

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6515

To: Members, Subcommittee on Agriculture, Energy and Trade

From: Committee Staff

Re: Hearing: "Market Closed: Foreign Trade Barriers Facing Small Agriculture Exporters."

At 10:00 a.m. on July 26, 2012 in Room 2360 of the Rayburn House Office Building, the Subcommittee on Agriculture, Energy and Trade will meet for the purpose of receiving testimony on the use of non-tariff trade barriers imposed by foreign nations on agriculture products produced by American small businesses, particularly the use of sanitary and phytosanitary (SPS) measures. The Committee will hear testimony from individuals representing small agriculture producers and a trade policy expert.

I. Background

Exporting is a critical component for the long-term growth and viability of small businesses and the United States economy. In 2011, total United States exports of goods reached \$2.1 trillion, an increase of nearly \$250 billion over the previous year.¹ According to the Office of the United States Trade Representative, every \$1 billion in new goods exports support 6,000 domestic jobs.²

Trade is especially important source of income for agriculture producers, including small business operations. According to the United States Department of Agriculture Foreign Agriculture Service, compared to the rest of the United States economy, agriculture is twice as reliant on overseas markets, with exports contributing between 26 to 30 percent of farm cash receipts.³ Overall, the United States Department of Agriculture estimates farm exports to total \$134.5 billion in 2012.⁴ When imports are considered, the United States is estimated to attain a \$27 billion positive trade balance in agriculture goods.⁵ Identifying and complying with foreign SPS measures can be especially challenging for small

¹ UNITED STATES CENSUS BUREAU, U.S. TRADE IN GOODS AND SERVICES, (June 2012), *available at* <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

² OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, TRADE AGREEMENTS AND JOBS, *available at* <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/october/trade-agreements-and-jobs>.

³ UNITED STATES DEPARTMENT OF AGRICULTURE, FOREIGN AGRICULTURE SERVICE, THE IMPORTANCE OF AGRICULTURE TRADE, (February 2012), *available at* <http://www.fas.usda.gov/info/factsheets/tradevalue.asp>.

⁴ UNITED STATES DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, OUTLOOK FOR U.S. AGRICULTURE TRADE, (May 31, 2012), *available at* <http://usda01.library.cornell.edu/usda/current/AES/AES-05-31-2012.pdf>.

⁵ *Id.* The report forecasts exports valued at \$134.5 billion versus imports valued at \$107.5 billion.

and medium-sized businesses.⁶ As small farms account for approximately 91 percent of all farms,⁷ and given the importance of trade to the industry, issues related to agriculture product export barriers are of interest to the Committee.

It is often the case that firms and industries subject to import competition petition their national governments for protection from these imports.⁸ For example, in trade of agricultural goods, the United States enjoys a comparative advantage in agriculture production relative to a number of its trading partners, allowing it to export more products than it imports. Many of these same commodities and livestock are also produced by our trading partners. When trade liberalization reduces barriers to lower-cost imports from the United States, domestic producers in foreign nations can lose market share. As a consequence, they may petition their national governments for relief and their governments may respond by imposing measures to slow imports.

The barriers to agriculture products these governments can erect can take on many forms, but one of the most prevalent and common means are non-tariff barriers, predominately SPS measures. As the next section of the memorandum will explain, while the intent of SPS measures is to allow nations to protect the health and safety of their populations and environments, they can also be misused as potent trade weapons.

II. Sanitary and Phytosanitary Measures: What Are They?

While the purpose of trade liberalization agreements is to promote the cross border flow of goods, including agricultural products, these agreements also recognize that individual nations have a right to protect their people, industries and environments from products that are unsafe for consumption or could cause contamination. For this reason, the agreements allow nations to impose SPS measures, which are rules and procedures that governments apply to protect human, animal, or plant life or health risks arising from the entry or spread of plant- or animal-borne pests or diseases, or from additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs.⁹

⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REPORT ON SANITARY AND PHYTOSANITARY MEASURES 1 (March 2012) *available at* http://www.ustr.gov/webfm_send/3324 (hereinafter "USTR Report").

⁷ UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURE STATISTICS SERVICE, 2007 CENSUS OF AGRICULTURE, SMALL FARMS, *available at* http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Farm_Numbers/small_farm.pdf The United States Department of Agriculture defines an agriculture operation as small if it has \$250,000 or less in annual sales of agriculture commodities. In contrast, the United States Small Business Administration (SBA) considers different measurements that are also based on annual revenues. Information on SBA Size standards can be found at UNITED STATES SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES 1-2, *available at* http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁸ In some instances the requests for protection may be reasonably justified, such as when foreign firms dump goods at prices below their cost of production in order to push their foreign competition from the market, or in cases where national governments seek to promote their own export industries through currency manipulation.

⁹ WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES 3, (May 1998) *available at* http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm. (hereinafter "Understanding WTO SPS Agreement").

In the United States, a number of government agencies are responsible for ensuring the safety of imported and domestically produced foods and other non-food agriculture products. The agencies that make up this regulatory system are the United States Food and Drug Administration (FDA), which is responsible for ensuring the safety of most human and animal foods and drugs, the United States Department of Agriculture (USDA) Food Safety and Inspection Service, which regulates meat and poultry products not regulated by FDA, the USDA Animal and Plant Health Inspection Service, which regulates animal and plant health, and the United States Environmental Protection Agency, which regulates pesticide use.¹⁰

Trade agreements allow each nation to determine its own level of sanitary protection meaning they have a great deal of latitude implementing SPS measures. However, this latitude could provide countries with a sanctioned means of creating non-tariff trade barriers to agriculture goods. As the World Trade Organization (WTO) Agreement on Sanitary and Phytosanitary Measures noted: “Sanitary and Phytosanitary Measures, by their very nature, may result in restrictions to trade....(when) governments are sometimes pressured to go beyond what is needed for health protection and to use SPS restrictions to shield domestic producers from economic competition...”¹¹

To ensure that SPS measures are not abused as protectionist trade measures, most trade agreements include specific language on the proper applicability of SPS measures. The memorandum will now discuss the role of trade agreements in the application of SPS measures.

III. SPS Measures: The Role of International Trade Agreements.

As mentioned above, trade agreements recognize the right of nations to impose measures meant to protect public health while at the same time recognizing their utility in creating non-tariff barriers to trade. To better ensure that SPS measures are not abused as such, most trade agreements include specific language on their proper application.

An example of this is the WTO Agreement on SPS Measures.¹² This provision of the 1994 General Agreement on Tariffs and Trade created a framework to guide participatory nations in the appropriate application of SPS measures while at the same time creating a framework to resolve SPS-related disputes.

Specifically, the agreement states that SPS measures should include a scientific basis,¹³ be based on realistic risk assessment, that the measures are not more trade restrictive than necessary to achieve the

¹⁰ In addition to regulating agriculture imports, representatives of these agencies serve as part of the Trade Policy Staff Committee (TPSC) which works with USTR to identify and address foreign SPS measures that may act as non-tariff trade barriers and assists USTR in international trade liberalization agreement negotiations. USTR Report, *supra* note 6, at 13.

¹¹ Understanding WTO SPS Agreement, *supra* note 9.

¹² *Id.* The North American Free Trade Agreement between the United States, Canada and Mexico also contains a specific agreement on SPS measures that is similar to, but distinct from, trade regulated under WTO rules.

¹³ A definition of scientific basis can be found in the WTO Agreement on SPS Measures states that “measures to ensure food safety and to protect the health of animals and plants should be based as far as possible on the analysis and assessment of objective and accurate scientific data.”

appropriate level of protection, that SPS measures be disclosed publically, and to the best extent possible, be harmonized according to standards established by international standards setting bodies.¹⁴

The agreement recognizes three international standards setting bodies with expertise in each relevant health and safety protection area.¹⁵ Their goal is to identify and establish safety standards that have a scientific basis and can be used as a reference point for the establishment of each nation's SPS measures and to promote the harmonization of standards.

An international SPS Committee provides a regular forum at the WTO for consultations about SPS measures that affect trade and to oversee the implementation of the SPS Agreement. Each nation with an interest in SPS measures is permitted to send a delegation.¹⁶ Representatives of the international standard settings bodies often attend as observers. The goal of the SPS Committee is to foster continued dialogue and address member concerns regarding the applications of SPS measures.

However, as described earlier, each nation is free to establish its own level of protection, and is not required to accept or implement any specific standard(s). In the case of WTO-regulated trade, disputes can arise when a nation's SPS measures exceed those recognized by any of the three international standards setting bodies or in cases when the science behind the standard is in dispute. The memorandum will describe some of the more common types of SPS disputes involving United States agriculture products in multiple markets.

IV. Specific SPS Disputes

In an annual report on SPS measures, the Office of the United States Trade Representative (USTR) highlights four major cross-cutting SPS issues that have proven problematic for United States agriculture exporters in multiple markets.¹⁷ These include export certification requirements; barriers to commodities developed through biotechnology or genetic engineering techniques; restrictions imposed due to concerns about Bovine Spongiform Encephalopathy (BSE, also known as "mad cow disease") and Avian influenza; and Maximum Residue Limits for Pesticides.¹⁸

According to USTR, most of these measures lack a firm scientific basis, as required by the SPS Agreement. Below is a brief description of each to provide Members with a point of reference.

Export Certification: Many countries require that food imports be accompanied by written certifications that the product meets their nation's SPS standards. Increasingly, however, many trading

¹⁴ World Trade Organization, The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

¹⁵ These are: the Joint Food and Agriculture Organization (FAO)/World Health Organization (WHO) Codex Alimentarius Commission (Codex), which focuses on food safety; the FAO International Plant Protection Convention, which focuses on plant health; and the World Organization for Animal Health.

¹⁶ USTR Report, *supra* note 6, at 10-12. The United States delegation is led by the USTR and includes representatives from the United States Department of Agriculture, the United States Food and Drug Administration, the United States Environmental Protection Agency, and the United States Departments of State and Commerce.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 17-23. The USTR Report provides a comprehensive explanation of the issues involved in these areas.

partners have begun requiring export certificates to include cumbersome and unnecessary “attestations” which could subject American exports to unwarranted testing requirements.¹⁹

According to USTR, these requirements do not conform to internationally accepted norms and often lack a scientific basis.²⁰ An example is attestations requiring that pork or pork products are certified as free of H1N1 virus, a pathogen that cannot be transmitted through food.

Biotechnology: Beginning in 2003, the European Union instituted a de facto moratorium on approvals of United States agriculture products derived from modern biotechnology.²¹ According to USDA Economic Research Service, a majority of the soybeans, corn and cotton planted in the United States and available for export include biotechnology characteristics.²² While a WTO panel found these SPS measures inconsistent with WTO rules, and the best available international science has demonstrated no adverse food safety concerns, biotechnology products continue to face discriminatory treatment.

Maximum Residue Limits (MRL): The SPS Agreement encourages nations to base their MRL on standards established by one of the international standards setting bodies. Unfortunately, in many cases, nations have established limits that exceed international standards; have failed to establish a MRL for certain pesticides that have an established international standard; or have a significant backlog of reviews for new, safe pesticides.²³

Ractopamine: Ractopamine is a veterinary drug use to promote lean meat growth in hogs, cattle and turkeys. The drug is approved for use in the United States and a number of other countries and is considered safe. However, some trading partners continue to ban imports of pork and pork products containing residues of ractopamine. The United States contends these measures are unscientific and constitute an unfair barrier to trade.

In each of the above instances, products approved by federal regulatory entities as safe for consumption in the United States have been denied access by regulatory agencies in certain foreign countries party to the SPS Agreement. When disputes over the appropriate application of SPS measures arise, nations may seek to resolve the dispute between themselves or petition the WTO for a formal dispute resolution panel. The memorandum will now turn to how SPS measure disputes are settled.

¹⁹ *Id.* at 17-18.

²⁰ *Id.* at 17-18.

²¹ *Id.* at 15.

²² UNITED STATES DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, ADOPTION OF GENETICALLY ENGINEERED CROPS IN THE UNITED STATES, RECENT TRENDS IN GE ADOPTION, *available at* <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx>. The USDA defines genetic engineering as the manipulation of an organism's genes by introducing, eliminating or rearranging specific genes using the methods of modern molecular biology, particularly those techniques referred to as recombinant DNA techniques. UNITED STATES DEPARTMENT OF AGRICULTURE, BIOTECHNOLOGY, GLOSSARY OF TERMS, *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentid=BiotechnologyGlosary.xml&navid=AGRICULTURE>.

²³ USTR Report, *supra* note 6, at 23.

V. Resolving SPS Disputes

According to the USTR, the United States maintains a broad and active agenda of engagement both to prevent the adoption of SPS measures that would create unnecessary barriers to United States exports and to resolve specific SPS trade concerns.²⁴ These efforts can include informal and formal bilateral engagement with trading partners, or the use of more formal dispute resolution mechanisms such as the WTO Dispute Settlement Body (DSB).

Bilateral and Multilateral Engagement: Among the means the United States uses to attempt to engage trading partners on SPS trade issues and other unwarranted barriers are bilateral discussions with other countries. This includes providing comments to foreign regulators on SPS measures and meetings with appropriate government officials, including meetings between technical experts from United States regulatory agencies and their foreign counterparts.²⁵

If the United States is unable to resolve an SPS dispute through these methods, it may decide to raise the matter at a regular WTO SPS Committee meeting.²⁶ While the SPS Committee is not dedicated to addressing bilateral disputes between nations, it does provide WTO members a forum in which to engage other nations on the matter.

According to USTR, informal bilateral discussions are often effective in settling potential SPS measure disputes.²⁷ However, cases that cannot be resolved are often referred to more formal dispute resolution panels.

WTO DSB: According to WTO rules, if parties to a dispute cannot solve their problems among themselves, a party may petition for a formal DSB.²⁸ The DSB is intended to help settle the dispute. It establishes panels that work somewhat like a tribunal and consist of experts from different countries.²⁹ The panel investigates the complaints and issues a report on its findings. These reports are then referred to the DSB where they will become a formal ruling, unless a consensus emerges to reject the report, or one of the parties to the report decides to file an appeal of the decision.

Once a case has been decided, the nation that is the target of the complaint must follow the report's findings within "a reasonable period of time."³⁰ These findings can include formal compensation for injuries experienced by the claimant if the panel rules these are warranted. If the losing country fails to act on the report's findings within a reasonable period of time, the complaining nation may ask the DSB for permission to impose limited trade sanctions against the other side. The sanctions can be imposed in the same sector as the dispute, or, if this is not practical, in a different sector.

²⁴ *Id.* at 13.

²⁵ USTR Report, *supra* note 6, at 14.

²⁶ *Id.*

²⁷ *Id.* at 26-87. Section IV of the report includes individual country reports.

²⁸ WORLD TRADE ORGANIZATION, SPS AGREEMENT TRAINING MODULE: CHAPTER 5, IMPLEMENTATION – DISPUTE SETTLEMENT, available at http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c5s1p1_e.htm.

²⁹ *Id.*

³⁰ *Id.* While "reasonable period of time" is undefined, it should not normally exceed 15 months.

While the SPS Agreement provides an avenue for nations to formally pursue SPS-based trade complaints, industries affected by unwarranted trade barriers often complain that the process is long, cumbersome and all too often unenforceable. For these reasons, groups representing small business crop, livestock and food production industries advocate for stronger, more ambitious standards that they believe would underscore the importance that all SPS measures are based on scientific principles. The memorandum will now turn to proposals to strengthen SPS measure enforcement.

VI. SPS Measure Enforcement: A Way Forward

Despite provisions in trade agreements meant to ensure that SPS measures do not become non-tariff barriers to trade, in a number of cases American agriculture exports continue to face discriminatory treatment in foreign markets. This is leading a number of groups representing large, medium-size and small business agriculture producers³¹ to advocate for more robust protections to ensure that SPS measures do not become non-tariff barriers to trade.

Among the ideas currently favored by some in the agriculture industry is the inclusion of a “WTO-Plus” SPS chapter in the Trans Pacific Partnership (TPP). “WTO Plus” would in part reinforce the SPS Agreement rules that requires regulators to select the least-trade-restrictive of available risk management options; include a requirement that nations to share more background data regarding new measures; a strengthened role for science-based international standards and the better promotion of harmonized standards; and granting importers of agriculture products the right, in the case of an adverse test result, to a confirmatory test in a competent laboratory that uses validated testing methods, among other enhancements.³²

They are also advocating that the TPP make the “WTO Plus” chapter fully enforceable, meaning that TPP signatories would have less latitude to ignore those provisions in the SPS agreement that they don’t like. As described earlier, while the current SPS Agreement stipulates certain requirements related to SPS measures, in many cases, nations seeking to use SPS measures as non-tariff barriers have successfully resisted living up to their treaty commitments.

VII. Conclusion

The vast majority of crop and livestock operations in the United States are small businesses. SPS measures can be particularly challenging to small and medium-sized enterprises that typically lack the resources to identify and address such barriers.

The economic costs SPS measures pose to United States agricultural product exporters is difficult to quantify as the United States government does not maintain regular estimates. However, a growing body of academic literature and statements by the USTR³³ indicate that non-tariff barriers, like SPS

³¹ AGRICULTURE INDUSTRY STATEMENT, TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS, DALLAS ROUND, NEGOTIATIONS REGARDING DISCIPLINES ON SPS MEASURES (May 2012).

³² *Id.*

³³ USTR Report, *supra* note 6, at 5.

measures, prevent domestic agriculture producers from shipping hundreds of millions of dollars worth of goods, hurting farmers and small businesses.³⁴

Given the importance of overseas markets to the economic health of the agriculture industry, and the continued use of SPS measures as protectionist barriers by our trading partners, it is clear that the United States government must continue its efforts to vigilantly pursue remedies in cases where foreign SPS measures lack a scientific basis. In addition, the Administration should consider using its Trade Promotion Authority to pursue more robust and effective dispute resolution mechanisms in future trade agreements.

³⁴ *Id.*