

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.

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.