

Testimony of Craig Thorn

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before the

House Ways and Means Committee

Subcommittee on Oversight

Subcommittee on Trade

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INTERNATIONAL RULES REGARDING THE SAFETY OF IMPORTED FOODS

Mr. Chairman and Members of the Subcommittee:

My name is Craig Thorn. I am a partner in the firm DTB Associates. Our firm represents a number of companies and trade associations in the agriculture sector, but I am here today in a personal capacity to talk about international rules governing the application of food safety standards and other sanitary and phytosanitary (SPS) measures. It is a subject that has been a particular interest of mine throughout my career.

International trade rules have long recognized the right of countries to impose measures to protect consumers, the agricultural economy and the environment from unsafe products, even if such measures act as barriers to trade. The General Agreement on Tariffs and Trade, which entered into effect in 1948 and which still forms the foundation of the international trading system, permits contracting parties to adopt measures “necessary to protect human, animal or plant life or health”, provided such measures were not discriminatory and were not disguised trade barriers. During the Uruguay Round of trade negotiations, when countries were working to bring agricultural trade more fully under international disciplines and to eliminate most forms of non-tariff trade barriers, negotiators recognized the need for more detailed rules to govern SPS measures. Therefore, they began a negotiation that resulted in the *Agreement on the Application of Sanitary and Phytosanitary Measures*, or the “SPS Agreement”. That Agreement entered into force in 1995, along with the 16 other agreements that are administered by the World Trade Organization.

The SPS Agreement is a relatively simple collection of rights and obligations. First and most fundamentally, it explicitly recognizes the right of member countries to impose measures that restrict trade in order to protect health. Each country also has the right to determine its own level of sanitary or phytosanitary protection, provided that level of protection is appropriate to the risk concerned, and to apply that standard to imported products. In return, member countries agree to base their SPS measures on scientific principles and a risk assessment, to ensure that they are non-discriminatory, and to refrain from imposing measures that are simply disguised trade barriers.

The Agreement encourages countries to base their SPS measures on international standards where such standards exist. All measures that are based on international standards are presumed to be in conformity with the Agreement. However, members are free to impose a higher level of protection as long as that higher standard is scientifically defensible.

In cases where countries face a risk about which scientific information is insufficient, they are free to adopt a provisional, precautionary measure based on available information, provided they work to obtain the additional information they need to make a more informed decision within a reasonable period of time.

Several of the bilateral free trade agreements to which the U.S. is a party contain a section on SPS measures. In most cases, the agreements simply affirm the rights and obligations of both parties under the WTO SPS Agreement and establish standing committees to assist in the resolution of SPS-related trade problems. The agreements do not confer additional rights or impose additional obligations on SPS

matters. In other words, the rules governing trade between the parties to the FTA are those found in the WTO SPS Agreement.

The SPS Agreement has been a useful tool for U.S. exporters of agricultural products. As the Uruguay Round negotiators predicted, some countries have tried to replace the non-tariff barriers that they were forced to give up under the Uruguay Round *Agreement on Agriculture* with bogus SPS barriers. Others have ignored scientific evidence and imposed barriers in response to pressure from activists or politicians. The SPS Agreement is useful in such cases because it establishes an objective standard of legitimacy for food safety and plant and animal health regulations. U.S. trade officials have been able to use the leverage of SPS trade rules to challenge illegitimate barriers and open a number of markets to exports of U.S. products.

Most SPS trade problems have been solved through bilateral consultations under the threat of a formal WTO challenge. However, WTO members have taken six disputes all the way to a WTO dispute settlement panel. In each of these cases the complaining party prevailed on at least one important claim. The most recent successful challenge was the case brought by the U.S., Canada and Argentina against the EU's pre-marketing approval system for agricultural biotech products. The WTO Panel ruled that the EU had delayed unduly the processing of applications for approval. The four parties are currently engaged in consultations on the implementation of the ruling. EU officials, most of whom recognize the importance of the SPS Agreement and are interested in improving the functioning of the EU biotech regulatory system, have been cooperative thus far. U.S. officials are hopeful of using the ruling to restore lost trade opportunities and prevent future problems.

Some have criticized SPS trade rules, claiming that they force countries to accept unsafe products. I would like to list some of the points that these critics have made and respond to them.

Criticism: The SPS Agreement limits the ability of U.S. regulators to set domestic food safety standards.

Response: In fact, the U.S. is free under the SPS Agreement to determine its own level of protection against food safety risks, as long as that level of protection and the measures used to reach it are scientifically defensible. The U.S. can impose that standard on imported food and agricultural products as long as the regulatory burden on imports is not greater than that imposed on domestic production. Some regulators in certain countries might view the Agreement as an annoyance, since it may require them to justify their decisions to foreign governments. However, I have never heard a regulator in the United States or any other country make the claim that the rules adversely affect a country's ability to protect its consumers.

Criticism: The "equivalence" obligation under the SPS Agreement forces the U.S. to rely on foreign regulatory systems to ensure the safety of imported food.

Response: Nothing in the SPS Agreement requires countries to accept imports of food that do not comply with legitimate domestic food safety standards or to delegate the job of ensuring food safety to foreign regulators. WTO members are obliged to recognize foreign SPS measures as equivalent only if the exporting country is able to demonstrate objectively to the importing country that its measure meets the

standards of the importing country. The importing country is free to continue to monitor imports and revoke an equivalency determination if appropriate.

Criticism: Once the United States begins to accept imports from a country, SPS rules make it difficult to cut off those imports.

Response: Under the SPS Agreement, the importing country has the right to block the importation of any product that does not meet its standards, no matter where that product originates. It makes no difference whether or not the country has previously permitted imports from the same source.

Criticism: The United States is vulnerable to challenges under the SPS Agreement if it changes its regulations or acts to block unsafe imports.

Response: No U.S. SPS measure has ever been subject to challenge under the SPS Agreement. Indeed, there have been a total of just six cases under the Agreement since it entered into force twelve years ago. One reason for the infrequency of cases is the degree of latitude the agreement affords to domestic regulators. Countries recognize that challenges are likely to be effective only in cases of egregious violations. The rulings in the cases taken thus far underscore this fact.

Criticism: The SPS Committees established under U.S. free trade agreements aggravate the problem by facilitating imports from FTA partners.

Response: The purpose of the SPS Committees is to provide a forum for addressing SPS-related trade problems. However, as indicated above, the operative rules are those of the WTO SPS Agreement. The FTAs do not in any way alter U.S. rights or obligations under the WTO Agreement. This means that U.S. regulators retain the right to block unsafe or substandard imports, even if the product comes from an FTA partner.

To be clear, I am not arguing that there is no need to examine the U.S. system for ensuring the safety of imported foods. On the contrary, increases in international trade have placed greater burdens on U.S. regulatory agencies, and it is appropriate to examine whether or not the current approaches to enforcement of safety standards, and the resources allocated to that task, are adequate.

However, I believe that the problems and vulnerabilities that have been identified are not the result of constraints imposed by trade rules. The United States is free under international agreements to implement whatever controls it needs to ensure the safety of food imports as long as the controls on domestic production are equally stringent. The only real constraints are the amount of emphasis that FDA and USDA place on the issue and the resources that Congress allocates to the task.

Thank you, Mr. Chairman.