



**\*\*\* Special focus: SPS Issues and Free Trade Agreements \*\*\***

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## **Introduction: SPS Issues and Free Trade Agreements**

In the past two years, the United States has successfully negotiated six FTAs (with Australia, Bahrain, Central America, Chile, Morocco, and Singapore) and launched several more negotiations (with Andean countries, Panama, Thailand, and countries of the South African Customs Union). The US is also engaged in negotiations to create a broader Free Trade Agreement of the Americas (FTAA) which would encompass most of the Western Hemisphere. This is a dramatic increase in activity over the previous two decades, when FTAs were concluded with Israel (1985, the first FTA negotiated by the US), Canada (1988), Mexico (1992 as part of NAFTA, which also included Canada), and Jordan (2000).

This greater focus by the United States on FTAs is a result of several factors that include the clear success of NAFTA in boosting North American trade, the recent stalling of the Doha Round negotiations of the WTO that make bilateral agreements more attractive, and greater support for using free trade as a tool for promoting economic prosperity and political stability in the key regions such as Africa, Latin America, and the Middle East. Another factor that could maintain FTA momentum even if the Doha Round comes back to life is that many countries now view FTAs as an attractive opportunity for obtaining a wide range of economic concessions, trade or otherwise, from the United States.

This proliferation of FTAs creates challenges in the sphere of sanitary and phytosanitary issues. While the main US goal on agriculture in many FTA negotiations often is to secure non-SPS related concessions such as lower tariffs, the foreign partners often see the FTA as an opportunity to resolve outstanding SPS issues with the US as well as seek accelerated new market access to the US for their animal and plant products. Experience to date has shown that the number of SPS related issues raised by foreign trading partners during FTA negotiations greatly exceeds those raised by the US. They also exceed the number of issues that APHIS can realistically deal with given other priorities.

The recent acceleration of FTA activity means that we now have more of a track record from which to judge what has worked, and what has not, relative to SPS issues in FTA negotiations so far. Such experience could be useful as we engage in negotiations with more countries in the future.

In order to explore this “track record,” we have chosen to describe recent experience with a number of key FTAs: 1) Australia because it represents a country of similar economic development to the US, 2) CAFTA because it represents an FTA with a “bloc” of countries and also because SPS issues posed particular challenges, 3) Chile because it was the first “major” FTA signed after NAFTA, 4) Morocco and Bahrain because of the different approaches taken by those two countries from the same region, and, 4) Thailand because it is the first FTA being negotiated with an Asian nation that has a significant agricultural component.

*[Note: Background information on many of the FTAs discussed in this report, including updates on progress, can be found on the USTR website at: <http://www.ustr.gov/new/fta/index.htm>]*

## **U.S.--Australia Free Trade Agreement: SPS Issues Play Important Role**

The US-Australia Free Trade Agreement was signed on May 18, 2004. The Agreement must be ratified by Congress before it can enter into force. A bill to implement the Agreement was introduced in the House on July 6, 2004 and was passed by the House on July 14, 2004 and by the Senate the following day.

SPS issues were a central part of the negotiations for the agriculture sector. Many US stakeholders had expressed concerns that Australia's SPS measures unjustifiably limited US access to the Australian market for a number of products. Both Australian and US negotiators recognized that addressing such concerns was an important means of gaining support for a potential Agreement in the agriculture sectors. A high-level dialogue on agriculture was launched in July 2002. The parties agreed to enhance cooperation on SPS issues through greater communication between senior officials on priority bilateral animal and plant health issues.

An ad hoc group, co-chaired by then-APHIS Administrator Bobby Acord and by Biosecurity Australia Manager Mary Harwood, was established as a result. Its work focuses on outstanding SPS issues between the US and Australia. The first meeting was held in August 2002, and

subsequent meetings have been through teleconferences. The ad hoc group follows a set of specific high-priority issues, providing updates on their progress. The US included pork, California table grapes, Florida citrus, stonefruit and poultry meat market access. Australia identified access for feeder cattle, honeybees, Riverland citrus, cherries, and a variety of tropical fruits among its priority issues.

Like other FTAs the United States has concluded, the US-Australia Agreement contains language on SPS that reaffirms the parties' commitments to their obligations under the WTO SPS Agreement. The chapter on Sanitary and Phytosanitary Measures (Chapter 7 of the Agreement) provides for the creation of an SPS Committee. Similar committees have been established or would be established in other FTAs, for example under the NAFTA and the US-Chile FTA. Also similar to other FTAs, disputes related to SPS measures would not be subject to any dispute settlement procedures created under the FTA.

The US-Australia FTA Chapter on SPS has a unique element, in that it also establishes a standing technical working group on animal and plant health. This working group would essentially continue the activities currently performed in the ad hoc group, resolving issues by focusing on their technical and scientific aspects. It would provide a forum for the parties to engage at the earliest appropriate time in each others' regulatory processes on such issues and to cooperate in developing science-based measures that can facilitate trade between them.

## **CAFTA: Multilateral Approach for Central America**

The Central American Free Trade Agreement (CAFTA) was signed on May 28, 2004, by U.S. Trade Representative Robert B. Zoellick and Ministers of five Central American countries. Those countries are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

Negotiations began in January 2003. Following nine rounds of negotiations, agreement was reached with El Salvador, Guatemala, Honduras, and Nicaragua on December 17, 2003, and with Costa Rica on January 25, 2004. Negotiations to include the Dominican Republic in CAFTA began in January 2004 and concluded on March 15, 2004. The Administration plans to submit a single legislative package to Congress that includes CAFTA and the Dominican Republic together.

The U.S. strategy for the Sanitary and Phytosanitary (SPS) section in the free trade agreement (FTA) negotiations has generally been no new SPS rights and no new SPS obligations. The U.S. philosophy is that the current WTO SPS Agreement adequately addresses SPS concepts and no changes are needed in the Agreement. Generally, the United States has also agreed to discuss during FTA negotiations only issues that are already outstanding, rather than introducing new topics to be resolved.

This policy worked well with Chile, which has one of the more developed SPS infrastructures in South America. U.S. industry had some issues of interest to be resolved, so that U.S. negotiators had some areas to negotiate. Many of

the problems that face U.S. exporters seeking access in the FTA partner markets are attempts to protect domestic producers or a reflection of a poor SPS infrastructure, rather than disputes about the safety of the products.

For the CAFTA countries, Dominican Republic, and for the Andean Pact countries; the Caribbean Basin Initiative and Andean Trade Preferences Act have eliminated or set aside many tariffs; thus, only SPS concerns prevent the export of some commodities (other than a few protected commodities, such as sugar). For example, the presence of fruit flies throughout Central America prevents the export of many fruits and vegetables to the United States without some type of treatment. The lack of leverage with these countries in the tariff area for U.S. products creates additional pressure on the regulatory agencies to respond with some action on SPS issues.

Upcoming FTAs are being pursued with countries that have yet to demonstrate a strong SPS infrastructure that can meet the requirements of U.S. SPS regulations. Future FTA partners include the Andean Pact countries of Colombia, Peru, Ecuador and Bolivia; Panama; and Thailand. This deficiency limits the FTA partner's ability to gain market access for many products, which most partners view as the primary benefit of a FTA. By lack of SPS infrastructure, we mean no consistent monitoring or surveillance of major plant and animal diseases or pests; no quarantine plan or ability to implement a quarantine; no or limited border controls; or no HACCP requirements, enforcement or government oversight of slaughterhouse and processing facilities. In some cases, the partner country may

not be able to provide the information needed for a risk assessment, which delays market access for proposed exports to the United States.

In addition, the future FTA partners generally have failed to implement their WTO SPS obligations for equivalency, risk assessment, regionalization, transparency, and notification. This may prevent U.S. exports from gaining full access to these markets as countries fail to accept FSIS certification for all federally regulated meat and poultry slaughterhouses and processing facilities, rather than the partner country pre-certifying each facility (equivalence). The partner may fail to recognize the United States' ability to control or eradicate a disease within a certain zone and may prohibit products from all the United States rather than the affected region or area (regionalization). The country may fail to provide a comment period for new regulations (transparency) or announce a new policy (notification). Or the partner may feel that the U.S. rulemaking process is too lengthy and cumbersome for their proposed exports and may delay access for U.S. products in response.

#### **Central America FTA (CAFTA)**

**Experience:** Many of the problems cited in the preceding paragraph were experienced during the CAFTA negotiations. For example, the CAFTA countries generally do not have provisions in their laws to allow an equivalence determination where FSIS can determine if a U.S. facility meets the partner country's sanitary requirements. The current requirement is for facility-by-facility inspection, often called pre-certification. Most of the CAFTA countries currently have restrictions on

U.S. poultry and products due to concerns about avian influenza (highly pathogenic) or exotic Newcastle disease. Despite information provided by the United States that demonstrates these diseases were initially controlled within a certain zone and have been eradicated, countries have failed to respond to requests to remove or lessen the restrictions. This is a case where the countries are using a concern about disease to protect domestic industry from imports of U.S. poultry.

**Andean FTA Update:** The SPS Working Group held its second meeting on June 14-16, 2004 in Atlanta, Georgia. The Andean countries submitted a list of WTO SPS Agreement article concepts they would like incorporated into the US-Andean FTA SPS text. The United States presented its proposed SPS text. The United States and Andean countries will exchange written comments on each side's proposals. The United States gave detailed presentations on the U.S. food safety regulatory system. The Andean countries gave a brief presentation on the Andean community's role and Colombia presented its food safety regulatory system.

**Panama FTA Update:** On July 16, the United States and Panama concluded the third round of negotiations on a bilateral free trade agreement.

## **U.S. – Chile Free Trade Agreement: A Model for Success**

**Introduction:** Following more than a decade of bilateral discussions and formal negotiations, the U.S.-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004. On that date, tariffs on 90 percent of U.S. exports to Chile and 95 percent of Chilean exports to the United States were eliminated.

In aggregate terms, total U.S. exports to Chile increased in the first quarter of 2004 by 24 percent compared to the same period in 2003. Export of U.S. agriculture goods grew 22.6 percent from \$22.6 million to \$27.7 million.

The successful negotiation and ratification of this bilateral FTA has made it the road map for subsequent FTA negotiations and SPS discussions in the Western Hemisphere and elsewhere. However, the question remains as to whether the same level of resources are available and preconditions extant that would allow for the SPS successes achieved between the United States and Chile to be replicated.

**Ad-Hoc SPS Discussions:** In the run up to the January 1, 2004 implementation date, U.S. and Chilean trade and regulatory officials held ten face-to-face meetings over the course of two years, alternating between Washington, DC and Santiago. Having fixed the agenda of issues during the first round of discussions in 2001, the goal over the next two years was to advance as far as possible before Congressional ratification of the trade deal, which would not occur until late 2003. Resolution would mainly involve modifications to SPS import measures

resulting in enhanced market access for horticultural, dairy and meat products. Tracking progress from one meeting to the next was an important feature of these discussions.

While these SPS discussions did not take place within the formal Market Access negotiations of the FTA, they nevertheless were a way to demonstrate each side's commitment to finding technical solutions to modify plant and health import requirements and food safety measures in a manner that is least trade restrictive.

Despite having reached agreement on a final text of the FTA in December 2002, negotiators from both countries were careful to stress that SPS discussions to resolve issues related to meat, dairy and horticultural commodity health and inspection standards would continue on an ad-hoc basis until such time as the FTA entered into force. Once in force, the SPS discussions would then continue under the newly established SPS Committee as mandated under the terms of the FTA's SPS Chapter. Negotiators tacitly recognized that showing progress on these issues was an important part of garnering support from each country's agriculture constituents and, ultimately, from the legislators who would not vote to ratify the trade deal until December 2003.

The last of these ad-hoc SPS discussions was held on November 11-13, 2003. Both parties agreed that the dialogue in these meetings had made a valuable contribution to the understanding of the technical aspects of many issues and the regulatory requirements and procedures of each country -- understandings that

are critical for resolving bilateral SPS issues.

Although many issues had been resolved and significant progress achieved on the remaining ones, both sides agreed that necessary follow-up should occur either through direct bilateral technical dialogue or in the SPS Committee that would convene once the FTA entered into force.

From APHIS' perspective, progress during these intensive meetings accrued in favor of U.S. fresh fruits from the west coast, Arizona and Florida. From APHIS, Chile obtained modifications to the existing preclearance program and formal recognition as a country free of Classical Swine Fever. In addition, both sides stood to gain from a bilateral fruit fly protocol that was signed during course of the two-year discussions.

Still pending resolution are regulatory changes that will ease public health certification and inspection requirements for bilateral meat and poultry trade, and changes to APHIS' regulations for grape, tomato and Clementine imports from Chile.

**U.S. – Chile SPS Committee:** On January 13-14, 2004, the first U.S. – Chile SPS Committee meeting was held in Santiago. Much discussion involved the terms of reference for operating the Committee; however, Chile also pushed hard to create a couple of sub-working groups under the newly formed Committee to address remaining technical issues left over from the previous ad-hoc meetings that ended in November 2003. Specifically, the Chilean representatives sought

establishment of a poultry trade working group and a grape trade working group.

The U.S. delegation did not agree to these sub-working groups, commenting that existing channels of communications and working relations among the relevant authorities in each country were sufficient to address outstanding issues. Nevertheless, the U.S. delegation agreed to return to capital and solicit interagency opinion before ruling out the option of establishing sub-working groups. An interagency consensus on this is still pending.

**Lessons Learned:** Several factors led to the success of these ad-hoc SPS discussions. These include a long history of close working relations between the regulatory authorities in both countries that have developed around maintaining a preclearance program for Chilean fruit and vegetable exports to the United States. In addition, Chile's domestic agriculture health and inspection system has developed a relatively high level of sophistication geared toward meeting SPS standards in major markets in Europe and Asia, as well as the United States. These pre-existing advantages combined with a major push to hold face-to-face meetings almost every other month for two years to tackle a fixed set of issues, allowed the discussants to develop an unprecedented level of rapport and understanding of the topics. Finally, the strategic importance to both Chile and the United States in ratifying the overall trade deal served to move the SPS discussions close enough toward final resolution to dissuade agricultural interests in both countries from withholding their support for the FTA. The degree to which these and other

factors already exist or can be brought to bear during subsequent free trade negotiations and SPS discussions will help determine whether the successes we saw during the U.S.-Chile experience can be repeated elsewhere.

### **Morocco and Bahrain Free Trade Agreements – Very Different Experiences**

**Morocco:** The US-Morocco Free Trade Agreement (FTA) was signed on June 15, 2004. Negotiations began in January 2003 and agreement was reached in March 2004. The Moroccan FTA is part of a broader US initiative announced in May 2003 to create a Middle East Free Trade Area (MEFTA) by 2013. The initiative is designed to deepen U.S. trade relationships with all countries of the region through FTAs (concluded with Israel and Jordan in addition to Morocco; still being negotiated with Bahrain) as well as Trade and Investment Framework Agreements (TIFAs). The TIFAs are viewed as an intermediate step towards an eventual FTA and have been set up with eight nations in the region from Tunisia to Yemen.

Sanitary and phytosanitary issues did not play a significant role in the Moroccan FTA negotiations, due in part to the relatively small volumes of bilateral agricultural trade. In 2003, the U.S. exported about \$150 million worth of agricultural products to Morocco, while our agricultural imports from that market are worth less than half that amount (about \$70 million). Given the lack of SPS issues, the US strategy was to reaffirm existing rights and obligations under the WTO SPS Agreement.

Morocco's strategy was different and, as often happens with a less developed country, they arrived at the negotiation table seeking major commitments from the US in the spheres of technical assistance and market access. On technical assistance, Morocco sought US commitment to upgrade their entire plant and animal health infrastructure even though they could not prioritize their needs, demonstrate how such assistance would directly facilitate trade, or explain how such assistance could be coordinated with other assistance already being given by other countries, including those of the European Union (EU). By initially expecting too much from the US and then failing to scale back expectations to more realistic parameters, Morocco may have lost some genuine opportunities for receiving US technical assistance in the sphere of SPS infrastructure building.

On market access, Morocco sought under the FTA accelerated or "preferred" phytosanitary approval by APHIS of some plant products for entry into the United States. Considerable time was spent during the negotiations explaining that this market access request would be handled by APHIS through normal channels, was not appropriate for FTA negotiations, and the appropriate procedures was outlined to the Moroccans.

In a side letter to the US-Moroccan Agreement, a subcommittee was established a forum to discuss SPS issues. The US side was reluctant to establish an SPS subcommittee given the lack of substantive issue on both sides, and made it clear to the Moroccans that such a subcommittee in our minds did not represent any new obligations. It

would provide a forum, however, if such issues arise in the future and will likely convene only on an as-needed basis.

**Bahrain:** Negotiations on the US-Bahrain Free Trade Agreement (FTA) were concluded on May 27, 2004, less than four months after they were launched on January 26, 2004. The unusually short timeframe for the negotiations was facilitated by the lack of contentious issues and the good preparation and business-like approach of the Bahraini delegation, including in the sphere of SPS issues.

Like Morocco, the Bahraini FTA is the broader US Middle East Free Trade Area (MEFTA) initiative, there were no real SPS issues and the US strategy was therefore to reaffirm existing rights and obligations under the WTO SPS Agreement. In contrast to Morocco, the Bahrainis did not make any specific requests related to technical assistance or market access. As a result, the SPS negotiations were very brief (one half-day session), resulted in a minimalist SPS text that should be considered a model for other countries in the region, and even allowed for a substantive dialogue on future directions in each country's SPS regulations and policies.

**Lessons Learned:** The Bahraini SPS negotiations should be used as a model for any future FTAs with Middle Eastern countries or any other nations with which there are no significant SPS issues to resolve in bilateral trade relations. The experience with Morocco, particularly the drawn-out negotiation process and establishment of a subcommittee on SPS issues, should be avoided if at all possible. While such a subcommittee in theory promotes useful

bilateral dialogue on SPS matters, in reality it often creates unrealistic expectations on the part of the foreign partner and could even undermine the multilateral avenue for resolving such matters, the WTO SPS Committee.

### **U.S.-Thailand Free Trade Agreement: Negotiations Begin**

In March 2004, USTR published a Federal Register notice announcing that the United States and Thailand will initiate negotiations to develop a mutually beneficial Free Trade Agreement (FTA). Initial bilateral FTA negotiations will be held in Honolulu on June 28 – July 2, 2004. To date, specific SPS-related issues have not been formally raised for discussion. However, it is anticipated that Thai officials will request that APHIS give top priority to Thailand's market access request to ship fresh tropical fruits to the United States. Additional SPS-related issues that could be raised by Thai officials include: (1) approval or irradiation as a quarantine treatment for Thai-origin fruits and vegetables, and (2) market access for Thai-origin poultry and poultry products. As in all previous FTA discussions, APHIS will reiterate that established U.S. regulatory procedures must be followed to address pest risk issues associated with market access requests.