

In the matter of:

WTO Dispute Settlement Proceeding Regarding

United States – Certain Measures Affecting Imports of Poultry from China

Docket No. WTO/DS392/1

**COMMENTS OF THE AD HOC COALITION FOR FAIR TRADE IN
AGRICULTURAL PRODUCTS WITH CHINA**

These comments are submitted on behalf of the Ad Hoc Coalition for Fair Trade in Agricultural Products with China and in response to the request of the Office of the United States Trade Representative [74 Fed. Reg. 21421 (May 7, 2009)] for the public's views with regard to the above-mentioned WTO dispute settlement proceeding recently initiated by China. China has requested consultations pursuant to Article XXIII of GATT-1994, possibly in anticipation of initiating dispute settlement proceedings to challenge section 727 of the Agricultural Appropriations Act of 2008 (hereinafter referred to as "Section 727") as inconsistent with WTO rules. Section 727 precludes the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture from expending any funds to conduct a risk assessment and evaluation of the safety of poultry imports from the Republic of China.

USTR's Federal Register notice stated that China had requested consultations with respect to possible violations of Article I.1 and XI of GATT-1994, and Article 4.2 of the WTO Agreement on Agriculture, and requested public comment on those issues. We note, however, that China's Request for Consultations also stated that while it did not consider that section 727 to constitute a legitimate SPS measure, that if section 727 was determined to be an SPS measure, China also requested consultations with respect to Articles 2.1-2.3, 3.1, 3.3, 3.5-5.7 and 8 of the WTO Agreement on Sanitary and Phytosanitary Measures. *See* China's Request for Consultations, WT/DS392/1, G/L/886, G/AG/GEN/84, G/SPS/GEN/919 (21 April 2009). Because China's Request also implicates a possible SPS challenge to Section 727, we will provide comments in that regard also.

The Ad Hoc Coalition for Fair Trade in Agricultural Products with China is a group of trade associations and companies with substantial involvement and interests in international trade, in agriculture, and those products derived from livestock and poultry. A list of the Coalition's members follows this document.

The members of the Ad Hoc Coalition include some of America's most successful exporters, and constant participants in the domestic and international markets. As such,

Coalition members place great value and importance on the observance of the rule of law in international trade, and on adherence to the provisions of international trade law, in particular the multilateral agreements of the World Trade Organization and its provisions regarding standard setting for food products. Many members of the Coalition were staunch supporters of the efforts of the United States to launch the Uruguay Round negotiations in the 1980's and to improve and extend the rule of law in international trade, and worked vigorously with the Clinton Administration to achieve passage of the Uruguay Round Implementation Act in 1994.

The rule of law in international trade enhances, and in some cases ensures, fairness and predictability in international markets. Without the willingness of the world's governments to adhere to the rule of law, U.S. firms attempting to participate in world markets would be constantly frustrated by the vagaries of political decision-making. Prior to the conclusion of the Uruguay Round, U.S. exporters were too often excluded from markets through arbitrary and protectionist measures imposed by other governments. While international trade rules in the post Uruguay Round world are certainly not perfect, they have been improved dramatically and are accepted and observed by WTO Member nations. Enforcement of trade rules have also been strengthened through an improved system of dispute settlement. The United States has been the leading champion of the rule of law in international trade since 1946 when it initiated the international discussions that led to the formation of the General Agreement on Tariffs and Trade (GATT) a year later in 1947. For nearly 50 years, the United States has been a key participant in the GATT, and was the party most responsible for the launch of the GATT Uruguay Round and the evolution of GATT into the WTO in 1994. Key U.S. interests in initiating the Uruguay Round included the development of a fairer and more predictable set of rules to govern trade in agricultural products, and in the application of sanitary and phytosanitary measures, the systems that assure safety in the food supply. While the United States has a keen interest in advancing the rule of law, its interests are particularly strong in the case of the WTO rules that apply to agriculture, and to sanitary and phytosanitary measures.

The Coalition's interests in the WTO proceeding recently initiated by China involves the protection of the rule of law that the United States, and members of the Coalition, have fought hard to promulgate, preserve and protect over these past decades. The WTO rules recognize clearly that every country has the indisputable right to protect the health and safety of its citizens. Protection of a society's health and safety are paramount, and the WTO Agreements recognize and feature this principle. At the same time, WTO rules also recognize that health and safety is best guaranteed by a rational and science-based decision making process. WTO rules recognize that measures can be taken by a country under the guise of health and safety which are actually motivated by other factors. As a consequence, WTO rules require that measures taken by WTO Members in the sanitary and phytosanitary arena be based on sound science and appropriate risk assessment, to ensure that those measures are employed fairly, justifiably and in a non-discriminatory manner.

U.S. exporters expect that other countries that are WTO Members will abide by those standards, and know that their success in the export arena depends upon strict

observance of these important rules of law. If another country acts to deprive U.S. exporters of market opportunities under the guise of unjustified SPS measures, we expect that our government will take immediate action to redress these problems by insisting that the rights of the United States under the WTO Agreements be observed. Equally important, the members of the Coalition expect the United States to observe the rule of law in its dealing with other WTO member countries. We will have little ability to insist on adherence to the rule of law if we do not do so ourselves.

Specifically, coalition members are concerned that Section 727 violates five specific WTO obligations.

1. Most Favored Nation

As a WTO Member, the United States has agreed that it will act in a non-discriminatory manner and will afford all other WTO members “Most Favored Nation” status. GATT-1947, Article 1.1. This principle of non-discrimination applies specifically in the arena of sanitary and phytosanitary measures, where the United States has committed to apply its SPS measures in a non-discriminatory manner. WTO Agreement on Sanitary and Phytosanitary Measures, Article 2.3.

Section 727 violates this principle of non-discrimination. While the United States conducts risk assessment with respect to the imports of poultry from any other WTO Member that requests the opportunity to export product to our market, it will not do so for China, based on Section 727’s requirements. If there are concerns about the safety of Chinese poultry products, those questions must be answered in the very same way that questions regarding the safety of similar products from Canada, Mexico, Australia, Japan, the European Union or any of our other WTO trading partners have been answered: through appropriate risk assessment conducted on a scientific basis by the agency that the Congress of the United States has charged with this responsibility. Section 727 precludes FSIS from even conducting a risk assessment with respect to Chinese products, effectively committing the United States to act in a manner inconsistent with this most basic WTO rule.

The Coalition emphasizes that it does not prejudge the results of any risk assessment that FSIS might conduct with respect to Chinese poultry, if it were not precluded from doing so by section 727. In the past, FSIS has conducted risk assessment to determine the safety of imported products from various countries. These products are expected to meet the same, rigid standards that domestic products must meet, and facilities certified under FSIS’ regime are regularly reinspected to ensure compliance.

In some cases FSIS has determined that imported product meets U.S. standards and poses no threat to the health or safety of U.S. citizens. In other cases, FSIS has determined that imported products are produced under conditions of lower standards, that the risks that they pose are unacceptable, and that importation should not be permitted. In either case, FSIS has made its decision – to allow importation or to deny it – on the basis of sound science and after appropriate risk assessment. If FSIS is ultimately permitted to do its job and to make a reasoned and scientific investigation of the facts, it may grant China’s request for access, or it may deny it. We must be

willing to accept whatever scientific judgment that FSIS makes in this regard so long as the decision is taken consistent with sound science and appropriate risk assessment.

2. Sound Science in SPS Measures

While some have asserted that Section 727 is necessary to protect the health and safety of the American consumer, these assertions are not in line with U.S. obligations under the WTO SPS Agreement. The SPS Agreement requires that its Members adopt and apply their SPS measures on the basis of sound science – in the words of SPS Article 2.2, “based on scientific principles and not maintained without sufficient scientific evidence.” The WTO Appellate Body has held, in several cases involving SPS disputes, that Article 2.2 enunciates the general principle, and that Article 5.1, which requires that any measure taken be “based on risk assessment, appropriate to the circumstances...,” is a fundamental implementation of that principle.

To date, there has been no risk assessment performed to justify the ban on FSIS expenditures contained in section 727. The decision to deny FSIS the funds and ability to conduct a risk assessment with respect to Chinese poultry was not science-based. Indeed, the effect of section 727 is to prevent FSIS from collecting scientific evidence and from making a decision based on scientific principles.

3. Undue Delay in Approvals

The United States has also taken the obligation to conduct any system of approval “without undue delay.” SPS, Article 8 and Annex C, para. 1(a). It cannot be disputed that the United States, through FSIS, operates a very specific system for the approval of imported meat and poultry products. Section 727 not only delays the operation of this system with respect to the Chinese request, but it delays it indefinitely. Whatever the meaning of “undue delay” – a phrase that is not specifically defined in the SPS Agreement itself – it is reasonable to assume that indefinite postponement without any possibility of occurring would not meet the standard. As long as section 727 remains operative, however, that is the reality as a matter of domestic law -- a reality that it is inconsistent with our WTO obligations.

4. Section 727 as SPS Measure

The public statements of the authors of section 727 specified their intent that the legislation was a health protection measure. The SPS Agreement’s definition of a “Sanitary or phytosanitary measure” includes “any measure applied... 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.” SPS Agreement, Annex A, para. 1(b). Further, the term “measure” includes “all relevant laws, decrees, regulations, requirements and procedures...” Thus, it should be presumed that section 727 will be reviewed under the rules of the SPS Agreement.

5. Quantitative Restrictions

China had notified its intention to pursue its case under Article XI of GATT-1994. Article XI provides that “[n]o 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.” Section 727 has the effect of prohibiting the importation of a product – Chinese poultry – and is not a duty, tax or charge. Therefore Section 727 constitutes a *prima facie* violation of this WTO rule. The United States might conceivably defend Section 727 as pursuant to GATT Article XX(b) – *i.e.*, a measure to protect health and safety. However, if the United States were to make this claim, it would concede that section 727 qualifies as an SPS measure, and thus will be confronted with section 727’s inconsistencies with the SPS rules discussed above.

The United States, as the leader in promoting adherence to the international rule of law, should not attempt to justify or defend section 727 in WTO dispute settlement. Section 727 is clearly inconsistent with a number of obligations under the WTO agreements. Defending this provision would only serve to undermine the image of the United States as a principled and credible voice on international trade law issues and provide justification to trading partners who seek to bar the importation of U.S. goods.

In conclusion, the members of the Coalition reiterate that they do not prejudge the decision that FSIS ultimately may make on China’s application if it is eventually permitted to conduct a risk assessment on Chinese poultry meat. The Coalition contends, however, that international rules require that FSIS be permitted to conduct a risk assessment, and to make the decision to grant or deny China’s application on the scientific merits of the case.

If China is unable to demonstrate that its product is safe, FSIS will so determine; if China is able to show that its product meets U.S. standards, FSIS will so decide. China should be treated, in this regard, just as any of our other WTO trading partners are treated, no better and no worse.

The principles involved in this case – non-discrimination, science-based decision making, adherence to the rule of law – are the principles that the United States has always promoted and that it has agreed to follow. They are also the critical principles upon which the United States, and we as members of its exporting industry, depend if we hope to participate in a fair and predictable world market.

Advanced Medical Technology Association
AJC International, Incorporated
American Meat Institute
Animal Health Institute
Butterball, LLC
Cargill, Incorporated
DGM Commodities, Corporation
Elanco
Fieldale Farms Corporation
Grocery Manufacturers Association

Grove Services, Incorporated
Hormel Foods Corporation
Interra International, Incorporated
JBS S.A.
Keystone Foods, LLC
Limited OK Foods, Incorporated
MetaFoods, LLC
Monsanto Company
National Cattlemen's Beef Association
National Chicken Council
National Foreign Trade Council
National Meat Association
National Pork Producers Council
National Retail Federation
National Turkey Federation
New Orleans Cold Storage and Warehouse Company
Pilgrim's Pride Corporation
Sanderson Farms, Incorporated
Seaboard Corporation
Sellari Enterprises, Incorporated
Shelf-Stable Food Processors Association
Tyson Foods, Incorporated
USA Poultry & Egg Export Council
U.S. Chamber of Commerce
U.S.-China Business Council
U.S. Dairy Export Council
U.S. Hide, Skin and Leather Association
U.S. Meat Export Federation
U.S. Poultry and Egg Association