> "[T]he presence of the second element – the arbitrary or unjustifiable character of differences in levels of protection considered by a Member as appropriate in differing situations – may in practical effect operate as a 'warning' signal that the implementing measure in its application might be a discriminatory measure or might be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade."[516]

7.282 Therefore, it seems, according to the Appellate Body, that even if the presence of all three warning signals was demonstrated, that would not necessarily support a conclusion that the measure results in discrimination or a disguised restriction on trade. We further note that the Appellate Body in *EC – Hormones* stated that in the context of the third element of Article 5.5 of the *SPS Agreement*, the analysis should be on a case-by-case basis.[517]

7.283 Nevertheless, since *Australia – Salmon*, parties have typically structured their arguments around the third element in Article 5.5 by discussing these warning signals and additional factors. That is also the case in the current proceedings. Accordingly, the Panel will examine whether China has demonstrated the warning signals and additional factors and then determine whether any additional proof is necessary to demonstrate discrimination.

7.284 The conclusion on whether the first warning signal is present, flows from the analysis of the second element of Article 5.5. We recall that the Panel has found that there is a distinction in ALOPs and that this distinction is arbitrary or unjustifiable, therefore, the first warning signal is present and we move to the second warning signal.

7.285 The second warning signal is the "rather substantial" difference in the levels of protection. In this respect, China argues that there are "significant" differences in the applied ALOPs because one is less than zero and one accepts that there may be some minimal and inherent risk of importing unsafe poultry from an "equivalent" WTO Member.[518] In our view, it cannot be assumed that an import ban reflects an ALOP of zero or, in fact, an ALOP different from a control regime. Conversely, it is also difficult to maintain that the mere fact that there is no way to fully guarantee zero exposure through a particular control regime means that the ALOP set by the importing Member is not, in fact, zero. Additionally, it is unclear whether a "stricter than zero" tolerance exists.

7.286 Having said that, we refer to our findings under the first element of Article 5.5 of the *SPS Agreement* in respect to the application by the United States of two different ALOPs for poultry products from China and poultry products from other WTO Members. We recall that, following the panel in *Australia – Salmon*, we concluded that the ALOP reflected in Section 727, which imposed an absolute import ban on poultry products from China, was substantially different from the ALOP in the PPIA which is achieved via a conditional import ban which at least provides an avenue for WTO Members, other than China, to eventually achieve access to the United States market.[519] Therefore, the second warning signal is also met.

7.287 We note that even though it has brought claims under Articles 5.1 and 2.2, China did not argue that the warning signal of a violation of those articles was present. However, given our findings

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[516] Appellate Body Report, *EC – Hormones*, para. 215.
[517] Appellate Body Report, *EC – Hormones*, para. 240.
[518] China's response to Panel question No. 48.
[519] See Section VII.G.2(b)(i) above.

of violation of both provisions in Section VII.F.2(e) above, we can conclude that the third warning signal is also present.

7.288 Having concluded that the three warning signals are present, we will go ahead and determine whether any additional proof is necessary to demonstrate discrimination.

7.289 In determining whether discrimination exists, we find the language of the panel in *Canada – Pharmaceutical Patents* particularly interesting. In that case, which dealt with the TRIPs Agreement, the panel noted:

> "The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions of Articles 3 and 4, do not use the term 'discrimination'. They speak in more precise terms. The ordinary meaning of the word 'discriminate' is potentially broader than these more specific definitions. It certainly extends beyond the concept of differential treatment. It is a normative term, pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment. Discrimination may arise from explicitly different treatment, sometimes called 'de jure discrimination', but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called 'de facto discrimination'. The standards by which the justification for differential treatment is measured are a subject of infinite complexity. 'Discrimination' is a term to be avoided whenever more precise standards are available, and, when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains."[520]

7.290 We recall that both the panel and Appellate Body in *Australia – Salmon*[521], considered as an additional factor that proved discrimination the substantial differences in the conclusions concerning the measures required to address the perceived risk in a particular situation, in sequential reports issued by the importing Member government only one year apart. In this respect, China points to the "substantially different conclusions" on how to deal with Chinese poultry in a short period of time. China's argument focuses on the fact that in 2006, the FSIS concluded that Chinese processed poultry was safe enough to satisfy the United States' ALOP articulated in the PPIA; yet in 2008 the US Congress supplanted that determination with a finding that Chinese processed poultry was so dangerous that the FSIS needed to be prevented from going forward with establishing and implementing a rule permitting its importation. We agree that this may be considered to be an "additional factor".

7.291 Furthermore, the fact that Section 727 only applies to poultry products from China is discriminatory by nature. Indeed, examining the measure itself in the context of the differences in the ALOPs, we conclude that discrimination was occurring, in particular because Section 727 applies only to China. We note that the panel in *Canada – Pharmaceutical Patents* considered that "discrimination" refers "to results of the unjustified imposition of differentially disadvantageous treatment".[522] Therefore, a determination that "discrimination" exists would still rest on whether the different treatment applied was "justified".[523] Having determined that the differences in ALOPs are

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[520] Panel Report, *Canada – Pharmaceutical Patents*, para. 7.94.

[521] Appellate Body Report, *Australia – Salmon*, paras. 167-176.

[522] Panel Report, *Canada – Pharmaceutical Patents*, para. 7.94.

[523] We however note that the panel in *Argentina – Hides and Leather*, when discussing the differences between the types of discrimination discussed throughout the GATT, noted that a provision (Article III:2) could prohibit even "justifiable" discrimination. Panel Report, *Argentina – Hides and Leather*, para. 11.315.

"It is important to bear in mind that the standard of "unjustifiable" discrimination is different in nature and quality from the standard of discrimination contained in Article III:2, first sentence. As Argentina correctly

unjustified[524], we can reasonably conclude that the differences in ALOPs result in discrimination against China.

7.292 We also recall the finding of the Appellate Body in *US – Shrimp* that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[525] It would seem that a ban preventing the FSIS from considering China's application for equivalency would be just such a measure as that described by the Appellate Body.

7.293 Therefore, it seems reasonable to conclude that Section 727 results in discrimination against China. We thus find that the arbitrary or unjustifiable distinction in ALOPs applied by the United States in respect of poultry products from China *vis-à-vis* poultry products from other WTO Members results in discrimination against China. Accordingly, the third element of Article 5.5 of the *SPS Agreement* is satisfied, with respect to the importation of Chinese poultry products *vis-à-vis* that of poultry products from other WTO Members.

(iv) Conclusion

7.294 Having found that the importation of poultry products from China and that of poultry products from other WTO Members are different yet comparable situations and that the United States is applying different ALOPs to such situations; that the distinction in ALOPs for poultry products from China and for poultry products from other WTO Members is "arbitrary or unjustifiable"; and that this arbitrary or unjustifiable distinction in ALOPs results in "discrimination " against China, we conclude that the three elements of Article 5.5 of the *SPS Agreement* are present. Accordingly, the Panel finds that Section 727 is inconsistent with Article 5.5 of the *SPS Agreement.*

(c) The importation of Chinese poultry products *vis-à-vis* that of other food products from China

7.295 The second set of comparable situations presented by China refers to a comparison of the importation of Chinese poultry products and that of other food products from China. We shall therefore commence our analysis by examining whether such different situations exist and if so, whether they are comparable.

Whether different yet comparable situations exist

7.296 We shall start by considering whether the importation of Chinese poultry products and that of other food products from China are "different" situations. This is not a difficult examination since the measure applied to Chinese poultry products – Section 727 – is only applied to Chinese poultry products; and hence all other food products from China will be subject to different measures and thus will be in different situation. In response to a question from the Panel, China clarified that the FDA has jurisdiction over all imported food except for meat, poultry, and fresh eggs, which are under the jurisdiction of the FSIS.[526] The basis for the FDA procedures is the *Food, Drug and Cosmetic Act.*[527]

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points out, the prohibition on unjustifiable discrimination in the application of a measure by necessary implication leaves room for justifiable discrimination. On the other hand, this does not imply that some discrimination is always justifiable. Whether or not any discrimination is justifiable, in a given instance, and if so, to what extent, must be ascertained by way of analysis of the specific circumstances of each case."

[524] See para. 7.269 above.

[525] Appellate Body Report, *US – Shrimp*, para. 165.

[526] Exhibit CN-7, Exhibit CN-48, Exhibit CN-57.

[527] Sections 701, 801 of 21 USC §371, (Exhibit CN-89).

According to China, the FDA import procedures are, like Section 727, an SPS measure under Annex A.[528]

7.297 In addition to being different, though, we recall that the Appellate Body has called for the situations to be comparable. China must thus establish a common element between the two situations.

7.298 At first, **China** broadly argued that "based on the logic of the JES, any food product from China could in theory be contaminated, since all food products produced in China are subject to the food safety laws that the United States claims in its submission are not enforced."[529] China also argues that any food product, including but certainly not limited to poultry products, could be contaminated, for example, basil, peanut butter, and pet food contaminated with Salmonella; candy contaminated with lead; fish contaminated with mercury; and rice contaminated with unapproved genetic material.[530] In China's view, the common element between these two situations is sharing common risk of potential contaminants which are pathogenic bacteria such as Salmonella, Campylobacter and Listeria in addition to E Coli and Highly Pathogenic Avian Influenza (HPAI) virus.[531] China asserts that these contaminants are within the meaning of footnote 4 or disease-causing organism according to Annex A(1)(b), they are not unique to China, in addition they are not only found in poultry products.[532]

7.299 In response to a question from the Panel, China clarified that it was not arguing that all food products subjected to the same regulatory regime could be contaminated with the same contaminant. According to China, each of these pathogenic bacteria affects different types of food products in addition to poultry as explained in the FDA fact sheet in Exhibits CN 85, CN 87 and CN 88.[533] China also notes that neither the text nor the legislative history of Section 727, nor the FSIS documentation asserts or otherwise provides contemporaneous evidence that *poultry* is more likely to be "contaminated" than other types of food products such as basil or pet food.[534] It contends that the FDA which has jurisdiction over all imported food except for meat, poultry and fresh eggs considers "contaminated foods" to include foods containing bacteria such as Salmonella, Campylobacter, Listeria and E. coli.[535]

7.300 The **United States** responds that China has not established that the types of risks addressed by the PPIA are the same as the risks associated with other types of food products and that poultry has a different ALOP than other food products.[536] Moreover, the United States also clarifies that FSIS operates under an equivalence regime while the FDA relies on "import alerts" and more rigorous border measures so the situations are not comparable.[537]

7.301 We note that China has not contended that all Chinese food products could have Salmonella, Campylobacter and Listeria. It certainly has not argued that all Chinese food products could be potential sources of Avian influenza. It has instead initially argued that many Chinese food products could potentially be contaminated with the same pathogenic bacteria that the United States has indicated are of concern with respect to poultry imports.[538] In China's response to a question from the

[528] China's response to Panel question No. 124.
[529] China's opening oral statement at the first substantive meeting of the Panel, para. 49.
[530] China's opening oral statement at the first substantive meeting of the Panel, para. 54.
[531] China's opening statement at the second substantive meeting, paras. 36-37 and China's response to Panel question No. 123.
[532] China's response to Panel question No. 123.
[533] China's response to Panel question No. 123.
[534] China's opening oral statement at the first substantive meeting of the Panel, para. 55.
[535] China's response to Panel question No. 124.
[536] United States response to Panel question No. 121.
[537] United States' comment on China's response to Panel question No. 124.
[538] China's response to Panel question No. 123.

Panel, China provided the following list of food products which could be contaminated by the pathogenic bacteria namely:

– Salmonella: Eggs, poultry, milk, juice, cheese, fruits, and vegetables.

– Listeria: Cheese, milk, deli meats, and hot dogs.

– Campylobacter: Poultry, and milk.

– E.coli: Meat, milk, juice, fruits and vegetables, and cheese.

7.302 China also provided tables taken from UN Comtrade on the potential for contamination in food groups imported from China.[539]

7.303 We also note that China has only provided the more specific information about the SPS measures applied to food products from China other than poultry products and that relating to which pathogenic bacteria affect which types of food products late in the proceedings. Indeed, China provided this information only in response to a question from the Panel during and after the second substantive meeting asking where that information could be found in China's prior submissions.[540]

7.304 It is questionable whether the above list is sufficient to establish the common elements that make all "other food products" comparable to poultry products such that they are "different situations" within the meaning of Article 5.5. We do not believe that Article 5.5 permits a "mix and match" approach but rather requires that China links the measures to which it alleges the United States applies a lower ALOP, with the risks it believes are comparable to those posed by poultry. It is certainly not for the Panel to examine every other food product exported by China to the United States to determine which ones have the same contaminants or adverse health effects as poultry and then examine whether the measures applied to those products exhibit the same ALOP as Section 727.

7.305 However, given that the Panel has already found that Section 727 is inconsistent with the obligations in Article 5.5 with respect to distinctions in ALOPs for imports of poultry products from China *vis-à-vis* poultry from other WTO Members, the Panel does not see how continuing to make a finding on the second comparable situations proposed by China would assist in obtaining a positive resolution to the dispute. Therefore, we exercise judicial economy with respect to this aspect of China's claim under Article 5.5.

7.306 The Panel recalls that the principle of judicial economy is recognized in WTO law. The Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party but rather a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims are within its terms of reference.[541] The Appellate Body has relied on the explicit aim of the dispute settlement mechanism, which is to secure a positive solution to a dispute, as provided in Article 3.7 of the DSU, or a satisfactory settlement of the matter as per Article 3.4 of the DSU. The Appellate Body has stressed

[539] China's response to Panel question No. 123, referring to Exhibit CN-41.

[540] We note that pursuant to the working procedures of the Panel, all factual evidence was to have been submitted at the time of the first substantive meeting unless in response to a specific question by the Panel for that information or to rebut facts presented by the other party. We note that China appended this information in response to a question from the Panel asking where the information could be found in the closed factual record and that the Panel did not specifically ask China to provide new factual information in response to the question. However, the United States has not objected to this untimely submitted evidence and has had an opportunity to comment on it, in its comments on China's responses to the Panel's questions after the second substantive meeting.

[541] Appellate Body Report, *India – Patents (US)*, para. 87.

that the basic aim of dispute settlement in the WTO is to settle disputes and not to "make law" by clarifying existing provisions of the WTO Agreement that fall outside the context of resolving a particular dispute.[542]

7.307 We bear in mind that, in *Australia – Salmon*, the Appellate Body cautioned panels against false judicial economy arguing that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result.[543] The Panel believes that this is not the case in the current proceedings. In making findings under Article 5.5 of the *SPS Agreement* with respect to distinctions in ALOPs for imports of poultry products from China *vis-à-vis* poultry from other WTO Members, the Panel considers that it has effectively resolved China's claim under Article 5.5.

H. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE 2.3 OF THE *SPS AGREEMENT*

1. Arguments of the parties

7.308 **China** argues that the United States is applying a higher level of protection to China which is arbitrary or unjustifiable and results in discrimination.[544]

7.309 China affirms that the measures at issue restrict only China from seeking and obtaining authorization to export poultry products to the United States, which ultimately limits competitive opportunities and restricts imports of poultry products originating in China. Therefore, by forbidding the consideration, granting or implementation of authorization for Chinese poultry products, while offering the possibility to every other WTO Member to seek and obtain FSIS authorization to export poultry to the United States, Section 727 discriminates against China.[545]

7.310 China seems to invoke only the first sentence of Article 2.3 of the *SPS Agreement* in its claims. In its first written submission, China cites Article 2.3 of *the SPS Agreement* in full[546] but it does not advance specific arguments in regard to whether the United States measures are a disguised restriction on trade.[547] China submits that, under certain circumstances, a finding of inconsistency with Article 5.5 would necessarily imply inconsistency with Article 2.3. Particularly the demonstration of a "disguised restriction on international trade" which can be found in the second sentence of Article 2.3 and Article 5.5 of the *SPS Agreement*.[548] However, China claims that it is not the case for the "discrimination" element since Article 2.3 of the *SPS Agreement* has a narrower non-

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[542] The Appellate Body has explained that given the explicit aim of dispute settlement that permeates the DSU, it does not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. In the Appellate Body's view, a panel need only address those claims which must be addressed in order to resolve the matter at issue in the dispute.. Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340.

[543] The Appellate Body explained that:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'
> Appellate Body Report, *Australia – Salmon*, para. 223.

[544] China's first written submission, para. 126.
[545] China's first written submission, para. 121.
[546] China's first written submission, para. 118.
[547] China's first written submission, paras. 120-125.
[548] China's response to Panel question No. 125.

discrimination requirement which has a territorial component that is absent in Article 5.5 of the *SPS Agreement*.[549]

7.311 China also notes that it does not claim a violation of Article 2.3 of the *SPS Agreement* based on arbitrary distinctions in the ALOPs applied by the United States to poultry and non-poultry products from China.[550]

7.312 Finally, China argues that "identical or similar conditions" prevail between it and all other WTO Members that had the opportunity to seek and achieve equivalence. China points to Mexico which, in its view, is in the same situation as China in terms of its equivalence process and the allegation of systemic food safety crisis.[551]

7.313 The **United States** contends that it is unclear whether Article 2.3 is meant to apply to a procedural requirement rather than a substantive SPS measure. In particular, the United States contends that it is unclear if Article 2.3 was intended to apply in addition to the main SPS equivalence provision, Article 4.1. The United States also argues that there is no need to look at Article 2.3 of the *SPS Agreement*, because the issues addressed under Article 2.3 are essentially the same as those under the chapeau of Article XX(b) of the GATT 1994.[552]

7.314 The United States also argues that China has not even alleged any factors that might show a disguised trade restriction.[553]

7.315 Finally, the United States argues that the proper comparison to determine whether "identical or similar conditions prevail" is not between China and all countries who seek to export poultry to the United States. Rather, it argues that the comparison should be between China and other WTO Members with equivalent food safety problems and whose poultry inspection systems have already been found equivalent or for whom determination was imminent.[554] The United States asserts that "identical or similar conditions" do not prevail in China and Mexico for numerous substantive and temporal reasons *inter alia* Mexico has never experienced a food safety crisis characterized by the WHO as one of the largest food safety events the agency has had to deal with in recent years, the absence of broad systemic and food safety enforcement problems, Mexico's exporting history of poultry products to the United States and the different stages in the equivalence process where the problems arose.[555]

2. Analysis by the Panel

(a) Article 2.3 of the *SPS Agreement*

7.316 Article 2.3 of the *SPS Agreement* provides:

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

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[549] China's response to Panel question No. 125.
[550] China's response to Panel question No. 126.
[551] China's response to Panel question No. 128.
[552] United States' second written submission, paras. 102-107.
[553] United States' comment to China's response to Panel question No. 125.
[554] United States' response to Panel question No. 127.
[555] United States' response to Panel question No. 129.

7.317 The panel in *Australia – Salmon (Article 21.5 – Canada)* found that there were three elements required in order to establish a violation of Article 2.3, first sentence: (i) that the measure discriminates between the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member; (ii) that the discrimination is arbitrary or unjustifiable; and (iii) that identical or similar conditions prevail in the territory of the Members compared.[556]

7.318 We also recall that the panel in *Australia – Salmon*, upheld by the Appellate Body, noted that because Article 2.3 sets forth the "basic obligation" and Article 5 is a more specific enunciation of that obligation, a finding of a violation of Article 5.5 would necessarily imply a violation of Article 2.3.[557] We agree with the reasoning of the panel and the Appellate Body in *Australia – Salmon* and conclude that because Section 727 is inconsistent with Article 5.5 of the *SPS Agreement*, by virtue of a distinction in ALOPs which results in discrimination *between Members*, it is also inconsistent with the first sentence of Article 2.3 of the *SPS Agreement.*

(b) Conclusion

7.319 The Panel finds that the inconsistency of Section 727 with Article 5.5 of the *SPS Agreement* necessarily implies that Section 727 is also inconsistent with Article 2.3 of the *SPS Agreement*. Therefore, the Panel finds that Section 727 is inconsistent with the first sentence of Article 2.3 of the *SPS Agreement*.

I. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE 5.6 OF THE *SPS AGREEMENT*

1. Arguments of the parties

7.320 **China** claims that Section 727 is inconsistent with the obligation in Article 5.6 of the *SPS Agreement* that SPS measures not be unduly trade-restrictive[558]; China refers to the findings of *Australia – Salmon*, where the Appellate Body stated that, to establish a violation of Article 5.6, a Member must demonstrate that there is an alternative SPS measure which: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive to trade than the contested SPS measure.[559]

7.321 China argues that there is an alternative measure that meets all of these criteria, i.e. the application to China of normal FSIS approval procedures for the importation of poultry products.[560] China bases its arguments on the fact that FSIS approval procedures are applied on a regular basis to a variety of WTO Members involving a number of different risk factors, the FSIS approval process is technically and economically feasible and they have already been effectively applied to China, resulting in the 2006 equivalence determination and subsequent establishment of a rule authorizing the importation of processed poultry products from China.[561]

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[556] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

[557] Panel Report, *Australia – Salmon*, para. 8.109. (concluding that a finding of violation of the more specific Article 5.5, particularly a conclusion that the third element had been met, would imply a violation of the more general Article 2.3. However, the panel did recognize, at the same time, that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5); *upheld by* Appellate Body Report, *Australia – Salmon*, para. 252.

[558] China's first written submission, para. 192; China's second written submission, para. 114.

[559] Appellate Body Report, *Australia – Salmon*, para. 194 cited in China's first written submission, para. 150.

[560] China's first written submission, para. 151.

[561] China's first written submission, para. 152.

7.322 China considers that this alternative measure would meet the "appropriate level of protection" of the United States in connection with imported poultry products. The United States' appropriate level of protection for imported poultry from all WTO Members other than China, as reflected in its normal FSIS approval procedures, is much lower than that implied by Section 727. Those measures apply a risk tolerance of zero to Chinese poultry products. Application of the normal FSIS approval procedures to China would achieve the lower level of sanitary protection applied by the United States to all other imported poultry products, and it would be significantly less trade-restrictive than the measures at issue. FSIS procedures provide for the possibility of obtaining authorization to export to the United States, if the applicant country's poultry products conform to US food safety requirements. Section 727 precludes this possibility, regardless of how safe the Chinese food safety system and procedures are, or whether they are equivalent to the United States' system. The resulting *de facto* import ban is far more trade-restrictive than necessary.[562] Moreover, China submits that FSIS procedures would have made a greater contribution to protect human and animal life and health than Section 727 because Section 727 prevented the FSIS from conducting any examination whatsoever of alleged food safety problems that could affect Chinese poultry products.[563]

7.323 Finally, China contends that the possibility of having more restrictive measures is not relevant under Article 5.6 because the relevant test requires that there be a no less trade restrictive alternative measure (compared to the measure at issue) available to the imposing Member.[564]

7.324 In its oral statement at the first substantive meeting, China referred the Panel to its rebuttal of the US Article XX(b) defence for a demonstration that an alternative measure that meets all of the criteria of Article 5.6 would be the application to China of the normal FSIS procedures.[565]

7.325 The **United States** reiterates its main point that the substantive obligations in Article 5 do not apply to equivalence regimes set up pursuant to Article 4 of the *SPS Agreement*. Specifically, the United States argues that Article 5.6 does not appear to apply to every procedural requirement adopted in the course of operating SPS measures. Instead, according to the United States, it appears to apply to substantive measures "establishing or maintaining" the importing Member's ALOP.[566]

7.326 The United States finds support for its position in note 3 which clarifies that Article 5.6 is not breached unless there is another measure that achieves the ALOP. The United States argues that application of Article 5.6 to equivalence procedures seems inapposite as in that context it is the exporting Member that chooses the SPS measures intended to achieve a level of protection, and the question for the importing Member is whether those measures achieve the result of equivalence. According to the United States, it is hard to apply Article 5.6, which turns on whether SPS measures chosen by the importing Member are more trade restrictive than required, in the context of an equivalency regime.[567]

7.327 In response to Panel question No. 46 the United States disagreed with China's assertion that the normal FSIS procedures were a reasonably available alternative to Section 727. According to the United States, China's argument is "simply another way of asserting that Section 727 was not necessary to protect human and animal life and health against the risk posed by potentially dangerous

[562] China's first written submission, para. 154.
[563] China's comment to the United States' response to Panel question No. 130.
[564] China's response to Panel question No. 91.
[565] China's opening oral statement at the first substantive meeting of the Panel, para. 76.
[566] United States' second written submission, para. 116.
[567] United States' second written submission, para. 117.

poultry products from China in the first place."[568] According to the United States, it has demonstrated that Section 727 was indeed necessary to accomplish this objective.

7.328 Moreover, the United States argues that the normal FSIS procedures cannot be regarded as a less-trade restrictive, technically and economically feasible alternative measure because although the FSIS has the ability to temporarily suspend or permanently withdraw an equivalence finding, potentially dangerous poultry from China could still enter the United States. This would put consumers at risk before "something goes wrong" and this approach is inconsistent with ensuring that China's measures achieve the United States' ALOP.[569]

7.329 The United States finally contends that China's interpretation of Article 5.6 of the *SPS Agreement* – by referring to Article XX of the GATT 1994 – is incorrect because it is contrary to the customary rules of interpretation and in fact would appear to render Article 5.6 of the *SPS Agreement* inutile.[570] However, the United States also argues that applying the normal FSIS procedures is not an alternative at all or is not less trade restrictive because there is no guarantee that the United States will determine that China's measures are equivalent.[571] In its view, Section 727 is necessary because FSIS has never before been confronted with a similar challenge to that poised by China's food safety crisis and therefore the "normal" procedures were not enough alone in order to cope with the unusual circumstances.[572]

2. Analysis by the Panel

(a) Article 5.6 of the *SPS Agreement*

7.330 We commence by looking at the text of Article 5.6 of the *SPS Agreement* which provides that:

> "Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
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> [3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."

7.331 In *Australia – Salmon*, with respect to the structure of Article 5.6 of the *SPS Agreement*, the Appellate Body agreed with the panel that footnote 3 provides a three-pronged test to establish a violation of Article 5.6. In particular, the Appellate Body held that:

> "The three elements of this test under Article 5.6 are that there is an SPS measure which:
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> (1) is reasonably available taking into account technical and economic feasibility;

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[568] United States' response to Panel question No. 46.
[569] United States' response to Panel question No. 130.
[570] United States' comment to China's response to Panel question No. 91.
[571] United States' comment to China's response to Panel question No. 92.
[572] United States' comment to China's response to Panel question No. 92.

> (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
>
> (3) is significantly less restrictive to trade than the SPS measure contested.
>
> These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, or if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, or if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6."[573]

7.332 We note that the burden rests on the complaining party to demonstrate that there is an alternative measure that meets all three requirements in Article 5.6.[574] As noted above, China has proposed as an alternatively available, less trade-restrictive measure the standard FSIS procedures which would apply to China in the absence of Section 727.

7.333 We note that China argues that Section 727 is more trade restrictive than required to achieve the United States' ALOP for poultry as expressed in the PPIA. We recall our finding that the United States applies a different ALOP via Section 727 from what it does via the PPIA. Indeed, China has argued this strenuously in the context of its claims under Article 5.5. We note that Article 5.5 deals with determining whether a Member is applying distinctions that are arbitrary or unjustifiable in the application of ALOPs to the same risk. We note that the analysis under Article 5.5 is with respect to determining whether the Member is applying different ALOPs to the same risk. Article 5.6 deals with whether a particular measure is more trade restrictive than required to achieve the Member's ALOP. In our view, in a dispute where claims are made under both Articles 5.5 and 5.6 a finding of inconsistency with Article 5.5 cannot be taken to mean that the ALOP used in the analysis under 5.6 would always necessarily be the less restrictive ALOP of those being applied. Therefore, a finding that a Member is applying different ALOPs cannot be taken to mean that the Panel is determining which ALOP the Member should apply.[575] A finding of inconsistency with Article 5.5 cannot deprive the importing Member of its prerogative to choose its own ALOP.

7.334 In its arguments regarding its claims under Article 5.6, China has asked the Panel to assess the trade restrictiveness of the measure Section 727, *vis-à-vis* what is required by the ALOP in the PPIA and not the ALOP that it itself argues is reflected in Section 727. China is asking the Panel to gauge the trade restrictiveness of the measure *vis-à-vis* what is required by the ALOP it believes the United States *should* apply to its poultry products. We do not believe that it is an appropriate role for this Panel to engage in a speculative exercise of what ALOP a Member should apply to protect its own territory from public health risks. In particular, we recall the reasoning of the Appellate Body in *Australia – Salmon* that "'the level of protection deemed appropriate by the Member establishing a sanitary ... measure' is a *prerogative* of the Member concerned and not of a panel or the Appellate Body."[576]

7.335 Additionally, we note that a determination of whether a measure is more trade restrictive than required to achieve the ALOP of a Member must be done by comparing the ALOP actually applied to

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[573] Appellate Body Report, *Australia – Salmon*, para. 194.

[574] Appellate Body Report, *Japan – Agricultural Products II*, para. 126.

[575] The determination of the ALOP, as defined in paragraph 5 of Annex A, is a prerogative of the Member concerned and not of a panel or of the Appellate Body. Appellate Body Report, *Australia – Salmon*, para. 199.

[576] Appellate Body Report, *Australia – Salmon*, para. 199.

the risks posed by the products. We recall our findings under Articles 5.1, 5.2 and 2.2 that the United States has not based Section 727 on a risk assessment and that it has maintained Section 727 without sufficient scientific evidence. Without knowing the level of risk posed by Chinese poultry products the Panel would have to enter into an hypothetical analysis that would be akin to the Panel doing its own risk assessment and then comparing that risk to the United States' ALOP to determine whether Section 727 is more trade restrictive than required. We recall that this is also not the appropriate role for a panel. In particular prior panels have explained that, a panel should not conduct its own risk assessment[577] or impose any scientific opinion on the importing Member.[578]

7.336 Given the above considerations, in the present case an analysis under Article 5.6 would be inappropriate for this Panel to engage in as it would be entirely speculative and be exceeding our role under Article 11 of the DSU to make an objective assessment of the matter.

7.337 Accordingly, after careful consideration, the Panel refrains from ruling on China's claim under Article 5.6 of the *SPS Agreement*.

(b) Conclusion

7.338 For the above reasons, the Panel concludes that it would not be appropriate to proceed and rule on China's claim under Article 5.6 of the *SPS Agreement*, and, thus, declines to do so.

J. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE 8 OF THE *SPS AGREEMENT*

1. Arguments of the parties

7.339 **China** claims that the United States has violated Article 8 of the *SPS Agreement* by failing to follow the requirements under Annex C(1)(a) of the *SPS Agreement* concerning WTO Members' obligations to "undertake and complete" the procedures for assessing compliance with a substantive SPS measure "without undue delays". China argues that the application of Section 727 unjustifiably delayed the application of the normal FSIS procedures to Chinese poultry products, and it could not be justified based on China's inaction. China maintains that the delay which resulted from the application of Section 727 was "undue" and constituted a violation of Article 8 of the *SPS Agreement*.[579]

7.340 China specifically refers to the panel report in *EC – Approval and Marketing of Biotech Products*, arguing that the obligation in Annex C(1)(a) means that "approval procedures [must] be undertaken and completed with no unjustifiable loss of time", and that such determination depends on "whether there is a legitimate reason, or justification for a given delay, not the length of a delay as such".[580]

7.341 China notes that Section 727 was one of a series of measures – including its predecessor, Section 733, and the measure that replaced it, Section 743 – that delayed the application of FSIS procedures to China by two years.[581]

7.342 China clarifies that the normal FSIS procedures are "control, inspection and approval procedures" covered by Annex C and Article 8 of the *SPS Agreement*[582], and that Section 727 caused

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[577] Panel Report, *EC – Hormones (Canada)*, para. 8.104; Panel Report, *EC – Hormones (US)*, para. 8.101.

[578] Panel Report, *Australia – Salmon*, para. 8.41.

[579] China's first written submission, paras. 156-160.

[580] China's first written submission, para. 158.

[581] China's opening oral statement at the first substantive meeting of the Panel, para. 78. As explained in Section VII.A.1(a), Sections 733 and 743 are not part of our terms of reference.

"undue delay" in undertaking and completing the FSIS procedures of "control, inspection and approval".[583] China further asserts that Article 8 and Annex C of the *SPS Agreement* apply to all types of "control, inspection and approval procedures" whether for one product or multiple products[584], and argues that Annex C(1)(a) of the *SPS Agreement* does not specify whether the source of an "undue delay" must be caused by an SPS measure or by other requirements. According to China, the only requirement to demonstrate a failure to observe the requirements in Annex C(1)(a) is "that the 'undue delay' impacts the undertaking and completing of 'control, inspection, and approval procedures' used 'to check and ensure the fulfilment of sanitary and phytosanitary measures'."[585]

7.343 Alternatively, China maintains that Section 727 denied the approval of Chinese poultry imports in a manner that allows it to be characterised as an "approval procedure", since it withheld funds from the FSIS and, thereby, prevented the review of China's applications to export poultry under normal FSIS procedures.[586]

7.344 The **United States** contends that China has failed to show that Section 727 breached Article 8 and Annex C(1)(a) of the *SPS Agreement* first because these provisions apply to "control, inspection, and approval procedures" which do not include equivalence determinations under Article 4 of the *SPS Agreement*. Second, because China has not established the existence of any "undue delay".

7.345 The United States further argues that Article 8 of the *SPS Agreement* only mentions systems for approving the use of additives and systems for establishing tolerances for contaminants. According to the United States, these two examples relate only to the approval and control of particular products or substances, rather than an examination of an exporting Member's SPS measure.[587]

7.346 Moreover, the United States submits that the text of Annex C of the *SPS Agreement* provides contextual support for its view that "control, inspection or approval" procedures involve particular products or substances, and not the evaluation of an equivalence determination of another Member's regulatory system.[588]

7.347 The United States further asserts that China's argumentation on this claim is conclusory and merely repeats its other claims, in particular that Section 727 is lacking in justification and results in discrimination. The United States argues that, to the contrary, it "has shown that Section 727 falls squarely within the Article XX(b) exception and is both necessary under the meaning of Article XX(b) and not discriminatory under the meaning of the chapeau."[589]

2. Analysis by the Panel

7.348 The Panel will therefore examine China's claim that the United States has acted inconsistently with Article 8 of the *SPS Agreement* by failing to observe the requirements of Annex C(1)(a) of the *SPS Agreement*, because Section 727 unduly delayed the application of the normal FSIS procedures to Chinese poultry products. We will commence our analysis by reviewing the text of Article 8 and Annex C(1)(a) of the *SPS Agreement*, and how these provisions had been interpreted in the past.

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[582] China's response to Panel question No. 133, para. 123; question 141, para. 142; and question 144, paras. 149-151.
[583] China's response to Panel question No. 133.
[584] China's response to Panel question No. 134.
[585] China's response to Panel question No. 139.
[586] China's response to Panel question No. 133.
[587] United States second written submission, paras. 118-122.
[588] United States second written submission, para. 123.
[589] United States second written submission, para. 124.

(a) Article 8 and Annex C(1)(a) of the *SPS Agreement*

7.349 Article 8 of the *SPS Agreement*, entitled "Control, Inspection and Approval Procedures" requires, *inter alia*, that Members observe the provisions of Annex C in the operation of "control, inspection and approval procedures". Article 8 of the *SPS Agreement* reads as follows:

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

7.350 We note that Annex C of the *SPS Agreement* which is also entitled "Control, inspection and approval procedures", in footnote 7, clarifies that "[c]ontrol, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification."

7.351 Annex C(1)(a) of the *SPS Agreement* reads as follows:

> "1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> > (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;"

7.352 The panel in *EC – Approval and Marketing of Biotech Products*, was the first panel that examined the disciplines in Annex C(1)(a) thoroughly.[590] The panel found that Annex C(1) establishes obligations "with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures". In that respect, the measures before the panel were SPS measures within the terms of Annex A(1) and, according to the panel, also constituted procedures "to check and ensure the fulfilment of sanitary or phytosanitary measures" within the meaning of Annex C(1).[591]

7.353 In that panel's view, the first clause of Annex C(1)(a) determines that Members must ensure that approval procedures are "undertaken and completed without undue delay".[592] With respect to the textual interpretation of the phrase "undertaken and completed", the panel explained that the verb "undertake" makes clear that Members are required to begin, or start, approval procedures after receiving an application for approval, while the verb "complete" indicates that approval procedures are not only to be undertaken, but are also to be finished, or concluded.[593] For that panel, the phrase "undertake and complete" covers all stages of approval procedures meaning that, once an application has been received, approval procedures must be started and then carried out from beginning to end.[594]

7.354 The panel in *EC – Approval and Marketing of Biotech Products* further considered that the ordinary meaning of the phrase "without undue delay" requires that "approval procedures be

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[590] We note that the panel in *Australia – Salmon (Article 21.5 – Canada)* succinctly addressed the scope of Annex C(1), and concluded that the Australian requirements under the specific circumstances of that particular case were substantive measures in their own right, and not "procedures or information requirements 'to check and ensure the fulfilment of sanitary ... measure' that are subject to paragraph 1(c) of Annex C." Therefore, the panel did not consider the Australian measures *vis-à-vis* the obligations in Annex C(1). Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.156-7.157.

[591] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1491.

[592] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.

[593] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.

[594] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.

undertaken and completed with no unjustifiable loss of time."[595] Therefore, only "undue" delay in the undertaking or completion of approval procedures is contrary to the first clause of Annex C(1)(a). Regarding "undue delay", what matters, according to the panel, is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such.[596] The panel also explained that the determination of "without undue delay" must be made on a case-by-case basis according to the relevant facts and circumstances of a specific case. In its view, delays attributable to action, or inaction, of an applicant must not be held against a Member maintaining the approval procedure.[597]

7.355 The panel in *EC – Approval and Marketing of Biotech Products* further considered that the phrase "without undue delay" relates to both elements of the phrase "undertake and complete". Thus, Members must "undertake" approval procedures "without undue delay" and, subsequently, "complete" them "without undue delay".[598]

7.356 Article 8 and Annex C(1) therefore apply to certain types of "procedures", namely those dealing with control, inspection and approval which are aimed at checking and ensuring the fulfilment of SPS measures. In order to determine whether both provisions apply to the specific circumstances of this dispute, the Panel will first examine what we understand "control, inspection and approval procedures" to be. We will then proceed to examine the FSIS procedures in order to ascertain whether they are "control, inspection, or approval procedures" within the scope of Annex C(1) of the *SPS Agreement.* If so, we will then turn to examine whether Section 727 had the effect of causing an undue delay in the application of the normal FSIS procedures to Chinese poultry products failing to observe the requirements in Annex C(1)(a) of the *SPS Agreement* and thus being inconsistent with Article 8 of the *SPS Agreement.*

(b) Whether the procedures applied by the FSIS in the equivalence determination process are control, inspection and approval procedures within the scope of Annex C(1) of the *SPS Agreement*

7.357 We note that Annex C(1) of the *SPS Agreement* expressly provides a general obligation for WTO Members to ensure that "any procedure", which aims to "check and ensure the fulfilment of sanitary and phytosanitary measures", complies with the specific provisions found in the immediately subsequent items (a) through (i). Accordingly, the nature and coverage of items (a) to (i) under Annex C(1) encompass a variety of general principles and guidance for Members to respect when carrying out "control, inspection and approval procedures" to check and ensure the fulfilment of a particular SPS measure.

7.358 As explained above, the panel in *EC – Approval and Marketing of Biotech Products* concluded that the scope of Annex C(1) covers "procedures" to "check and ensure the fulfilment of sanitary and phytosanitary measures".[599]

7.359 We recall that the **United States** argues that Annex C of the *SPS Agreement* applies to "control, inspection and approval procedures" which do not include equivalence determinations as described under Article 4 of the *SPS Agreement*. To support this assertion, the United States affirms that Article 8 makes clear that Annex C does not apply to every SPS measure, but rather to a subset of SPS measures, namely "control, inspection or approval procedures". Furthermore, the United States alleges that Article 8 mentions three specific types of SPS procedures, but does not mention the

[595] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[596] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.
[597] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1497.
[598] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1502.
[599] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1491; see also Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.156-7.157.

procedures used in equivalence determinations. In addition, the United States argues that Article 8 provides context for what is meant by "control, inspection, and approval procedures" in Article 8 and Annex C, specifying (i) systems for approving the use of additives, and (ii) systems for establishing tolerances for contaminants. According to the United States, both of these examples relate to the approval and control of "particular products or substances", and nothing in Article 8 indicates that "control, inspection or approval procedures" were intended to involve an examination of an exporting Member's SPS measure.[600] The United States observes that these assertions are further corroborated by the text of Annex C, which indicates that "control, inspection or approval" procedures involve particular products or substances, and not the evaluation of the equivalence of another Member's regulatory system.[601]

7.360 **China** argues that Annex C of the *SPS Agreement* applies to *any* "procedure to check and ensure the fulfilment of sanitary and phytosanitary measures" and that the list of measures in Article 8 is "illustrative rather than exhaustive". China further asserts that there is no basis to find that equivalence-related procedures are not "control, inspection, or approval procedures". China also argues that Article 8 of the *SPS Agreement* provides that Members "ensure that their procedures are not inconsistent with the provisions of this Agreement", indicating that Article 4 is one of the provisions of the *SPS Agreement* and, thus, Article 8 reinforces that Article 4 provides an additional obligation rather than some type of exception or safe haven.[602]

7.361 Moreover, China argues that Article 8 and Annex C of the *SPS Agreement* do not distinguish between "control, inspection and approval procedures" covering one product or multiple products. In its view, these provisions apply to all types of "control, inspection, and approval procedures".[603]

7.362 The Panel does not feel that it is necessary to define the whole universe of what could fall within the scope of "control, inspection, and approval procedures." However, the Panel must determine whether Section 727 caused an undue delay in the operation of "control, inspection, and approval procedures." We note that Section 727 affected the operation of the FSIS equivalence determination process, which both parties have agreed includes "procedures".[604] Therefore, the question before the Panel is the narrow one of whether these type of equivalence procedures fall within the scope of "control, inspection, and approval procedures."

7.363 Considering the actual text of Annex C(1) of the *SPS Agreement* the Panel notes that Annex C(1) does not specify, nor exclude, any type of "procedures". According to our reading, Annex C(1) basically requires that "any procedure" is covered by its provisions so long as that "procedure" is aimed at "checking and ensuring the fulfilment of sanitary or phytosanitary measures", and is undertaken in the context of "control, inspection, or approval". In the Panel's view, no *a priori* exclusion is contemplated by the *SPS Agreement*.

7.364 We find equally important to note that the *SPS Agreement* does not specify or limit, the SPS measures referred to in Annex C(1). Indeed, Annex C(1) of the *SPS Agreement* merely provides that any procedure to check and ensure the fulfilment of SPS measures is subject to the provisions of items (a) through (i).

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[600] United States second written submission, paras. 118-122.
[601] United States second written submission, para. 123.
[602] China's response to Panel question No. 133.
[603] China's responses to Panel questions Nos. 134 and 135.
[604] United States' first written submission, para. 90; United States' response to Panel question No. 103; China's first written submission, paras. 1, 2, 4 and 37.

7.365 As explained in Section II.C above, the United States has established an equivalence-based regime for the importation of poultry into the United States following the provisions of the PPIA. This equivalence-based regime is implemented and enforced by the FSIS.

7.366 We recall that the FSIS authorizes the importation of poultry products into the United States on a country-by-country basis, and countries wishing to export poultry products to the United States have to first request a determination of eligibility by the FSIS. Once eligibility for importation of poultry is requested, the FSIS will then establish whether an applicant's poultry inspection system is equivalent to that of the United States through up to three sequential processes: (a) a document review; (b) an on-site audit; and (c) the publication of the proposed and final rules in the Federal Register and the country's addition to the list in the CFR.

7.367 Once the FSIS determines that an applicant country's poultry inspection system is equivalent, the FSIS establishes and implements a rule allowing the importation of poultry products from that country. After the initial equivalence determination, a process of certification of establishments fit to export is undertaken by the applicant country and submitted to the FSIS. This is then followed by an ongoing equivalence review, comprising: (i) a recurring document analysis; (ii) further on-site audits; and (iii) continuous port of entry re-inspections of poultry products shipped to the United States from the eligible exporting country.

7.368 The Panel understands that the successful completion of the equivalence determination process undertaken by the FSIS, which includes the establishment and implementation of a rule allowing the importation of poultry products from a specific country, is the only means that any country, including WTO Members, has to export poultry and poultry products to the United States.

7.369 We note that the Merriam-Webster's dictionary defines "approval" as the act of approving. That same dictionary defines "approving" as:

> "2. to have or express a favorable opinion of <couldn't approve such conduct> 3 a: to accept as satisfactory <hopes she will approve the date of the meeting> b : to give formal or official sanction to: Ratify <Congress approved the proposed budget>"[605]

7.370 Based on the above-mentioned facts, we note that pursuant to the FSIS equivalence determination process a country may not export poultry products to the United States unless the FSIS accepts that country's SPS measures on the inspection and safety of poultry products as satisfactory for achieving the United States ALOP for poultry products. It is only if these SPS measures are satisfactory that a country may export poultry products to the United States Without a positive FSIS equivalence determination, a country would not, under any circumstances, be allowed to export poultry and poultry products to the United States. It is, therefore, reasonable to conclude that the FSIS equivalence determination process is an "approval procedure" within the scope of Annex C(1) for imported poultry and poultry products to enter into the United States, because the FSIS equivalence determination process means that the FSIS is giving formal or official sanction (i.e. authorization)[606] and thus approval of a country to export poultry and poultry products to the United States.

7.371 The Panel acknowledges that nothing in the *SPS Agreement* seems to prevent a Member from using an equivalence process to determine who is eligible to export certain products to its market. The

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[605] "approving" (2010). In Merriam-Webster Online Dictionary. Retrieved 8 June 2010, from http://www.merriam-webster.com/dictionary/approving.

[606] We note that Merriam-Webster lists "authorization" as a synonym for "sanction". "approving" (2010). In Merriam-Webster Online Dictionary. Retrieved 8 June 2010, from http://www.merriam-webster.com/dictionary/approving.

Panel also acknowledges that the FSIS equivalence determination process, as described in Section II.C above, involves a series of actions which may go beyond "control, inspection, and approval procedures." Nevertheless, we are of the view that, where the recognition of equivalence (as the one granted through the FSIS equivalence determination process) is the only way that a Member may export its products to an importing Member, then the equivalence determination process of the importing Member must comply with the pertinent obligations on "approval procedures" under Annex C(1) of the *SPS Agreement*.

7.372 The "approval procedures" encompassed by Annex C of the *SPS Agreement* may cover a broad array of procedures, as the drafters of the *SPS Agreement* did not limit the scope of those "procedures" to any specific type of "approval procedures". Bearing that in mind, the Panel considers that the application of specific provisions of the *SPS Agreement*, such as Annex C(1), is by no means restricted to the title or to the characterization of an SPS measure given to that measure by the WTO Member maintaining it. To put it differently, it is not because the United States named its requirements as "FSIS equivalence determination process" and characterizes it as a purely "equivalence" process, that the only provisions applicable to the measure are those of Article 4 of the *SPS Agreement*.

7.373 This Panel certainly understands that Article 4 of the *SPS Agreement*, has its own concepts and disciplines separate from those governing "control, inspection, and approval procedures" envisaged and regulated by Annex C and Article 8. This is illustrated by the existence of the decision reached by the SPS Committee on the implementation of Article 4 of the *SPS Agreement.*[607] However, we note that we have already concluded in Section VII.D that Article 4 cannot be read in isolation from the other provisions of the agreement and that an SPS measure covered by Article 4 may nevertheless be subject to other obligations in the *SPS Agreement*.

7.374 Having said that, the Panel understands that to deny that an equivalence determination process, which also has the ultimate effect of approving the importation of a product from a given WTO Member, as envisaged in any other "approval procedure", is subject to Annex C(1) of the *SPS Agreement*, would unfairly reward the ingenuity of some WTO Members and possibly create a dangerous safe haven for disguised protectionism. Such an understanding would result in an undesired precedent that may entice some WTO Members to circumvent the application of the *SPS Agreement*.

7.375 In the Panel's view, the disassociation of the FSIS equivalence determination process from the disciplines on "approval procedures" of Annex C(1) could ultimately result in an insurmountable loophole in the *SPS Agreement*, contrary to the first and fourth preambular paragraphs of the Agreement which determine that "[SPS] measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" and WTO Members' desire for the "establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade", respectively.

7.376 For instance, if a WTO Member is able to control imports only through the recognition of equivalence according to Article 4 of the *SPS Agreement*, it could perhaps indefinitely postpone and delay the importation of products from a given WTO Member by arguing that the *SPS Agreement* does not prescribe a time-frame for conclusion of equivalence processes. In this hypothetical situation, the indefinite delay of an equivalence process would completely undermine the application of the *SPS Agreement*, and impede the importation of certain products into the WTO Member maintaining the equivalence process based on the provisions of the *SPS Agreement*. In the Panel's view, this is certainly not what the drafters of the *SPS Agreement* had envisaged according to the preambular

[607] G/SPS/19/Rev.2 of 23 July 2004.

language seen above, nor would it be in accordance with the decision reached by WTO Members in the SPS Committee on the implementation of Article 4 of the *SPS Agreement.*[608]

7.377 Accordingly, the Panel concludes that the United States' FSIS equivalence determination process for the importation of poultry and poultry products from other WTO Members qualifies as an "approval procedure" within the meaning of Annex C(1) of the *SPS Agreement.*

7.378 The Panel recalls that according to China's claim, the FSIS equivalence determination procedures are covered by Annex C(1)(a) of the *SPS Agreement*, i.e. "control, inspection and approval procedures".[609] However, China also clarifies that if the Panel finds that the FSIS equivalence determination process encompasses only one type of the procedures covered by Annex C(1), it would be sufficient.[610] On this basis, the Panel will limit its analysis to the fact that the FSIS equivalence determination process is an "approval procedure" within the meaning of Annex C(1). The Panel will therefore assess whether Section 727 has affected the FSIS equivalence determination process in a manner inconsistent with the United States' obligations under Annex C(1)(a) of the *SPS Agreement*.

(c) Whether Section 727 has resulted in an undue delay of the FSIS equivalence determination process in respect of poultry products from China within the meaning of Annex C(1)(a) of the *SPS Agreement*

7.379 The Panel is therefore called upon to decide whether, as claimed by China, Section 727 would have unjustifiably delayed the application of FSIS equivalence procedures until its expiration, resulting in an "undue delay" within the meaning of Annex C(1)(a) of the *SPS Agreement*.[611]

7.380 We recall that the measure at issue in this dispute, Section 727, reads: "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[612]

7.381 We also recall that, as explained by the panel in *Colombia – Ports of Entry*[613], municipal law is to be approached as a "factual issue".[614] In making an objective assessment of municipal legislation, a panel should consider the very terms of the law[615], in their proper context[616], and complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.[617]

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[608] G/SPS/19/Rev.2 of 23 July 2004. For instance, paragraph 9 of the preamble provides "*Recognizing* the importance of minimizing possible negative effects of sanitary or phytosanitary measures on trade and of improving market access opportunities, particularly for products of interest to developing country Members".

[609] China's response to Panel question No. 133.

[610] China's response to Panel question No. 144.

[611] China's first written submission, paras. 156-160.

[612] Section 727, AAA of 2009 (Exhibit CN-1).

[613] Panel Report, *Colombia – Ports of Entry*, para. 7.93.

[614] Appellate Body Report, *India – Patents (US)*, para. 66; See also Panel Report, *US – Section 301 Trade Act*, para. 7.18, See also PCIJ, *Certain German Interests in Polish Upper Silesia*, PCIJ, 1926, Rep., Series A, No. 7, p. 19. The Panel is aware that the Appellate Body has explicitly stated that when a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU. Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

[615] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112; See also Panel Report, *US – 1916 Act (EC)*, para. 6.48.

[616] Panel Report, *US – Section 301 Trade Act*, para. 7.27.

[617] Appellate Body Report, *US – Carbon Steel*, para. 157.

7.382 We accept the United States' explanation that the effect of Section 727 in United States domestic law was limited to the explicit terms of that law, comprising 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.[618] Therefore, Section 727 precluded the FSIS from ultimately granting equivalence to poultry products from China.

7.383 The Panel recalls the comprehensive findings reached by the panel in *EC – Approval and Marketing of Biotech Products* that the first clause of Annex C(1)(a) requires that WTO Members must ensure that approval procedures are "undertaken and completed without undue delay"[619]. The panel in *EC – Approval and Marketing of Biotech Products* interpreted that the requirement in Annex C(1)(a) to undertake and complete approval procedures without undue delay makes clear that WTO Members are required to begin, or start, approval procedures after receiving an application for approval. Additionally, the use of the term" completed" requires that, approval procedures are not only to be undertaken, but are also to be finished, or concluded.[620] Hence, once an application has been received, approval procedures must be started and then carried out from beginning to end.[621] That panel also concluded, that the ordinary meaning of the phrase "without undue delay" requires Members to both undertake and complete approval procedures with no unjustifiable loss of time.[622] We agree with these findings of the panel in *EC – Approval and Marketing of Biotech Products* and make them our own.

7.384 Accordingly, based on the very terms of Section 727, the Panel finds that regardless of the actions undertaken or available to the FSIS during the period that Section 727 was in force, the FSIS would have never been able to "complete" China's equivalence determination process, as explicitly prescribed by the US Congress through the terms of Section 727. In our view, this interpretation finds support in the United States' own definition of the effects of Section 727 as "comprising 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"[623], which to us is the only possible effect of the succinct text of Section 727.

7.385 As we have explained above, the "establishment and implementation of a rule" allowing the importation of poultry products from a specific country is the only means by which a WTO Member may export poultry and poultry products to the United States' market. By prohibiting the "establishment and implementation of a rule", Section 727 undeniably eliminates any possibility for "completion" of the FSIS equivalence determination process, which, if not "justified", as explained by the panel in *EC – Approval and Marketing of Biotech Products*, must be characterised as an "undue delay" according to Annex C(1)(a) of the *SPS Agreement.*

7.386 We shall therefore look at whether there was any legitimate justification for the delay caused by Section 727.[624]

7.387 The Panel notes that the United States has submitted that its arguments regarding the "necessity" of Section 727 under Article XX(b) of the GATT 1994 are also relevant in determining whether any delay resulting from Section 727 was "due" or "undue".[625] China has also stated that the

[618] United States' first written submission, para. 22.
[619] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.
[620] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.
[621] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.
[622] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[623] United States' first written submission, paras. 5 and 22.
[624] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.
[625] United States' response to Panel question No. 146.

Panel may look at the parties arguments under Article XX(b) when considering the issue of "undue delay" in Article 8.[626]

7.388 We thus note that the United States has attempted to justify Section 727 on the basis that it was necessary to protect against the risk posed by the importation of poultry products from China.[627] It argues that China has had numerous food safety crisis in the past years, that China is a country where avian influenza" exists and that China has struggled with corruption, smuggling and lax enforcement of its food safety laws.[628] The United States refers to the melamine crisis that struck China in 2007 and which was documented by the World Health Organization (WHO).[629] The United States argues that Section 727 contributed to the protection of human and animal life and health by ensuring that FSIS would consider China's recent food safety crises and China's enactment of a new food safety law, provide FSIS the opportunity to improve its equivalence process, and provide the United States' Government the chance to examine FSIS's equivalence process and its overall efforts to ensure that imported food safety is safe.[630]

7.389 China argues that Section 727 was one of a series of measures – it mentions Section 733 and Section 743 – that unjustifiably delayed the application of the normal FSIS procedures to China by two years.[631] Further, it argues that Section 727 delayed the application of the FSIS procedures until the enactment of the Agriculture Appropriations Act 2010. Finally, China argues that the prohibition imposed under Section 727 on Chinese access to FSIS approval procedures is without scientific justification, and that it results in arbitrary and unjustifiable discrimination against Chinese poultry products.[632]

7.390 The justification that the United States provides for the delay in the FSIS equivalence process caused by Section 727 is the risk posed by the importation of poultry products from China. The Panel is of the view that its findings concerning the lack of scientific justification in support of the arbitrary or unjustifiable distinction in ALOPs applied to poultry products from China and poultry products from other WTO Members are relevant in assessing the United States' alleged justification for the undue delay caused by Section 727.

7.391 We recall our findings in Section VII.F.2(e) where we found that Section 727 is inconsistent with Articles 5.1, 5.2 and 2.2 of the *SPS Agreement* because it is not based on a risk assessment and is maintained without sufficient scientific evidence. We further recall our consequent findings in Section VII.G.2(b)(ii) that there is no justification based on scientific evidence for the distinction in ALOPs applied to the risk of potentially unsafe poultry; and that, accordingly, the distinction in ALOPs for poultry products for China and for poultry products from other WTO Members is arbitrary or unjustifiable within the terms of Article 5.5 of the *SPS Agreement*. Accordingly, we do not see how the delay in the completion of the FSIS approval procedures could be justified on the basis of arguments already rejected by the Panel.

7.392 The Panel recalls that under Annex C(1)(a) of the *SPS Agreement*, WTO Members are obliged to "undertake and complete" the procedures for assessing compliance with a substantive SPS measure "without undue delay". The Panel concludes that Section 727 completely foreclosed the possibility for "completion" of the FSIS equivalence process for Chinese poultry products resulting in

[626] China's response to Panel question No. 146.

[627] United States' first written submission, paras. 123-129, United States' oral statement at the first substantive meeting, paras. 42-48, United States' second written submission, para. 13.

[628] United States' second written submission, para. 13.

[629] Exhibit US-23.

[630] United States' second written submission, para. 17.

[631] China's first written submission, para. 158, China's opening oral statement at the first substantive meeting of the Panel, para. 78.

[632] China's opening oral statement at the first substantive meeting of the Panel, para. 78.

an unjustified and therefore undue delay within the meaning of Annex C(1)(a) of the *SPS Agreement*. Therefore, the United States has failed to observe the requirements under Annex C(1)(a) of the *SPS Agreement*.

(d) Whether by failing to observe the provisions of Annex C(1)(a) of the *SPS Agreement*, the United States has acted inconsistently with Article 8 of the *SPS Agreement*

7.393 We recall that China has claimed that the United States has violated Article 8 of the *SPS Agreement* by failing to follow the requirements under Annex C(1)(a) of the *SPS Agreement* concerning WTO Members' obligations to "undertake and complete" the procedures for assessing compliance with a substantive SPS measure "without undue delays".

7.394 The Panel notes that Article 8 of the *SPS Agreement* requires, inter alia, that WTO "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures". In this respect, both parties agree that the non-observance of the obligations in Annex C(1)(a) implies a violation of Article 8 of the *SPS Agreement*.[633] This understanding is in line with the conclusions reached by the panel in *EC – Approval and Marketing of Biotech Products*.[634]

7.395 Having found that Section 727 has caused an "undue delay" in the FSIS "approval procedures", by foreclosing any possibility of "completing" the FSIS equivalence determination process for Chinese poultry products to enter into the United States; having thus concluded that the United States has failed to observe the provisions of Annex C(1)(a) of the *SPS Agreement*, the Panel accordingly finds that Section 727 is inconsistent with Article 8 of the *SPS Agreement*.

(e) Conclusion

7.396 The Panel therefore finds that, by failing to observe the provisions of Annex C(1)(a) of the *SPS Agreement*, Section 727 is inconsistent with Article 8 of the *SPS Agreement*.

K. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

1. Arguments of the parties

7.397 **China** argues that Section 727 is inconsistent with Article I:1 of the GATT 1994 because it affords an advantage to all other WTO Members that is not extended immediately and unconditionally to the like poultry products from China.[635] In its view, all WTO Members other than China are being offered the opportunity to export poultry products to the United States after successful completion of the procedures applied by the FSIS. It further asserts that Section 727 operates to exclude only Chinese poultry products from the competitive opportunity of entering the United States' market, while allowing poultry products from all other WTO Members that same opportunity. In doing so, Section 727 violates Article I:1 of the GATT.[636]

7.398 The **United States** responds that China has not provided any basis for the Panel to make a finding under Article I:1 of the GATT 1994.[637] The United States argues that China fails to recognize that Section 727 only has meaning within the context of the overall operation of an equivalency-based food-safety regime under the PPIA.[638] The United States contends that "under an equivalency-based regime, products of different WTO Members are necessarily treated differently: that is products of

[633] China's response to Panel question No. 143. United States' response to Panel question No. 143.
[634] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1569.
[635] China's first written submission, para. 85.
[636] China's first written submission, para. 93.
[637] United States' first written submission, para. 94.
[638] United States' first written submission, para. 95.

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".[639] It further contends that the Panel need not address Article I:1 in order to solve this dispute, because in its view the core of the issue is whether Section 727 is justified by legitimate concerns with human and animal life and health. In the United States' view, it would not promote the resolution of this dispute for the Panel to analyse the application of Article I to equivalency-based regulatory regimes, or to the likeness of products with different levels of safety. The order of analysis thus proposed by the United States is to review the measures under Article XI, followed (if necessary) by findings under Article XX(b).[640]

2. Analysis by the Panel

7.399 In this instance, the Panel is called upon to examine whether Section 727 is inconsistent with Article I:1 of the GATT 1994. The Panel takes note of the United States' contention that the Panel need not to address this claim to resolve this dispute. We are however of the view that it would be appropriate for us to rule on China's claim under this provision.[641]

7.400 We shall start by looking at the text of Article I:1 of the GATT 1994 and how it has been interpreted by panels and the Appellate Body. In that light, we will proceed and examine whether Section 727 violates this provision.

(a) Article I:1 of the GATT 1994

7.401 We note that Article I:1 of the GATT 1994 contains the Most-Favoured Nation (MFN) principle, which "has long been a cornerstone of the GATT and is one of the pillars of the WTO trading system."[642] Article I:1 provides:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

7.402 The Appellate Body in *Canada – Autos* explained that the object and purpose of Article I:1 of the GATT 1994. "is to prohibit discrimination among like products originating in or destined for different countries." The Appellate Body further explained that "[t]he prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."[643]

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[639] United States' first written submission, para. 96.
[640] United States' first written submission, para. 99.
[641] See Section VII.B.
[642] Appellate Body Report, *Canada – Autos*, para. 69.
[643] Appellate Body Report, *Canada – Autos*, para. 84.

7.403 The Appellate Body in *EC – Bananas III* confirmed that, to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" of all WTO Members.[644]

7.404 In accordance with the approach followed by the panel in *EC – Bananas III (Article 21.5 – US)*, and upheld by the Appellate Body, the Panel will conduct its analysis by considering: (i) whether Section 727 is a measure of the kind subject to the disciplines of Article I:1 of the GATT 1994, (ii) whether it confers an advantage of the type covered by Article I, and, if so, (iii) whether the advantages are extended to all like products immediately and unconditionally.

(b) Whether Section 727 is a measure subject to the disciplines of Article I:1 of the GATT 1994

7.405 The first step in our analysis is to determine whether Section 727 is a measure subject to the disciplines of Article I:1 of the GATT 1994. In this respect, **China** argues that Section 727 is a rule in connection with the importation of poultry products from China within the meaning of Article I:1. For China, this is evident from the wording of Section 727, which refers to the establishment or implementation of a rule allowing the importation of poultry products into the United States from China.[645]

7.406 The **United States** has not presented any arguments in this respect.

7.407 We note that prior panels and the Appellate Body have interpreted the terms "rules and formalities in connection with importation" to encompass a wide range of measures. As China points out, countervailing duties, additional bonding requirements and activity function rules have been found to be rules and formalities in connection with importation within the meaning of Article I:1.[646]

7.408 In the context of Article XI:1 of the GATT 1994, the panel in *India – Autos* when interpreting the terms "restriction ... on importation", explained that this meant a restriction "with regard to" or "in connection with" the importation of a product. The panel further explained that these terms would not necessarily be limited to measures which directly relate to the "process" of importation but could also encompass measures which otherwise relate to other aspects of the importation of the product.[647]

7.409 The Panel recalls that Section 727 prohibits the FSIS from using appropriated funds to establish or implement a rule allowing poultry products from China to be imported into the United States. As described in Section II.C above, the establishment and implementation of a rule by the FSIS is a prerequisite for the importation of poultry products into the United States. We also recall that we have concluded that the effect of Section 727, which is a legislative provision, was to prohibit the importation of Chinese poultry products into the United States.

7.410 The Panel finds the reasoning of the panel in *India – Autos* with respect to the terms "in connection with importation" to be persuasive. We conclude that "in connection with importation" as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures, such as Section 727, which relate to other aspects of the importation of a product or have an impact on actual importation. Given the foregoing, we determine

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[644] Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 7.555, Panel Report, *Indonesia – Autos*, para. 14.138, citing to Appellate Body Report, *EC – Bananas III*, para. 206. Panel Report, *Colombia – Ports of Entry*, para. 7.322.

[645] China's first written submission, para. 85.

[646] China's first written submission, para. 77 citing GATT Panel Report, *US – MFN Footwear*, para. 6.8; Panel Report, *US – Certain EC Products*, para. 6.54 and Appellate Body Report, *EC – Bananas III*, para. 206 respectively.

[647] Panel Report, *India – Autos*, para. 7.257.

that Section 727 is a rule in connection with importation within the meaning of Article I:1 of the GATT 1994.

(c) Whether the United States confers an advantage of the type covered by Article I:1 of the GATT 1994

7.411 The Panel's next step is thus to examine whether the United States is conferring an advantage of the type covered by Article I:1 of the GATT 1994.

7.412 We note that, according to China, the advantage accorded to other countries and not extended to China is "the opportunity to export poultry products to the United States, pending a successful finding of initial or ongoing equivalence and certification of individual Chinese poultry producers."[648] China argues that in accordance with the United States' regulations and procedures governing the importation of poultry products, WTO Members' poultry products have the opportunity to be imported into the United States (the advantage) if produced under a food safety system equivalent to that of the United States. However, China contends that without funding, the FSIS cannot use its personnel and resources to implement existing rules or establishing rules, and in its view, it denies Chinese poultry products the advantage identified above.[649]

7.413 The United States, however, has not contested China's argumentation on the existence of an advantage of the type covered by Article I:1 of the GATT 1994.[650]

7.414 The Panel notes that the term "advantage" in Article I:1 of the GATT 1994 has been broadly interpreted by panels and the Appellate Body. The Appellate Body in *Canada – Autos* examined the language in Article I:1 "any advantage … granted by any Member to any product" and gave a rather broad interpretation of the term "advantage":

> "We note next that Article I:1 requires that '*any advantage*, favour, privilege or immunity granted by any Member to *any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.' (emphasis added) The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product* '; and not to like products from *some* other Members, but to like products originating in or destined for '*all other* ' Members."[651]

7.415 The Panel in *EC – Bananas III* considered that "advantages" within the meaning of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.[652]

7.416 We note that under the PPIA and the FSIS procedures[653], any country may request a determination of eligibility for the importation of poultry products to the United States.[654] Once a

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[648] China's first written submission, para. 86.
[649] China's first written submission, paras. 87-88.
[650] *See* United States' first written submission, paras. 94-100. In fact, the United States has not responded to China's arguments concerning the "advantage" being granted or whether this advantage is granted "unconditionally and immediately". The United States has only focussed on contesting China's likeness arguments.
[651] Appellate Body Report, *Canada – Autos*, para. 79.
[652] Panel Report, *Colombia – Ports of Entry*, para. 7.341, *citing* the Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.
[653] See Section II.C.

successful determination of equivalency is made and a final rule is published in the Federal Register, countries can start exporting poultry products to the United States.[655] Thus, successful completion of the mentioned procedures is the only way that an importer can enter the United States market for poultry products.[656] The opportunity to sell poultry products in the United States market is therefore a very favourable market opportunity and not having such an opportunity would mean a serious competitive disadvantage, or rather would amount to an exclusion from competition in the US market. Such an opportunity would also affect the commercial relationship between products of two different origins where one of the countries of origin is denied access to the PPIA and the FSIS procedures.

7.417 The Panel thus considers that the opportunity to export poultry products to the United States after successful completion of the PPIA and the FSIS procedures *is* an advantage within the meaning of Article I:1 of the GATT 1994 because it creates market access opportunities and affects the commercial relationship between products of different origins.

(d) Whether like products from other Members are granted an advantage within the meaning of Article I:1 of the GATT 1994

7.418 Having found that the opportunity to export poultry products to the United States after successful completion of the FSIS procedures is an advantage within the meaning of Article I:1 of the GATT 1994, the Panel will next consider whether like products from other Members are granted such an advantage.

7.419 The Panel notes that **China** has argued that the measure at issue discriminates against Chinese poultry products on the basis of origin, given that if China were to attempt to engage in either the initial equivalence determination for products made from domestically slaughtered poultry or in an ongoing equivalence verification for processed poultry products, Section 727 would operate to exclude Chinese poultry products from those FSIS procedures based simply on their origin. China notes that in cases of origin-based distinctions, panels and the Appellate Body have resorted to a hypothetical like products analysis. Accordingly, China considers that a hypothetical like product analysis should be conducted[657] and therefore poultry products originating from other WTO Members whose poultry production system has been found to be equivalent to the United States are like products to Chinese poultry products.[658]

7.420 The **United States** argues that China has not provided an explanation 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.[659]

7.421 The United States argues that the different treatment is not based on origin but on the fact that different countries have different food safety systems which afford different levels of protection. The United States contends that the hypothetical like product approach has not been applied by panels or the Appellate Body to situations such as the one in this dispute, and that the cases cited by China in support (*Colombia – Ports of Entry* and *Canada – Autos*) are not pertinent, because these disputes did

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[654] "Countries desiring to establish eligibility for importation of poultry products into the United States may request a determination of eligibility by presenting copies of the laws and regulations..." 9 CFR 381.196 (a)(2)(iii) (Exhibit CN-6).

[655] 9 CFR 381.196 (a)(1) (Exhibit CN-6).

[656] See Section II.C.

[657] China's first written submission, para. 91.

[658] China's first written submission, para. 91. China supports its view on the following cases: Panel Report, *Colombia – Ports of Entry*, para. 7.356, Panel Report, *Canada – Periodicals*, pp. 20-21 and Panel Report, *Indonesia – Autos*, para. 14.113.

[659] United States response to Panel question No. 31.

not involve differences in safety between products of different WTO Members.[660] In its view, equivalency-based regimes respond to the fact that health and safety systems vary from country to country, and it does not accept that Chinese poultry products present no particular safety issues as compared to products from any other WTO Member. In this sense, the United States contends that disputes such as *EC – Asbestos* in which a panel examined issues of "likeness" in the context of products with different levels of safety should not be ignored. In sum, the United States seems to argue that the determination of likeness in this dispute should be done in accordance with the traditional criteria.

7.422 China responds that the United States has not rebutted its argument that the "like products" in this dispute are "poultry products" (as defined by the PPIA)[661], hypothetically capable of accessing the FSIS procedures and being exported from any other WTO Member to the United States.[662] Further, China argues that the United States has neither denied that Section 727 imposes a *de jure* origin-based distinction between Chinese poultry and poultry from all other origins, nor distinguished the panel and Appellate Body reports cited by China.[663]

7.423 The Panel notes that Article I:1 requires a comparison between like products originating from one country *vis-à-vis* products originating from a WTO Member. The products to be compared in this dispute are the products at issue – poultry products as defined by the PPIA originating from China *vis-à-vis* poultry products originating in the territory of other WTO Members which have been deemed equivalent by the FSIS. China argues that the Panel should follow a hypothetical like product analysis as several panels have done when confronted with origin-based discrimination[664], while the United States argues that the Panel should rely on the approach of the panel in the *EC – Asbestos* dispute because it dealt with the issue of "likeness" in the context of products with different safety levels.[665]

7.424 The concept of like product has been abundantly interpreted in the prior decisions of panels and the Appellate Body. Whatever the provision at issue, the Appellate Body has explained that a like product analysis must always be done on a case-by-case basis.[666]

7.425 The traditional approach for determining "likeness" has, in the main, consisted of employing four general criteria:[667] "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products."[668]

7.426 A different approach used by panels and the Appellate Body to determine the likeness of the products has been to assume – hypothetically – that two like products exist in the market place when one of two situations arises: first cases concerning origin-based discrimination, and second, cases

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[660] United States' first written submission, para. 99 and footnote 110.

[661] Exhibit CN-4.

[662] China's response to Panel question No. 33.

[663] China cites the panel reports in *Colombia – Ports of Entry* at para. 7.356, *Canada – Periodicals* at pp. 20-21, and *Indonesia – Autos* at para. 14.114.

[664] China's first written submission, para. 89.

[665] United States' first written submission, para. 98.

[666] Appellate Body Report, *EC – Asbestos*, para. 102.

[667] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21, DSR 1996:I, 97, at 113 and, in particular, fn. 46; Panel Report, *US – Gasoline*, para. 6.8 (where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994).

[668] The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (*e.g.*, GATT Panel Report, *EEC – Animal Feed Proteins*, para. 4.2; GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.6; and Panel Report, *US – Gasoline*, para. 6.8; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22, DSR 1996:I, 97, at 114.

where it was not possible to make the like product comparison because of – for example – a ban on imports.[669]

7.427 The panel in *China – Publications and Audiovisual Products*[670] recalled the relevant WTO jurisprudence which supports a hypothetical like product analysis where a difference in treatment between domestic and imported products is based exclusively on the products' origin. In these cases, the complainant did not need to identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of "likeness". Instead, when origin is the sole criterion distinguishing the products, it has been sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are "like".[671] For example, the panels in *Argentina – Hides and Leather* and *Canada – Wheat Exports and Grain Imports* found in the context of Article III:2 of the GATT 1994, that "where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it is not necessary to examine the various likeness criteria."[672] We also note that panels have found that foreign origin cannot serve as a basis for a determination that imported products are "unlike" domestic ones.[673]

7.428 The panel in *Colombia – Ports of Entry* applied a hypothetical like product analysis in respect of products originating from Panama and other WTO Members in the context of Article I:1. The measure at issue affected products coming from Panama into Colombia, whether originating or not in Panama. Panama did not appear to produce goods for export to Colombia, but nevertheless the Panel considered Panama's claim. Based on the above jurisprudence under Article III of the GATT 1994[674], the panel adopted a hypothetical likeness approach on the premise of an origin-based distinction that would arise if Panama were to produce the subject goods and export them to Colombia.[675] The panel considered that if Panama were to produce textiles, apparel and footwear, goods originating in Panama would be "like products" to those originating in other countries.[676]

7.429 We note that the United States has argued that the differing safety levels of poultry from China *vis-à-vis* other WTO Members may have an impact on the like products analysis.[677] However, the United States did not provide specific evidence relating to different safety levels between poultry products from China and other WTO Members. Therefore, we see no reason not to proceed with the "hypothetical" like products analysis and base our determination on whether the products alleged to be "like" are distinguished solely because of their origin.

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[669] Panel Report, *Canada – Periodicals*, paras. 5.22-5.23 upheld by the Appellate Body Report, *Canada – Periodicals*, p. 12.

[670] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1446.

[671] Panel Report, *Indonesia – Autos*, para. 14.113; Panel Report, *Argentina – Hides and Leather*, paras. 11.168 -11.170; Panel Report, *Canada – Autos*, para. 10.74; Panel Report, *India – Autos*, paras. 7.174-7.176.

[672] Panel Report, *Canada – Wheat Exports and Grain Imports*, footnote 246 to para. 6.164.

[673] Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 8.133.

[674] The panel referred to the Appellate Body Report, *Canada – Periodicals*, pp. 20-21; Panel Report, *Indonesia – Autos*, para. 14.113. Panel Report, *Colombia – Ports of Entry*, footnote 648 to para. 7.356.

[675] Panel Report, *Colombia – Ports of Entry*, para. 7.356.

[676] Panel Report, *Colombia – Ports of Entry*, para. 7.357.

[677] United States' first written submission, para. 98.

7.430 We recall the language in Section 727:

> "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[678]

7.431 The funding restriction imposed by Section 727 is origin-based in respect of the products it affects, i.e. poultry products from China, and not from any other WTO Member. By targeting only China, Section 727 imposes origin-based discrimination.

7.432 Given this origin-based distinction the Panel believes it is appropriate to follow prior panels that have used a hypothetical like products analysis.[679] In this sense, for the purposes of determining whether an advantage has been accorded immediately and unconditionally to other WTO Members and not to China, the Panel will assume that poultry products originating from China are like products to those originating from other WTO Members.

(e) Whether the United States confers an advantage that is not extended "immediately and unconditionally" to poultry products from China

7.433 Having found that an advantage, i.e. the opportunity to export poultry products to the United States, pending a successful finding of initial or ongoing equivalence and certification of individual poultry producers, has been granted to products which are "like" poultry from China, the Panel will now determine whether by virtue of Section 727 that "advantage" is extended immediately and unconditionally to the like poultry products from China as required by Article I:1 of the GATT 1994.

7.434 **China** argues that Section 727 is "inconsistent with Article I:1 because it applies a condition in a manner that discriminates between like products of different origins."[680] It states that Section 727 applies solely to poultry products and that it removes the advantage of an opportunity to access the United States' market.[681] For these reasons, China concludes that Section 727 does not operate on an MFN basis and cannot be seen to unconditionally accord advantages to the like products of all WTO Members.[682]

7.435 The **United States** does not respond to the substance of China's claim under Article I:1, because in its view China has not met the threshold of establishing that poultry products from China are like those from other WTO Members.[683]

7.436 The Panel now turns to the interpretation of the phrase "immediately and unconditionally". This phrase has already been interpreted by prior WTO panels. The panel in *Canada – Autos* considered that the issue of whether an advantage within the meaning of Article I:1 of the GATT 1994 is accorded "unconditionally" cannot be determined independently of an examination of whether it involves discrimination between like products of different countries.[684] The panel clarified that the word "unconditionally" (i.e. "not subject to conditions") in Article I:1 of the GATT 1994 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all

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[678] Section 727, Agriculture Appropriations Act 2009 (Exhibit CN-1).

[679] Panel Report, *Colombia – Ports of Entry*, Panel Report, *Indonesia – Autos* and Appellate Body Report, *Canada – Periodicals.*

[680] China's first written submission, para. 92.

[681] China's first written submission, para. 92.

[682] China's first written submission, para. 92.

[683] United States' response to Panel questions Nos. 31, 33 and 87.

[684] Panel Report, *Colombia – Ports of Entry*, para. 7.361, citing the Panel Report, *Canada – Autos*, para. 10.22.

Members an advantage which has been granted to any product originating in any country. The panel further explained that the purpose of Article I:1 of the GATT 1994 "is to ensure unconditional MFN treatment." In this context, the panel considered that the obligation to accord unconditionally to WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. The panel explained that this means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin. The panel went on to say:

> "[I]t appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word 'unconditionally' in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products."[685]

7.437 The panel in *Colombia – Ports of Entry* followed the reasoning of the panel in *Canada – Autos* and considered that it could assess whether an advantage was conferred "immediately and unconditionally" "based on whether an advantage granted to textiles, apparel, or footwear of any Member was not similarly accorded to those products originating in Panama for reasons related to its origin or the conduct of Panama."[686] Colombia argued that it could condition its customs procedures on the need to control and verify imported merchandise from Panama and to avoid circumvention of such laws and regulation through under-invoicing, fraud and smuggling, without violating Article I:1 of the GATT 1994.[687] The panel reiterated the view expressed by the *Canada – Autos* panel that conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 of the GATT 1994 only when such conditions discriminated with respect to the origin of the products, and ruled that Article I:1 of the GATT 1994 prohibited Members from addressing such concerns through the use of customs rules that are applied on the basis of origin.[688]

7.438 We recall that China argues that Section 727 is inconsistent with Article I:1 of the GATT 1994 as it applies a condition in a manner that discriminates between like products of different origins, given that it applies solely to Chinese poultry products, hence not being applied on MFN basis.[689]

7.439 Section 727 prohibited FSIS from spending funds to establish or implement a rule allowing the importation of poultry products from China; it therefore applies *solely* to China. The Panel recalls that without the establishment or the implementation of a rule allowing the importation of poultry products – even if a country is determined by FSIS to provide equivalent food safety standards – it

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[685] Panel Report, *Canada – Autos*, para. 10.24.
[686] Panel Report, *Colombia – Ports of Entry*, para. 7.362.
[687] Panel Report, *Colombia – Ports of Entry*, para. 7.366.
[688] Panel Report, *Colombia – Ports of Entry*, para. 7.366.
[689] China's first written submission, para. 92.

cannot export poultry products to the United States.[690] This means that even if Chinese poultry production system is found to provide equivalent food safety standards as those applied in the United States[691], it will not be able to export poultry products because of the funding prohibition. Further, the United States acknowledges that the purpose and effect of Section 727 was to prevent Chinese poultry products from being imported into the United States.[692]

7.440 No other country was subject to the funding prohibition that Section 727 imposed on China. This means that China is the only WTO Member that is denied the advantage that the Panel identified earlier – the opportunity to export poultry products to the United States after the successful completion of the FSIS procedures. Therefore, Section 727 discriminates against China with respect to other WTO Members by denying the above-mentioned advantage, and this discriminatory treatment means that the United States is not extending an advantage "immediately and unconditionally".[693]

(f) Conclusion

7.441 For the above reasons, the Panel concludes that the United States is not extending an advantage immediately or unconditionally to the like products originating from China, advantage that it has extended to all other WTO Members. We therefore find that Section 727 is inconsistent with Article I:1 of the GATT 1994.

L. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

1. Arguments of the parties

7.442 **China** argues that Section 727 is inconsistent with Article XI:1 of the GATT 1994 because it imposes a restriction on importation which negatively impacts the competitive opportunities for poultry products from China. In China's view, the measure institutes a *de facto* prohibition on the importation of poultry products from China.[694] Further, it contends that since China cannot participate in the FSIS approval procedures, the measure at issue effectively eliminates China's competitive opportunities in the United States market, thus constituting a restriction within the meaning of Article XI:1 of the GATT 1994.[695]

7.443 In the alternative, China argues that to the extent that the practical impact of Section 727 is an import ban on Chinese poultry products, Section 727 institutes an import prohibition in the sense of Article XI:1 of the GATT 1994.[696]

7.444 The **United States** argues that 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.[697] The United States

[690] See Section II.C.
[691] The Panel notes that the FSIS has determined that China is equivalent to the United States for processed poultry products and reached a preliminary determination that the same was true for slaughtered poultry products. See Section II.D.
[692] United States' response to Panel question No. 110.
[693] Panel Report, *Canada – Autos*, para. 10.23.
[694] China's first written submission, para. 102.
[695] China's first written submission, para. 104, China's opening oral statement at the first substantive meeting of the Panel, para. 83.
[696] China's first written submission, para. 106.
[697] United States' first written submission, para. 101; United States response to Panel question No. 31.

contends that Section 727 meets the requirement of subparagraph (b) of Article XX of the GATT 1994.[698]

2. Analysis by the Panel

7.445 As indicated above, the United States has not contested China's claim under Article XI:1 of the GATT 1994. The absence of refutation of a claim raises the question of what the role of the Panel should be in such a case. We note that in *US – Shrimp (Ecuador)* and *US – Shrimp (Thailand)*, the panels found that although the respondent was not seeking to refute the claims, in order to make an objective assessment of the matter before them they had to satisfy themselves whether the complainant had established a prima facie case of violation.[699] In particular, the panels considered whether the complainant had presented evidence and argument which "was sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".[700]

7.446 Although the United States has not presented arguments seeking to refute China's claims, the Panel, in order to make an objective assessment of the matter as directed by Article 11 of the DSU, will still examine whether China has established a prima facie case of violation of Article XI:1 of the GATT 1994.

(a) Article XI:1 of the GATT 1994

7.447 Article XI:1 of the GATT 1994 contains one of the fundamental principles of the GATT/WTO legal system[701], the general prohibition of quantitative restrictions. This provision reads as follows:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.448 Hence, Article XI:1 foresees the elimination of import and export restrictions or prohibitions *other than* duties, taxes or other charges. The Panel will proceed to examine whether Section 727 is a measure prohibiting or restricting the importation of poultry products inconsistent with Article XI:1 of the GATT 1994.

(b) Section 727 as an "other measure"

7.449 Article XI:1 of the GATT 1994 covers prohibitions and restrictions "made effective through quotas, import or export licenses or other measures". China argues that Section 727 institutes a restriction on the importation of poultry products from China, made effective through "other measures", because the restriction does not constitute a duty, tax or other charge within the meaning of Article XI:1 of the GATT 1994.[702] We agree with China that Section 727 is not a duty, tax or other charge, nor a quota or import/export license.

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[698] United States' first written submission, para. 102.
[699] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.7-7.11; and Panel Report, *US – Shrimp (Thailand)*, para. 7.20.
[700] Panel Report, *US – Shrimp (Ecuador)*, para. 7.11.
[701] Panel Report, *Turkey – Textiles*, para. 9.63.
[702] China's first written submission, para. 103.

7.450 In *India – Quantitative Restrictions*, the panel found that the text of Article XI:1 of the GATT 1994 is "broad" in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges".[703] In this sense, the term "other measures" is meant to encompass a "broad residual category".[704] The GATT panel in *Japan – Semi-Conductors* found that "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."[705]

7.451 As stated by the GATT panel in *Japan – Semi-Conductors* quoted above, laws and regulations fall within the concept of "other measures". Given that Section 727 is a law enacted by the US Congress, the Panel considers that it falls within the residual category of "other measure" that may be challenged under Article XI:1. The Panel will thus proceed to consider whether Section 727 is a prohibition or restriction on importation within the meaning of Article XI:1.

(c) Whether Section 727 is a "prohibition or restriction" within the meaning of Article XI:1 of the GATT 1994

7.452 In order to determine whether Section 727 violates Article XI:1 of the GATT 1994, the Panel must establish whether the measure imposes a "prohibition" or a "restriction" within the meaning of Article XI:1.

7.453 China argues that the measure constitutes a restriction on importation, and in the alternative argues that, to the extent that the practical impact of the measure is an import ban on Chinese poultry products, the measure institutes an import prohibition in the sense of Article XI:1.[706]

7.454 The panel in *Brazil – Retreaded Tyres* stated that the term "prohibition" in Article XI:1 meant that "Members shall not forbid the importation of any products of any other Member into their markets."[707] As for the term "restriction", the panel in the *Colombia – Ports of Entry* case, after reviewing several GATT and WTO cases, concluded that "restrictions" in the sense of Article XI:1 contemplate measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, and that the importance in an Article XI:1 analysis is to look at the design of the measure and its potential to adversely affect importation.[708] On the basis of these considerations, the Panel will now proceed to examine Section 727 to determine whether it constitutes a "restriction" or a "prohibition within the meaning of Article XI:1.

7.455 The establishment and implementation of a rule by FSIS in the Federal Register allowing the importation of poultry products from a given country is a prerequisite for the importation of such

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[703] The panel in *India – Quantitative Restrictions* found:

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'." (original footnotes omitted).

Panel Report, *India – Quantitative Restrictions*, para. 5.128. See also Panel Report, *Colombia – Ports of Entry*, para. 7.226.

[704] Panel Report, *Argentina – Hides and Leather*, para. 11.17.

[705] GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

[706] China's first written submission, paras. 103-106.

[707] Panel Report, *Brazil – Retreaded Tyres*, para. 7.11.

[708] Panel Report, *Colombia – Ports of Entry*, para. 7.240.

products.[709] Without the establishment or implementation of this rule, countries are prohibited from importing poultry products into the United States.

7.456 Section 727 prohibited the FSIS to use appropriated funds to "establish" or "implement" a rule allowing the importation of poultry products from China. This restriction on the use of funds, had the effect of prohibiting the importation of poultry products from China, because without a rule being established / implemented, Chinese poultry products are banned from entering the US market. Hence, Section 727 operated as a prohibition on the importation of poultry products from China into the United States.

(d) Conclusion

7.457 The Panel therefore finds that during the time Section 727 was in operation, it imposed a prohibition on the importation of poultry products from China and thus is inconsistent with Article XI:1 of the GATT 1994.

M. WHETHER SECTION 727 IS JUSTIFIED UNDER ARTICLE XX(B) OF THE GATT 1994

1. Background

7.458 The United States has put forward an affirmative defence under Article XX(b) of the GATT 1994. For the United States, Section 727 was enacted in order to "protect human and animal life and health from the risk posed by the importation of poultry products from China".[710] The United States invokes this provision as a defence in case the Panel finds a violation of Article I:1 and XI of the GATT 1994 by Section 727.

7.459 Article XX(b) of the GATT 1994 provides for a justification to otherwise WTO-inconsistent measures when they are "necessary to protect human, animal or plant life or health". Having found that Section 727 is inconsistent with Articles I:1 and XI:1 of the GATT 1994, the Panel will proceed to examine the United States' defence under Article XX(b) of the GATT 1994.

7.460 We note that we have found that Section 727 is an SPS measure which is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*. We also note that the preamble and other provisions of the *SPS Agreement* specifically relate the *SPS Agreement* to Article XX(b) of the GATT 1994. In this respect, the parties[711] have argued around the issue of the interpretation of Article XX(b) of the GATT 1994 and how the *SPS Agreement* provides context. In our view, the crux of the matter is whether it is possible to justify Section 727 under Article XX(b) of the GATT 1994 as necessary to "protect human and animal life and health from the risk posed by the importation of poultry products from China"[712] if that measure is inconsistent with various provisions of the *SPS Agreement*.

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[709] USDA/FSIS, *Process for Evaluating the Equivalence of Foreign Meat and Poultry Food Regulatory Systems*, p. 12 (Exhibit CN-7), 9 CFR § 381.196(a)(1) and § 381.196 (b) (Exhibit CN-6).

[710] United States' first written submission, paras. 111 and 119.

[711] Third parties have also commented on this. For example, the European Union suggests that the close relationship between Article XX(b) of the GATT 1994 and the *SPS Agreement* means that the provisions of the *SPS Agreement* provide immediate context for the interpretation of the provisions of Article XX(b) of the GATT 1994. The European Union draws support for this view from the fact that, as clearly stated in its Preamble, the *SPS Agreement* "elaborates rules for the application" of "in particular" Article XX(b) and the chapeau of Article XX of the GATT 1994, as well as from the fact that measures which satisfy the provisions of the *SPS Agreement* are expressly stated to satisfy also the provisions of Article XX(b) of the GATT 1994. European Union's third-party submission, para. 38.

[712] United States' first written submission, paras. 111 and 119.

7.461 Accordingly, we will commence our analysis of the United States' defence under Article XX(b) by looking into the relationship between Article XX(b) of the GATT 1994 and the *SPS Agreement*.

2. Relationship between Article XX(b) of the GATT 1994 and the *SPS Agreement*

(a) Arguments of the parties

7.462 When asked about the relationship between the *SPS Agreement* and Article XX(b) of the GATT 1994, the **United States** agrees that the *SPS Agreement*, as one of the covered agreements, is context for Article XX(b), just as other parts of the WTO Agreement are context. The United States cautions, however, by stating that a consideration of "context" under the VCLT occurs when there is a specific question of treaty interpretation. In its view, the fact that the *SPS Agreement* is context for Article XX(b) does not mean that any particular element of the *SPS Agreement* becomes a part of the legal text for the consideration of a justification under Article XX(b). In the United States' view, it would be incorrect to consider that Article XX(b) is to be interpreted as somehow incorporating all the obligations of the *SPS Agreement*.[713] In the United States' view, there is nothing that makes the *SPS Agreement* more relevant than, for example, Article XIV of the GATS.[714]

7.463 When asked about which provisions of the *SPS Agreement* the Panel should examine as context for Article XX(b), the United States argued that it would be incorrect to view the *SPS Agreement* as altering the scope or adding to the scope of Article XX(b), or as necessarily being more "immediate" context than other provisions of the covered agreements.[715]

7.464 **China** argues that the provisions of the *SPS Agreement* provide relevant and immediate context for interpreting Article XX(b). In China's view, the close relationship between Article XX(b) and the *SPS Agreement* is reflected in the preamble and the presumption of consistency set forth in Article 2.4 of the *SPS Agreement*.[716] When asked about which provisions of the *SPS Agreement* should the Panel examine as context for Article XX(b), China responded that the Panel should take Articles 2, 3, 5, 6 and 8 of the *SPS Agreement* under consideration. China argued that these provisions relate to the justification for a given measure, along with disciplines on non-discrimination in the application of such measure.[717]

(b) Analysis by the Panel

7.465 The Panel is thus confronted with the issue of the relationship between Article XX(b) of the GATT 1994 and the *SPS Agreement*. As explained above, it is an important issue because, given our findings in Sections VII.F, VII.G and VII.H, the question is whether it is possible to justify Section 727 under Article XX(b) of the GATT 1994 as necessary to "protect human and animal life and health from the risk posed by the importation of poultry products from China"[718] when we have found that it is an SPS measure which is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*.

7.466 In examining the relationship between Article XX(b) and the *SPS Agreement*, we recall the customary rules of interpretation set out in the VCLT. The Panel also recalls that in accordance with Article II:2 of the *WTO Agreement*, the multilateral trade agreements included in its Annexes 1, 2 and

[713] United States' response to Panel question No. 54.
[714] United States' response to Panel question No. 54.
[715] United States' response to Panel question No. 56.
[716] China's response to Panel question No. 54. China's opening oral statement at the first substantive meeting of the Panel, paras. 35-36.
[717] China's response to Panel question No. 56.
[718] United States' first written submission, paras. 111 and 119.

3 must be interpreted as a whole[719], and in a manner that gives meaning to all of them harmoniously.[720]

7.467 We shall start by looking at the text of the chapeau of Article XX of the GATT 1994 and, in particular, its paragraph (b), which read as follows:

> "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:
>
> ...
>
> (b) necessary to protect human, animal or plant life or health ..."

7.468 There is obviously no explicit reference to the *SPS Agreement* in the text of Article XX(b) of the GATT 1994 because the text of this provision is a restatement of the GATT 1947 which pre-dates the *SPS Agreement*. It does however refer to measures "necessary to protect human, animal or plant life or health".

7.469 We now turn to the *SPS Agreement*. Starting with the preamble of the *SPS Agreement*, we see that it does either explicitly refer to Article XX(b) of the GATT 1994 or to its wording, on several and meaningful occasions. The preamble reads as follows in the relevant portions:

> "*Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;
>
> ...
>
> *Desiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b);*
>
> *Footnote 1: In this Agreement, reference to Article XX(b) includes also the chapeau of that Article."

7.470 Hence, the preamble explicitly states that the purpose of the *SPS Agreement* is to "elaborate rules for the application of…, in particular, Article XX(b)", including a clarification in footnote 1 that such a reference to Article XX(b) also includes the chapeau of that Article. We note that the preamble actually commences by paraphrasing the wording of Article XX(b) and that of the chapeau of Article XX of the GATT 1994.

7.471 We also note that the preamble uses the word "elaborate" to qualify the relationship of the *SPS Agreement* with Article XX(b). The ordinary meaning of the word "elaborate" is to "explain something in detail".[721] Accordingly, when the preamble states that the *SPS Agreement* elaborates the

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[719] Appellate Body Report, *Korea – Dairy*, para. 81.
[720] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.
[721] The new Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon press, 1993), Vol. II, p. 799.

rules for the application of Article XX(b), it is thus saying that the *SPS Agreement* "explains in detail" how to apply Article XX(b). Because the *SPS Agreement* only applies to SPS measures[722], this conclusion would apply in respect of measures found to be SPS measures, such as Section 727.

7.472 This is further confirmed by the wording of a number of provisions throughout the *SPS Agreement* which either explicitly refer to Article XX(b) or mirror relevant language in that provision.

7.473 As pointed out by the panel in *EC – Hormones*, Article 2 of the *SPS Agreement* is an example of rules that elaborate Article XX(b).[723] In particular, Article 2.4 of the *SPS Agreement* includes a presumption whereby SPS measures conforming to the *SPS Agreement* are presumed to be consistent with Article XX(b) of the GATT 1994. Article 2.4 of the *SPS Agreement* reads:

> "Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."

7.474 Similarly, Article 3.2 of the *SPS Agreement* includes a presumption to the effect that SPS measures that conform to international standards are deemed necessary and presumed consistent with the relevant provisions of the *SPS Agreement* and the GATT 1994.

7.475 We also note that the definition of SPS measures in Annex A(1) of the *SPS Agreement*, although not referring directly to Article XX(b) of the GATT 1994, does encompass measures applied to protect animal or plant life or health as well as human life or health. We recall that Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". Hence, the same type of measures. Although Article XX(b) of the GATT 1994 could be seen as encompassing more measures than those defined in Annex A(1) of the *SPS Agreement*; measures of the type defined in Annex A(1) are included within the type of measures contemplated in Article XX(b) of the GATT 1994.

7.476 We also note that Articles 2.3 and 5.5 of the *SPS Agreement* refer to "arbitrary or unjustifiable" discrimination and distinctions. Those same provisions also refer to "disguised restrictions on international trade". Both of these phrases echo the language of the chapeau of Article XX.

7.477 It is not uncommon for the specific agreements on trade in goods to be elaborations on provisions of the GATT 1994.[724] Indeed, we find support for our understanding of such a relationship in the way WTO Members have elaborated other provisions of the GATT 1994 through specific covered agreements. The *Customs Valuation Agreement*, for example, elaborates the provisions of Article VII of the GATT 1994[725], the *Anti-Dumping Agreement* and the *Agreement on Subsidies and*

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[722] For example measures that fall within the definition in Annex A(1) and that directly or indirectly affect international trade. Article 1 of the *SPS Agreement*.

[723] Panel Report, *EC – Hormones*, paras. 8.38-8.40.

[724] We acknowledge the existence of a general interpretative note in Annex 1A of the *WTO Agreement* which, in the words of the Appellate Body in *Brazil – Desiccated Coconut*, was included "in order to clarify the legal relationship of the GATT 1994 with the other agreements in Annex 1A (Appellate Body Report, *Brazil – Desiccated Coconut*, p. 12). It provides that in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the latter shall prevail to the extent of the conflict. We are not referring to this note since we do not understand this situation as a conflict.

[725] The relevant part of the preamble of the *Customs Valuation Agreement* provides: "*Recognizing* the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".

Countervailing Measures provide that they explain the implementation and application of Article VI of the GATT 1994[726], and the *Agreement on Safeguards* provides that it clarifies and reinforces the disciplines of GATT 1994, specifically those of Article XIX.[727]

7.478 The negotiating history[728] of the *SPS Agreement* also appears to confirm our interpretation. The Negotiating Group on Agriculture established by the Group of Negotiations on Goods, sought to strengthen the GATT rules and disciplines, in particular Article XX(b) recognizing the need to rely on scientific evidence for SPS measures.[729] This strengthening of GATT rules and disciplines was to be done by developing a set of principles that would govern the use of SPS regulations and barriers.[730] In this sense, one of the purposes of *SPS Agreement* was to complement Article XX(b) by providing specific provisions that SPS measures must comply with in order to be consistent with Article XX(b).

7.479 We therefore conclude that the *SPS Agreement* elaborates and thus explains the provisions of Article XX(b) in further detail when dealing with SPS measures. In the Panel's view, this interpretation gives meaning to both Article XX(b) of the GATT 1994 and the *SPS Agreement* in a harmonious manner.

7.480 Our next step would be to consider the implication of such a conclusion on our question; i.e. whether it is possible to justify Section 727 under Article XX(b) of the GATT 1994 as necessary to "protect human and animal life and health from the risk posed by the importation of poultry products from China"[731] when we have found that it is an SPS measure which violates, *inter alia*, Articles 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*.

7.481 We note that the United States has argued that merely because the *SPS Agreement* is context for Article XX(b) does not mean that Article XX(b) is to be interpreted as somehow incorporating all the obligations of the *SPS Agreement*.[732] We disagree to a certain extent. Given our conclusion that the *SPS Agreement* explains the provisions of Article XX(b) in further detail and because the *SPS Agreement* only applies to SPS measures[733], the *SPS Agreement* thus explains in detail the provisions of Article XX(b) in respect of SPS measures. Since that is the case, we have difficulty in accepting that an SPS measure which is found inconsistent with provisions of the *SPS Agreement* such as Articles 2 and 5, which are explanations of the disciplines of Article XX(b), could be justified under that same provision of the GATT 1994. Additionally, we recall that Article 2.1 of the *SPS Agreement* provides that Members have a right to take SPS measures necessary for the protection of human, animal, or plant life or health, provided that such measures are not inconsistent with the provisions of the *SPS Agreement*.[734] Therefore, the Panel is of the view that an SPS measure which

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[726] Article 1 of the *Anti-Dumping Agreement* reads: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as actions taken under anti-dumping legislation or regulations." See also Article 10 of the *SCM Agreement*.

[727] The relevant part of the preamble of the Agreement on Safeguards provides: "*Recognizing* the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular products), to re-establish multilateral control over safeguards and eliminate measures that escape such control".

[728] Supplementary means of interpretation under Article 32 of the VCLT.

[729] MTN.GNG/NG5/10, para. 3.

[730] MTN.GNG/NG5/WGSP/1.

[731] United States' first written submission, paras. 111 and 119.

[732] United States' response to Panel question No. 54.

[733] For example measures that fall within the definition in Annex A(1) and that directly or indirectly affect international trade. Article 1 of the *SPS Agreement*.

[734] We note that other agreements on trade in goods contain similar formulations. For example, Article 10 of the *SCM Agreement*, which is entitled Application of Article VI of the GATT 1994, states that

has been found inconsistent with Articles 2 and 5 of the *SPS Agreement*, cannot be justified under Article XX(b) of the GATT 1994.

7.482 We are not deciding that any analysis of Article XX(b) must be done with reference to the *SPS Agreement*. We are only saying that, where an SPS measure is concerned, the provisions of the *SPS Agreement* become relevant for an analysis of Article XX(b) and, furthermore, where such an SPS measure has been found inconsistent with provisions of the *SPS Agreement* such as Articles 2 and 5, the disciplines of Article XX(b) cannot be applied so as to justify such a measure.

(c) Conclusion

7.483 We therefore find that, because we have found that it is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*, the United States has not demonstrated that Section 727 is justified under Article XX(b) of the GATT 1994.

N. WHETHER SECTION 727 IS INCONSISTENT WITH ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

7.484 The Panel observes that China claims that Section 727 violates Article 4.2 of the *Agreement on Agriculture*. In particular, China requests the Panel to find that Section 727 restricts the volume of Chinese poultry products that may enter the United States at zero, resulting in the maintenance of a "quantitative import restriction" inconsistent to Article 4.2 of the *Agreement on Agriculture.*[735]

7.485 We recall that we have found that Section 727 is inconsistent with Article XI:1 of the GATT 1994, entitled "General elimination of quantitative restrictions", because Section 727 operates as a prohibition on the importation of poultry products from China into the United States.

7.486 The Panel, after careful consideration, on the basis of judicial economy, refrains from ruling on China's claim under Article 4.2 of the *Agreement on Agriculture*. As explained in Section VII.G.2(c) above, the principle of judicial economy is recognized in WTO law. The Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party provided they do not exercise judicial economy where only a partial resolution of a dispute would result. The Panel believes that this is not the case. Indeed, in making findings under Article XI:1 of the GATT 1994, the Panel considers that it has effectively resolved the aspects in this dispute related to the "restrictions" on Chinese poultry and poultry products into the United States. The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings. For example, the Panel in *US – 1916 Act (Japan)*, after finding a violation of Article VI, held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article XI although this did not mean that Article VI applied to the exclusion of Article XI:1. On that occasion, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.[736]

7.487 For the above reasons, the Panel concludes that it would not be appropriate to proceed and rule on China's claim under Article 4.2 of the *Agreement on Agriculture*, and, thus, declines to do so.

"[c]ountervailing duites may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the *Agreement on Agriculture*." See also, Article 1 of the *Anti-Dumping Agreement* and Article 2.1 of the *Safeguards Agreement*.

[735] China's first written submission, paras. 113-114.

[736] Panel Report, *US – 1916 Act (Japan)*, para. 6.281.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, the Panel *finds* that Section 727 is inconsistent with*:*

(a) Articles 5.1 and 5.2 of the *SPS Agreement* because it is not based on a risk assessment which took into account the factors set forth in Article 5.2;

(b) Article 2.2 of the *SPS Agreement* because it was maintained without sufficient scientific evidence;

(c) Article 5.5 of the *SPS Agreement* because the distinction in ALOPs for poultry products from China and for poultry products from other WTO Members is arbitrary or unjustifiable and that this arbitrary or unjustifiable distinction in ALOPs results in discrimination against China;

(d) Article 2.3 of the *SPS Agreement*, first sentence, because the inconsistency of Section 727 with Article 5.5 of the *SPS Agreement* necessarily implies that Section 727 is also inconsistent with Article 2.3 of the *SPS Agreement;*

(e) Article 8 of the *SPS Agreement* because Section 727 has caused an undue delay in the FSIS approval procedures and thus the United States failed to observe the provisions of Annex C(1)(a) of the *SPS Agreement.*

8.2 The Panel *declines to rule* on China's claim that Section 727 is inconsistent with Article 5.6 of the *SPS Agreement*.

8.3 The Panel further *finds* that Section 727 is inconsistent with:

(a) Article I:1 of the GATT 1994 because the United States is not extending an advantage immediately or unconditionally to the like products originating from China, advantage that it has extended to all other WTO Members;

(b) Article XI:1 of the GATT 1994, because during the time it was in operation, Section 727 imposed a prohibition on the importation of poultry products from China.

8.4 The Panel *finds* Section 727 is not justified under Article XX(b) of the GATT 1994 because we have found that it is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*.

8.5 Finally, the Panel *declines to rule* on China's claim that Section 727 is inconsistent with Article 4.2 of the *Agreement on Agriculture.*

8.6 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with the specified provisions of the *SPS Agreement* and the GATT 1994, it has nullified or impaired benefits accruing to China under those agreements.

8.7 Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement: "it shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted). However, given that the measure at issue, Section 727 has expired, we do not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the *SPS Agreement* and the GATT 1994.

8.8 In this respect, the Panel notes that China has requested the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the United States could implement the recommendations and rulings of the DSB.[737] In particular, China has requested the Panel to issue a recommendation that the United States does not revert to language similar to that in Section 727 in its future legislation.[738]

8.9 The Panel is of the view that we are not to make recommendations on measures other than Section 727 itself because these other measures, including future measures, are outside our terms of reference. We do note that any findings of the Panel on the consistency of Section 727 with the relevant provisions of the covered agreements should clarify the obligations raised and provide some predictability for future cases dealing with the same or similar matters.[739] The Panel also notes that Section 743, the most recent appropriations measure, already includes language different from that of Section 727.

8.10 The Panel therefore decides that, in the present circumstances, although it makes rulings on the consistency of Section 727 with the *SPS Agreement* and the GATT 1994, it will refrain from making recommendations under Article 19 of the DSU in the terms requested by China.

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[737] China's first written submission, para. 194.

[738] China's closing oral statement at the second substantive meeting, para. 7. In its first written submission, when Section 727 was still in force, China had requested that the Panel make a suggestion to the United States to implement the recommendations and rulings of the DSB (i) by withdrawing the measure and (ii) by committing to exclude language identical (or substantially similar) to that used in Section 727 from any future measure. China's first written submission, para. 194.

[739] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.