F. TRADE RULES MEAN IT IS REALLY NOT "THE SAME" OLD HAMBURGER

As mentioned above one of the mechanisms required under trade rules to facilitate trade is "equivalence determinations." Specifically, Article 4.1 of the WTO SPS Agreement, which is incorporated into the pending FTA's by reference, requires countries to "accept the sanitary or phytosanitary measures of other Members as equivalent, even if those measures differ from their own."[1] Equivalency agreements are designed to allow goods produced under "equivalent," possibly less health protective systems, "free passage" into the importing country's market, theoretically without the need for re-inspection at the border. Once equivalence is achieved, products to be imported into a country must only meet the standards of the exporting country – not those of the importing country.

In the United States, USDA's Food Safety and Inspection Service (FSIS) is charged with ensuring the safety of domestically produced meat and of imported meats. Prior to the passage of the Uruguay Round Agreements Act in 1995 which implemented the WTO package of agreements, FSIS required foreign countries to maintain meat and poultry inspection systems "equal to" the U.S. system in order to export meat and poultry to the United States.[2] This meant that those countries' meat and poultry laws, regulations, and procedures for conducting inspections essentially had to mirror those of FSIS, and all foreign establishments that exported meat or poultry to the United States had to comply with U.S. inspection requirements. After the passage of the Uruguay Round Agreements Act, FSIS changed the language in its regulations from "equal to" to "equivalent."[3] Now countries that export meat and poultry products can have laws, regulations, and inspection procedures substantially *different* from FSIS' and still be eligible to export meat and poultry into the United States.

A coalition of the largest food groups on both sides of the Atlantic have characterized the lack of precision and subjective decision-making that goes into deciding what standards are deemed equivalent is a threat to consumer safety.[4] The U.S.-based Center for Science in the Public Interest puts it more bluntly, "equivalency is a method by which nations can create exemptions to each other's food safety laws to advance trade."[5]

In 1998 and 1999, for the very first time FSIS conducted country audits and determined that an initial 32 foreign trading partners had "equivalent" food safety systems to the United States (in later years more countries were determined to be equivalent and the total is now 40). A short time later, the USDA's independent investigative Office of Inspector General (OIG) decided to review the USDA's performance in making these historically important equivalency decisions. In 2000, the OIG released a blistering analysis, noting systemic failures in the equivalence determination and enforcement processes for countries representing every inhabited continent. The OIG report was a scathing exposé on the threats posed when food safety prerogatives and policies are trumped by trade goals.

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1 WTO Sanitary and Phytosanitary Agreement, Article 4.1.
2 60 FR 38667 (Jul. 28, 1995)
3 60 FR 38667 (Jul. 28, 1995)
4 Transatlantic Consumer Dialogue's paper on equivalency and harmonization states "the very notion of equivalence allows for imprecise, subjective comparisons that are not appropriate when dealing with issues as important as public health and safety." TACD, "Principles of Harmonization," Feb. 2000, available at: http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=31.
5 Bruce Silverglade, "The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Foods Safety Regulations to Facilitate Trade," *Food and Drug Law Journal*, Vol. 55 No. 4 at 517.

The report documented that FSIS implemented the WTO-required equivalence determination on a vast scale in ill-considered haste. Among the problems:

- FSIS granted equivalency status to six countries without even conducting onsite reviews;[6]
- Foreign establishments that had supposedly lost their eligibility certification were found to have shipped millions of pounds of meat and poultry into the U.S. unhindered by border inspectors;[7]
- Nineteen plants that had not been recertified as meeting U.S. standards were allowed to continue to export meat to the United.[8]

In follow-up reports in 2003, the OIG assessed USDA's performance since 2000 finding that they had satisfactorily addressed only a small portion of their 35 recommendations.[9]

The Peru and Panama FTAs do not automatically grant equivalency to those countries to import beef or chicken to the United States, but they do smooth the way. The Peru FTA specifically provides for consultations on trade in chicken after nine years and the Peruvian government is already starting to prepare for this chicken trade. More immediately, both agreements include dozens of tariff lines on cuts of beef that will drop to zero when the agreements go into force. While Panama does not have a large beef market, Peru has significant export potential with an estimated five million head of cattle.[10]

Currently, no cattle or beef is allowed into the United States from Peru due to the presence of the animal virus called foot and mouth disease (FMD) in that country. When in the future Peru is able to demonstrate that regions of the county are free of the disease, they would be eligible to apply for equivalency status from the USDA. This process entails public notice that equivalency for Peru is being considered in the U.S. Federal Register, but such notice can be swift when the sensibilities of valued trading partners are in play.

In 2000, Uruguay suffered an FMD outbreak and suspended beef exports. A few years later the country got the virus under control.[11] In 2003, the U.S. granted equivalency to Uruguay after only a three month notice and comment period.[12] Subsequently beef from Uruguay has flooded the U.S. market. In 2004-2005, according to Foreign Agricultural Service data, U.S. importers purchased an average of 157,000 metric tons of fresh and frozen beef destined for hamburger from Uruguayan beef processors. That's a five fold increase over the 32,000 metric tons imported

6 USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III, page iii, available at http://www.usda.gov/oig/webdocs/imported.pdf.
7 USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III, page 37.
8 USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Inspection Process, Phase I*, Report No. 24099-3-Hy, June 2000, Section III, page ii.
9 USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Reinsertion Process, Phase II, Report No. 24099-0-Hy, Feb. 2003,* USDA, Office of Inspector General, *Food Safety and Inspection Service, Imported Meat and Poultry Equivalence Determinations,, Phase III, Report No. 24099-05-Hy Dec. 2003.*
10 R-CALF USA, 2007 Stampede Fact Sheet: International Trade in Cattle and Beef, available at: http://www.r-calfusa.com/Animal%20ID/02-09-07%20R-CALF%20USA%20Stampede%20Fact%20Sheet%20NAIS.pdf.
11 Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Center for Emerging Issues, "Foot and Mouth Disease: Uruguay Impact Worksheet," Oct. 27, 2007. Available at http://www.aphis.usda.gov/vs/ceah/cei/taf/iw_2000_files/foreign/fmd_uruguay1000e.htm.
12 68 FR 31940. (Feb. 2003)

in 2003.[13] By 2005, more than 95 percent of Uruguayan exports to the United States were assessed at the 26.4 percent duty because they exceeded the WTO's most favored nation tariff rate quota (TRQ). This means that Uruguayan exporters found it profitable to go well over their TRQ and pay the penalty.[14] Peruvian exporters in contrast would be granted permanent *duty-free* access in 28 beef categories under the Peru-U.S. FTA immediately with more categories of beef to be phased in later.[15]

What could reasonably be expected if free trade in beef commences with Peru? In 2003, Public Citizen conducted an extensive study of foreign country audit reports. Developing countries had a difficult time meeting even the most basic food safety requirements. For instance, in numerous countries:

- Company-paid inspectors were found to be conducting and/or controlling inspection instead of government-paid inspectors as required under U.S. law.[16]
- The microbiological testing programs for *E. coli*, *Salmonella*, and *Listeria* were found to be woefully deficient.[17]
- There were serious sanitation deficiencies, including serious "zero-tolerance" problems such as ingesta, fecal and hair contamination found in meat.[18]

With regard to Mexico, a U.S. auditor found that "un-trained or poorly trained inspectors or employees pose a serious risk to food safety and public health."[19] This is a chronic problem in many developing countries. However, once an equivalency determination has been reached, no country has *ever* had this status revoked by the United States – often despite repeated findings of serious problems.

The documented failure of the U.S. government in its implementation of trade agreement equivalence requirements to uphold U.S. law while engaging in equivalency raises serious concerns. Not only are U.S. consumers being put at greater risk because the U.S. government is failing to live up to the core standards of its own food safety system, it also is failing to give developing countries the resources they need to ensure the safety of exports and the soundness of their own domestic regulatory policies. Combined, these two policies are a recipe for disaster.

13 Clint Peck, "Looming Large," *Beef*, Nov. 1, 2006, available at: http://beef-mag.com/mag/beef_looming_large/.
14 Gregg Doudd and Julie McWright, "2006 Imports Are Up, but Slowed from Record Pace Set in 2004," Cattlemen's Beef Board and National Cattlemen's Beef Association, May/June 2006. Available at http://www.beef.org/uDocs/imports107.pdf.
15 Also of concern to U.S. beef producers is the weak rule of origin in the Peru FTA. The largest cattle herd in the world is located next to Peru, Brazil has some
16 USDA, FSIS, "Audit Report for Mexico, November 5 through November 26, 2001, at 4.
17 USDA, FSIS, Technical Service Center, "Audit Report for Mexico, April 28 – May 20, 1999," at 7
18 USDA, FSIS, Technical Service Center, "Audit Report for Mexico, April 28 – May 20, 1999," at 7.
19 USDA, FSIS, Technical Service Center, "Audit Report for Mexico, April 28 – May 20, 1999," at 10