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The Conflict Between Facilitating International Trade and Protecting U.S. Agriculture from Invasive Species: Aphis, the U.S. Plant Protection Laws, and the Argentine Citrus Dispute

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THE CONFLICT BETWEEN FACILITATING INTERNATIONAL TRADE AND PROTECTING U.S. AGRICULTURE FROM INVASIVE SPECIES: APHIS, THE U.S. PLANT PROTECTION LAWS, AND THE ARGENTINE CITRUS DISPUTE[1]

TERENCE P. STEWART* AND CARYN B. SCHENEWERK**

Table of Contents

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I. INTRODUCTION

The United States Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) is the primary agency responsible for safeguarding U.S. plant and animal resources from invasive pests and diseases.[2] Since its establishment in 1972, APHIS's mission has been to protect commercial crops and native ecosystems in the United States. For the past decade, APHIS has been adjusting to demands arising from expanded trade through multilateral and bilateral trade agreements. In response to international obligations such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization (WTO), the agency has been redefining its approach to agricultural safeguarding in order to "embrace a dual mission of trade facilitation and protecting agriculture."[3]

For most of the past century, the U.S. Department of Agriculture was authorized to restrict certain plant imports primarily through the Plant Quarantine Act of 1912.[4] That law remained in effect until 2000, five years past the conclusion of the Uruguay Round negotiations and the implementation of the WTO's SPS Agreement.[5] Since its inception, the U.S. Department of Agriculture has fulfilled its role as a protector of the ecosystem and agriculture by promulgating and enforcing regulations on imports of plants and plant products, including fruits and vegetables. In 2000, under the statutory authority of the Plant Quarantine Act of 1912, APHIS published a rule change to its citrus fruit regulations that permitted the importation of citrus from Argentina into the United States through a systems approach.[6] APHIS had previously implemented systems approaches when a single treatment method was not able to effectively reduce pest or disease risks. Over the last five years, APHIS's use of the systems approach has increased with the agency's increased focus on facilitating trade.[7]

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2. *See* NAT'L PLANT BOARD, U.S. DEP'T OF AGRIC., SAFEGUARDING AMERICAN PLANT RESOURCES: A STAKEHOLDER REVIEW OF THE APHIS-PPQ SAFEGUARDING SYSTEM 71 (1999), *available at* http://www.aphis.usda.gov/ppq/safeguarding/ [hereinafter SAFEGUARDING PLANT RESOURCES].

3. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., A 25-YEAR RETROSPECTIVE OF THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE 1972-1997 (1997), *at* http://www.aphis.usda.gov/oa/retro25.html [hereinafter APHIS RETROSPECTIVE].

4. Plant Quarantine Act of 1912, 7 U.S.C. §§ 151–167, *repealed by* Plant Protection Act of 2000, Pub. L. 106–224, 7 U.S.C. §§ 7701–7772 (2000).

5. *Id.*; *see generally* ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., APHIS IN THE GLOBAL TRADE ARENA 2 (Sept. 2001), *available at* http://www.aphis.usda.gov /oa/pubs/ brotradb.pdf (discussing creation of WTO in 1995).

6. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at C.F.R. pts. 300, 319)

7. *See* NAT'L PLANT BOARD, U.S. DEP'T OF AGRIC., PREVENTING THE INTRODUCTION OF

In an attempt to prevent the Argentine rule change from being implemented, the U.S. Citrus Science Council (Citrus Science Council) — a consortium of California and Arizona citrus growers — sued the agency. The growers claimed that APHIS had violated the Plant Quarantine Act by neglecting to determine how the systems approach would reduce the risk of citrus diseases and pests in Argentina contaminating U.S. citrus. [8] They also claimed that APHIS had failed to base its rule on sound science.[9] The court agreed with the Citrus Science Council in part and remanded the rule to APHIS in 2001.[10]

During the course of the Argentine citrus dispute, and apparently unrelated to it, Congress passed the Plant Protection Act of 2000, which was signed into law in June 2000.[11] The new Plant Protection Act was developed to "streamline and consolidate the 11 plant-related statutes," including the Plant Quarantine Act, that governed APHIS's actions.[12] While the Argentine rule fell under the old Plant Quarantine Act, the outcome of the Citrus Science Council's case has served as a stimulus for other domestic producers to question and legally challenge APHIS decisions. Under the new Plant Protection Act, U.S. avocado growers are attempting to block a rule change that would expand imports of Mexican Hass avocados.[13] A challenge has also been filed by U.S. producers in response to APHIS's decision to lift certain restrictions on clementine oranges imported from Spain.[14] In both cases, domestic producers are suing APHIS to prevent rule changes that they believe are lacking in sound science, are based on political motives and did not grant them appropriate opportunities to participate in a process that has a direct and serious impact on their livelihoods.[15]

This article first discusses the Plant Quarantine Act of 1912, followed by a discussion of the methodology APHIS used to amend its regulations and permit Argentine citrus imports into the United

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PLANT PATHOGENS INTO THE UNITED STATES: THE ROLE AND APPLICATION OF THE "SYSTEMS APPROACH" 1 (2002), *at* http://www.aphis.usda.gov/ppq/systemsapproach [hereinafter NAT'L PLANT BOARD, SYSTEMS APPROACH].

8. *See* Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1085–1086 (E.D. Cal. 2001).

9. *See id.* at 1087.

10. *Id.* at 1098–99.

11. Plant Protection Act of 2000, 7 U.S.C. §§ 7701–7772 (2000).

12. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 7.

13. The case was filed in the United States District Court for the Eastern District of California. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

14. Telephone Interview with Joel Nelsen, President, Cal. Citrus Mutual (Jan. 21, 2004).

15. U.S. Citrus Council, Comments on the Proposed Rule, *Importation of Grapefruits, Lemons, and Oranges fromArgentina*, to the Animal and Plant Health Inspection Serv., 1, 4 (Feb. 11, 1999) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.) [hereinafter Citrus Council, Comments].

States. That leads to an evaluation of the Citrus Science Council's lawsuit against APHIS and the court's ruling. The article then progresses through an analysis of the shift that has occurred in APHIS's mission as a result of the WTO SPS Agreement and Plant Protection Act of 2000. Through discussion of the SPS Agreement, the legislative history and interpretation of the Plant Protection Act, and examples of two recent rule changes, the article will examine how APHIS is "working to enhance the free flow of trade by removing phytosanitary and technical barriers"[16] and why this mission has resulted in increased distrust by domestic producers. Finally, the article proposes ways in which the agency could address domestic producers' concerns earlier, with increased participation, improved transparency and, possibly, better science. These improvements would also help the agency achieve the goals of the SPS Agreement and 2000 Plant Protection Act — important steps forward as the agency's "role in the global marketplace [continues] to increase as the United States expands current trade relationships and establishes new partnerships with developing countries."[17]

II. PLANT QUARANTINE ACT OF 1912

Through most of the past century, the U.S. Department of Agriculture regulated the importation of various agricultural commodities that might carry plant pests and diseases through the Plant Quarantine Act of 1912 (7 U.S.C. § 151–167). Accordingly, when APHIS issued the final rule on Argentine citrus in 2000, the Plant Quarantine Act applied to its actions.[18] The Plant Quarantine Act authorized the Secretary of Agriculture to prohibit the importation of plants into the United States to prevent the introduction of "any tree, plant, or fruit disease or any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States."[19] Under the Plant Quarantine Act, regulations governing "fruits, vegetables, propagative material, logs, lumber and unmanufactured wood, as well as noxious weed[s]," were promulgated.[20]

The Plant Quarantine Act granted the Secretary of Agriculture the authority to restrict imports from areas where insects or diseases were present, stating in part:

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16. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., PROTECTING PLANT HEALTH IN A GLOBAL ENVIRONMENT 2 (Sept. 2001).

17. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., APHIS IN THE GLOBAL TRADE ARENA 6 (Sept. 2001).

18. Plant Quarantine Act of 1912, 7 U.S.C. § 151–167 (repealed 2000).

19. *Id.* § 160.

20. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 7.

> Whenever, in order to prevent the introduction into the United States of any tree, plant or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, . . . or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of . . . plants, fruits, vegetables . . . or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of . . . plant products specified in the said promulgation from the country and locality therein named, . . . is hereby prohibited . . . .[21]

The Act provided that when producers believed that the U.S. Department of Agriculture was not fulfilling its primary obligation of protecting U.S. agriculture, they could file suit against the agency.

The Plant Quarantine Act's purpose was to protect the United States, including U.S. agriculture, from the introduction and dissemination of foreign plant diseases and pests.[22] When the WTO SPS Agreement was finalized in 1995, the Plant Quarantine Act was considered to be in compliance with the Agreement's general standards and purpose. As a result, it was not necessary for the United States to amend the Act. However, implementation of the SPS Agreement marked a turning point in how the agency viewed itself.[23]

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21. 7 U.S.C. § 160 (repealed 2000).

22. *Id.*

23. APHIS responded to the SPS Agreement by setting up the Trade Support Team within its International Services department and the Phytosanitary Issues Management Team was established to aid the Plant Protection and Quarantine group. *See* APHIS RETROSPECTIVE, *supra* note 3.

III. PROPOSALS TO PERMIT THE IMPORTATION OF ARGENTINE CITRUS

A. 1993 Request by Argentina

In 1993, the Argentine government requested that APHIS amend its regulations and thereby exempt the States of Catamarca, Jujuy, Salta and Tucuman from the country-wide quarantine on Argentine citrus fruit codified at 7 C.F.R. §§ 319.56-319.56-8 and 7 C.F.R. § 319.28.[24] Argentina's request was based on surveys showing that those states were free from citrus canker as of 1992.[25] However, citrus black spot, sweet orange scab, Mediterranean fruit flies (Medflies), and other fruit flies — all of which are considered risks to U.S. agriculture — remained present in those states.[26]

Argentina proposed managing all of the quarantine-significant pests and diseases through a systems approach.[27] The U.S. Department of Agriculture has utilized systems approaches since 1967[28] to protect against plant pests and diseases when a single treatment method, such as fumigation treatment or cold treatment, will not effectively reduce risks such as insects or diseases.[29] According to the National Plant Board's report on the use of the systems approach, the systems approach is "designed for incorporation into a regulatory framework whereby foreign commodities may be imported into the United States with minimal risk of quarantine plant pathogen introduction."[30]

In response to Argentina's request and proposal, APHIS's experts traveled to the four states and conducted on-site evaluations in May 1994.[31] Following the on-site review, APHIS stated that Argentina had "demonstrated, in accordance with the standards established by the United Nations' Food and Agriculture Organization (FAO) for pest-free areas," that the four Argentine

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24. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319). Until 7 C.F.R. § 319.28(a)(1) was amended in 1998, Argentina was not included in the citrus canker strain A restrictions; however, the regulation was being enforced as a result of scientific literature indicating the presence of the strain in Argentine citrus. Argentina's citrus has continuously been included in restrictions on countries with strain B as well as sweet orange scab present. *Id.*

25. *Id.*

26. *Id.* at 43,118.

27. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., FACTSHEET: PLANT PROTECTION & QUARANTINE – Q & A'S ABOUT ARGENTINE CITRUS 3 (2000) [hereinafter APHIS FACTSHEET].

28. *See* NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 5.

29. *Id.* at 1.

30. *Id.*

31. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1079 (E.D. Cal. 2001).

states were citrus canker-free.[32] However, APHIS concluded that it was unable to assess fully how successfully Argentina's protocol would combat the risk of citrus black spot and sweet orange scab, which remained present in the canker-free areas.[33] Consequently, APHIS identified areas in which additional research was needed and requested that Argentina substantiate its proposed mitigation measures with "another year's worth of data."[34] Argentina's 1993 request was rejected in 1995.[35]

In the years following the 1995 denial, APHIS combined efforts with Argentina's national plant protection organization, the Servicio Nacional de Sanidad y Calidad Argoalimentaria (SENASA), to prepare and implement a systems approach that would protect against pests and diseases spreading to the United States through Argentine citrus. The first step in that direction was APHIS's 1995 completion of a preliminary qualitative risk assessment.[36] The 1995 assessment was followed in 1997 by APHIS's final risk assessment, which the agency used to support its 1998 proposed rule change.

B. 1998 Proposed Rule Change

In 1998, APHIS published a proposed rule change that would permit Argentine citrus from the specified Argentine states to enter the U.S. market.[37] The amended regulations would be found at 7 C.F.R. §§ 319.56-319.56-8 and 7 C.F.R. § 319.28. Based on the results of the 1997 risk assessment, APHIS and SENASA developed a systems approach that involved the layering of protective phytosanitary measures, many of which would take place in Argentina.[38] These layers included origin requirements, grove requirements, phytosanitary certification, and disease detection.[39] The overlap that was created by the various measures was aimed at safeguarding against failures in the system and maintaining the requisite level of phytosanitary protection to protect U.S. citrus.[40]

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32. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,117–43,118.

33. *See Harlan Land*, 186 F. Supp. 2d at 1079.

34. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608, 37,611 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

35. *Harlan Land*, 186 F. Supp. 2d at 1079.

36. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,611.

37. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,117.

38. *Id.* at 43,118.

39. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,617.

40. *Id.*

The systems approach was largely dependent on the fulfillment of control and inspection procedures by SENASA in Argentina.[41]

Within the proposed rule, APHIS stated that it was motivated to make changes to the regulations by the belief that the specified states were free of citrus canker and that the proposed systems approach would reduce the risk of other plant pest and disease introduction to a negligible level.[42] APHIS further provided that "[m]aintaining a prohibition on the importation of grapefruit, lemons, and oranges from the Argentine States . . . in light of those State's [sic] demonstrated freedom from citrus canker would run counter to the United States' obligations under international trade agreements and would likely be challenged through the World Trade Organization."[43]

1. APHIS's Systems Approach

The Argentine systems approach started with the requirement that imported fruit originate in a grove within a region of Argentina that was disease-free.[44] Those regions included the States of Catamarca, Jujuy, Salta, and Tucuman.[45] The groves that produced the fruit for export had to be registered with SENASA's export program as well as "surrounded by a 150-meter-wide buffer area."[46] Further requirements were placed on the origin of new citrus planting stock that was used in a qualified grove.[47] Within the approved groves, SENASA was responsible for overseeing maintenance and inspection requirements that included verifying the fruit's freedom from disease through visual inspections as well as through sampling.[48]

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41. *Id.*

42. *Id.*

43. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. at 43,123.

44. *See id.* at 43,118. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures defines a pest- or disease-free in Annex A (4) as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur." World Trade Organization, Sanitary and Phytosanitary Measures: The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), *at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

45. APHIS FACTSHEET, *supra* note 27, at 5.

46. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1081 (E.D. Cal. 2001) (quoting 7 C.F.R. § 319.56-2f (2000)).

47. *Id.*

48. *Id.* The schedules for the treatments SENASA would conduct are listed in the USDA-APHIS Plant Protection and Quarantine Treatment Manual and were developed by USDA to eradicate plant pests of quarantine significance found in, on, or with commodities offered for entry into, export from, or for movement within the United States. Recommendations listed there are based on uses authorized under provisions of the Federal Insecticide,

Once the harvesting of the grapefruit, oranges, and lemons was complete, APHIS imposed further conditions on their handling. They were required to be moved in specially SENASA-marked boxes and never be in the same packinghouse as fruit from groves that did not meet the export requirements.[49] The origin of all fruit entering the packinghouse had to be certified by a SENASA technician, and the fruit was then held at room temperature for four days.[50] That period of time was necessary to allow any symptoms of citrus black spot to become evident.[51] After that period, the fruit was culled and inspected to check for the presence of citrus black spot and sweet orange scab.[52]

The next proposed step was a chemical treatment[53] followed by individual labeling and packaging in new specially marked boxes. All Argentine citrus bound for the United States was accompanied by a SENASA-issued phytosanitary certificate, verifying that all the required steps were followed and that the fruit were disease- and pest-free.[54] In order to protect against the Medfly and fruit flies of the genus *Anastrepha* that are present in Argentina, all citrus exports would also undergo an authorized cold treatment.[55] Cold treatments generally involve storing fruit at a temperature below 36 F (2.2 C) for a specified period of time.[56]

2. *APHIS's Statements on the Domestic Impact of the Change*

Members of the U.S. Citrus Science Council protested that the potential benefits of Argentine citrus imports were outweighed by the need to protect domestic groves from the introduction of diseases that would "cause irreparable injury" resulting in "denied domestic and export markets, lost jobs, and compromised global competitiveness for American industry."[57] APHIS responded to these

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Fungicide and Rodenticide Act (FIFRA), as amended. *See* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., *Fruits and Vegetables Treatment Manual* 1 (Jan. 12, 2004), *at* http://www.aphis.usda.gov/ppq/ manuals/pdf_files/FV_Chapters.htm.

49. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117, 43,119 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

50. *Id.*

51. *Id.*

52. 7 C.F.R. § 319.56-2f(c)(4) (2003).

53. The fruit is treated by immersing it in a solution of sodium hypochlorite, then in orthophenilphenate of sodium. Following the immersion, the fruit is sprayed with imidazole and 2-4 thiazalil benzimidazole and wax are applied. *Id.*

54. *Id.*

55. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1082 (E.D. Cal. 2001).

56. Postharvest Florida Citrus Information Guide, *Cold Treatment* (last visited March 14, 1997), *at* www.fdocitrus.com/coldtreatment.htm.

57. Comments submitted by the U.S. Citrus Science Council, to the Animal and Plant Health Inspection Serv., 1 (Feb. 11, 1999) (on file with the Animal and Plant Health Inspection Serv.), (quoting ANIMAL AND PLANT HEALTH INSPECTION SERV., IMPORTATION OF

concerns by stating that imports from Argentina would not significantly compete with U.S. citrus because the imports would arrive primarily from May to October.[58] The U.S. season peaks in the late fall, winter, and early spring. As a result, the U.S. Department of Agriculture contended that importer brokers could benefit from the ability to provide a higher quality of fruit during low domestic production periods.[59] Staggering imports of agricultural products to avoid overlap with the U.S. production season is not uncommon among APHIS's rulings on foreign agricultural imports.

Another challenge by domestic producers was to the agency's decision not to proceed beyond the economic analysis it originally prepared on the impact of Argentine citrus to complete a Regulatory Flexibility Analysis.[60] The analysis evaluates the harmful impact a rule change may have on small businesses.[61] Under the Regulatory Flexibility Act, the Secretary of Agriculture can certify that a rule will not have a significant economic impact on a substantial number of small entities, thereby exempting APHIS from the requirement to assess the negative impact of new rules on small businesses through an initial and final regulatory economic analysis.[62] In this case, the agency concluded that there was a negligible risk of pest and disease introduction.[63] As a result of that determination, the agency concluded that small businesses were not likely to suffer economically due to disease or pest introduction resulting from the rule change.[64] The agency acted within the discretion granted by the Regulatory Flexibility Act, and did not complete the Regulatory Flexibility Analysis.[65] Fulfilling its obligations under the National Environmental Policy Act (NEPA) of 1969,[66] APHIS likewise made a "no significant impact" finding in the

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FRESH CITRUS FRUIT (SWEET ORANGE, *CITRUS SINENSIS*, LEMON, *C. LEMON*, AND GRAPEFRUIT, *C. PARADISI*) FROM ARGENTINA INTO THE CONTINENTAL UNITED STATES, SUPPLEMENTAL PLANT PEST ASSESSMENT (1997)).

58. APHIS FACTSHEET, *supra* note 27, at 5.

59. *Id.*

60. 5 U.S.C. §§ 603–605 (2000) (§ 604 requires the completion of a Regulatory Flexibility Analysis).

61. *Id.* § 604.

62. *Id.* §§ 603–605

63. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001).

64. *Id.*

65. *Id.* at 1096.

66. The National Environmental Policy Act, 42 U.S.C.A. § 4332 (2000), requires agencies to prepare an environmental impact statement "if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Harlan Land*, 186 F. Supp. at 1097 (quotations omitted).

required Environmental Assessment and, therefore, did not complete an environmental impact statement for the final rule.[67]

3. Public Comments

As part of APHIS's rule making process, the agency publishes its proposed rules in the Federal Register and announces that it will accept comments for a certain period of time, generally 60 days. During that time, comments and questions regarding the proposed rule change may be submitted from members of the public. In situations such as the rule change regarding Argentine citrus, the comment period does not occur until after the risk assessment is complete and the systems approach is designed. Thus, interested parties wishing to contribute to the process of designing the risk assessment or the systems approach are only allowed to do so at the final stage of the process, just before the final rule is adopted and made part of the agency's regulations.[68]

A large number of comments were submitted in response to the proposed rule, some 332 in all.[69] APHIS received comments from "foreign and domestic producers, handlers, packers, and processors of citrus fruit; Members of the U.S. Congress and elected representatives of State and local governments; State plant protection officials and officials from . . . [SENASA]; and representatives of the U.S. Citrus Science Council."[70] The submissions in support of the Citrus Science Council's position questioned the legitimacy of the Argentine systems approach and its ability to protect U.S. groves from Argentine pests and diseases.[71] The Citrus Science Council's comments encouraged APHIS to balance the "desire for more open global markets" against the "realities of Mother Nature," and quoted the agency's own risk analysis: "There are several *significant* arthropod pests and diseases of citrus in Argentina that do not occur in the United States. Introduction of *any* of these pests would constitute a *significant threat* to agriculture *in general*, and citrus production *in particular* in the United States."[72]

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67. *Harlan Land*, 186 F. Supp. 2d at 1097.

68. *See generally* Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

69. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

70. *Id.*

71. *See id.*

72. U.S. Citrus Science Council comments to the Animal and Plant Health Inspection Serv. 2 (submitted Sept. 22, 1998) (quoting Animal and Plant Health Inspection Serv., Importation of Fresh Citrus Fruit (Sweet Orange, Citrus sinensis, Lemon, C. lemon, and Grapefruit, C. paradisi) from Argentina into the Continental United States, Supplemental Plant Pest

The Citrus Science Council also submitted comments stating that APHIS's decision was improperly guided by concerns that the United States might be violating its international obligations under the SPS Agreement of the WTO.[73] The Citrus Science Council asserted that given the indisputable presence of other potentially devastating citrus diseases and pests beyond citrus canker, "the United States has no obligation [under the Uruguay Round WTO Agreement] to permit introduction and spread of these quarantine diseases and pests in [the United States]."[74] According to the Citrus Science Council's comments, a continuation of the quarantine of Argentine citrus fruit was supported by sound science and therefore did not violate the agreement.[75] In APHIS's responses to comments, it asserted that the proposed systems approach, based on sound science and confirmed by the risk assessment, would protect U.S. agriculture by keeping the risk to a negligible level.[76]

Food importers that believed the rule change would result in increased trade with Argentina submitted comments supporting APHIS's proposal. Many supporters noted that the proposal would significantly increase the supply of citrus products available to consumers, as well as provide a higher quality product, between U.S. peak seasons.[77]

C. APHIS's 2000 Final Ruling

After accepting comments in 1998 and 1999 on the proposed amendment to the restrictions on Argentine citrus imports, the U.S. Department of Agriculture published a final ruling on June 15, 2000, in the Federal Register.[78] The published rule change is located in 7 C.F.R. § 319.56-2f.[79] Ultimately, APHIS adopted the systems approach described above, but it also added distribution

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Assessment (Sept. 1997)).

73. *See* Citrus Council, Comments, *supra* note 15, at 9-10.

74. *Id.* at 9.

75. *See id.* at 9–10.

76. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608, 37,609 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

77. *See* Letter from Richard Sullivan, President, Ass'n of Food Indus., Inc., to the Animal and Plant Health Inspection Serv. (Sept. 17, 1998) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.); Letter from Joel Segal, Produce Buyer, M. Levin & Co., Inc., to the Animal and Plant Health Inspection Serv. (Sept. 14, 1998) (in response to 63 Fed. Reg. 43,117 (Aug. 12, 1998)) (on file with the Animal and Plant Health Inspection Serv.).

78. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,608.

79. 7 C.F.R. § 319.56-2f is titled, "Administrative instructions governing importation of grapefruit, lemons, and oranges from Argentina."

limits as an extra precaution.[80] APHIS's final rule was based on the final risk assessment findings that the agency interpreted as supporting the exemption for Argentine citrus fruit from the specified states.[81]

1. Distribution Limitations

APHIS regularly imposes distribution limitations that ban imports from entering certain U.S. states in which there are similar goods. This policy helps protect domestic goods from the invasive species that the foreign goods are at risk of carrying. The Argentine citrus distribution limitations consisted of a three-stage plan, spanning from 2000 to 2004. In 2000, the first year that Argentine citrus was actually imported into the United States, shipments were banned from distribution in fifteen U.S. states that either produced citrus or acted as "buffer" states.[82] The second stage, the 2002 and 2003 shipping seasons, would have allowed imports into all U.S. states except Florida, California, Arizona, Louisiana, and Texas, the five commercial citrus producing states.[83] Under APHIS's approach, Argentine citrus would not have been allowed into these five states until the last stage, the 2004 season.[84]

In an effort to make it more likely that the distribution limitations would be effective, APHIS also included a requirement that all importers of Argentine citrus obtain a permit for their activities.[85] This requirement was aimed at ensuring that importers and distributors would be aware of the distribution limitations.[86] Personnel from APHIS, state regulatory agencies, and the U.S. Department of Agriculture's Agricultural Marketing Service would be responsible for enforcing the limitations.[87] Fulfilling this responsibility would involve "market visits, inspections, and outreach efforts targeted at importers, shippers, distributors, and retailers."[88]

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80. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,609.

81. *Id.*

82. *Id.* Imports were not allowed into Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Louisiana, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Texas and Utah.

83. *Id.*

84. *Id.*

85. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,609.

86. *Id.*

87. *Id.*

88. *Id.*

IV. HARLAN LAND CO. V. U.S. DEPARTMENT OF AGRICULTURE

A. The U.S. Citrus Science Council's Claims

In 2001, members of the Citrus Science Council and over 5,000 other lemon, orange, and grapefruit growers in Arizona and California responded to APHIS's final rule on Argentine citrus by filing a lawsuit in the U.S. District Court for the Eastern District of California. The growers sought judicial review of APHIS's final rule to implement a systems approach and thereby allow imports of grapefruit, lemons, and oranges from four Argentine states. The lawsuit epitomized the building tension between protection and trade promotion. APHIS adopted the Argentine citrus rule with the belief that it was based on sound science and in fulfillment of the United States' trade obligations. However, U.S. producers felt that "politics, not science, [was] driving USDA's push to allow Argentine citrus imports."[89] Joel Nelsen, President of California Citrus Mutual and co-chair of the Citrus Science Council, was quoted in *The Produce News* as stating, "[c]itrus has become nothing more than a political trading chip in this Administration's desire to open Argentina to U.S. exports and to help the country with its poor economy."[90]

The lawsuit alleged that APHIS did not provide adequate evidence as to how the systems approach would reduce the pest risk potential to the "negligible" level that APHIS used in its final rule announcement.[91] The plaintiffs further contended that APHIS failed to define specifically what a "negligible risk" would be in the context of these particular imports.[92] The citrus growers claimed that APHIS's decision was not based on the agency's statutory role articulated in the Plant Quarantine Act of protecting the United States against the introduction and dissemination of non-native plant pests and diseases.[93] They argued that APHIS was responsible under the Plant Quarantine Act for preventing the introduction of plant pests and diseases into the United States and that utilizing an undefined "negligible risk" standard resulted in an arbitrary exercise of discretion, violating the congressional intent of the statute.[94] The growers were resolute that APHIS could only

89. Allison Wright, *USDA Allows Citrus Imports from Argentina*, THE PRODUCE NEWS, June 19, 2000, *available at* http://www.theproducenews.com/storydetail.cfm?ID=449.

90. *Id.*

91. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

92. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1085-86 (E.D. Cal. 2001).

93. *Id.* at 1086.

94. *Id.* at 1085–86.

fulfill its statutory role by utilizing a zero tolerance policy in regard to plant pests and diseases.[95] The plaintiffs' claims further highlighted problems with the effectiveness of the Argentine systems approach and APHIS's ability to conclude that the likelihood of pest introduction would be negligible, particularly with regard to sweet orange scab and citrus black spot.[96] The case, *Harlan Land Co. v. USDA*, resulted in a summary judgment for the growers.[97] The court held that the agency had arbitrarily and capriciously based its ruling on a faulty risk assessment that did not define what constituted a "negligible risk" in relation to the Argentine citrus imports.[98]

The court looked to a 1994 report that APHIS scientists completed following an on-site review declaring that a grove-specific approach was unacceptable due to fears that disease pathogens from nearby non-registered groves might traverse buffer zones and infect registered groves.[99] The grove-specific method, which applied requirements to individual groves rather than larger geographically defined areas, was incorporated as part of the proposal four years later.[100] U.S. growers were concerned that the systems approach's grove cleaning requirements would be insufficient as a precautionary measure.[101] The plaintiffs claimed that the measures did not go far enough because they only required cleaning before the trees blossomed and not afterwards.[102] Their claim pointed to APHIS data showing that leaves continue to fall after trees blossom and argued that an increased risk of citrus black spot would result.[103] APHIS data also concluded that symptoms of citrus black spot infection do not necessarily become evident within the four-day holding period allotted for packing house inspections and that the disease would not be eradicated through post-harvest chemical treatments.[104]

A key component of every systems approach is accurate data on the level of pest or disease infestation. In this case, Argentina had provided survey data that contained little or no data on the infestation levels in the growing areas.[105] The growers complained

95. *See id.* at 1086.
96. *Id.* at 1087.
97. *Id.* at 1099.
98. *Id.* at 1098–99.
99. *Id.* at 1087.
100. *Id.*
101. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1087 (E.D. Cal. 2001).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1094.

that designing a systems approach without that data might have led to inadequate and inconclusive results.[106] For example, Argentine data indicated that citrus black spot infection rates vary from one year to the next,[107] a situation that has a large impact on the effectiveness of fungicide treatments.[108] If the incidence of citrus black spot is 82 percent in untreated oranges, the incidence is only reduced to 25 percent after the pre-harvest treatment,[109] a level that the plaintiffs believed was greater than "negligible."[110]

Various other challenges were raised concerning the risk assessment, including the risk unit APHIS adopted,[111] as well as a purported lack of clarity and consistency and lack of independence in the separate stages of the systems approach.[112] According to a 2002 USDA commissioned report on utilizing systems approaches, it is vital that "two or more *independent* control or mitigation measures are required."[113] The requirement that at least two completely independent safeguards are in place attempts to ensure that if one preventative measure fails, the others will protect the commodity from pest or disease contamination.[114] Failure of one measure must not have any effect on the performance of the other independent measures.[115]

The plaintiffs also criticized APHIS's reliance on SENASA. In March 2001, the Citrus Science Council filed a rulemaking petition with APHIS to suspend the final rule, claiming that SENASA was not dependable.[116] The petition requested that a full "investigation of SENASA's competence, integrity, trustworthiness, and ability to oversee, verify, and enforce compliance with the systems approach" be completed.[117] The Citrus Science Council noted that a major outbreak of foot-and-mouth disease, a highly infectious disease affecting livestock, was affirmatively hidden by SENASA for several months in 2001.[118] APHIS rejected the petition, but did finalize a

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106. *Id.* at 1088.

107. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1088 (E.D. Cal. 2001). The court discusses the rate jumping from 14 to 82 percent in one year. *Id.*

108. *Id.*

109. *Id.*

110. *See id.*

111. APHIS adopted an 18-kilogram "box of fruit" for the risk unit. *Id.* at 1090.

112. *Id.* at 1091.

113. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 9.

114. *See id.*

115. *See id.*

116. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1095 (E.D. Cal. 2001).

117. *U.S. Citrus Science Council Petitions USDA for Withdrawal of Argentine Citrus Rule*, FIELD TALK, Dec. 4, 2003, *available at* http://www.rinconpublishing.com/industry_news/citrus_news.html#argentina.

118. *Harlan Land*, 186 F. Supp. 2d at 1095. The Argentine government concealed an outbreak of bovine foot-and-mouth disease for several months in 2001. Anthony Faiola,

work plan in March 2001 that provided active and direct monitoring by APHIS in Argentina.[119]

APHIS's determination that the rule would not have a significant impact on a substantial number of small businesses and that it was therefore unnecessary to prepare a regulatory flexibility analysis was challenged as well.[120] In 2000, USDA reported that about 92 percent of U.S. farms are small businesses,[121] and according to the court in *Harlan Land Co. v. USDA*, about "97 percent of U.S. citrus farms are considered to be small entities."[122] Further, the plaintiffs claimed that if the risk assessment was faulty, then the conclusions APHIS drew from it regarding both the economic and environmental costs of pest infestation could be incorrect.[123] The plaintiffs claimed that the failure to provide an environmental impact statement (EIS) was arbitrary and capricious and a violation of NEPA.[124] Beyond the immediate risks that diseases and pests imported from Argentina might cause, the plaintiffs raised concerns that APHIS's methodology in this case might be applied to imports from other countries.[125] They claimed that lowering the risk threshold for all commodities would result in serious losses to the domestic industry from invasive species.[126]

B. APHIS's Response

APHIS's response to the citrus growers emphasized that the agency "routinely permit[s] the importation of agricultural commodities where the risk of pest introduction has been reduced to an insignificant or negligible level rather than a zero level."[127] Additionally, APHIS asserted that its selection of the model used in this case was based on the agency's "experience in examining the risks presented by agricultural commodities produced around the world . . . ."[128] The systems approach was defended as a proven

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Argentina's Concealed Outbreak; Meat Exports Banned Months After Livestock Virus Was Found, THE WASHINGTON POST, Mar. 17, 2001, at A13.

119. *Harlan Land*, 186 F. Supp. 2d at 1096.

120. *Id.* 5 U.S.C. § 605(b) permits agencies to avoid engaging in flexibility analysis if the agency head certifies that the rule will not cause a significant economic impact on a substantial number of small entities. *Id.*

121. RESEARCH, EDUCATION, AND ECONOMICS, U.S. DEP'T OF AGRIC., MEETING THE CHALLENGE OF A TIME TO ACT: USDA PROGRESS AND ACHIEVEMENTS ON SMALL FARMS REPORT 9 (2000), *available at* http://www.usda.gov/ oce/smallfarm/reports/pa_rpt1.htm.

122. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1096 (E.D. Cal. 2001).

123. *Id.* at 1097–98.

124. *Id.* at 1097; *see also supra* note 66 and accompanying text.

125. *Harlan Land*, 186 F. Supp. 2d at 1098.

126. *Id.* at 1086.

127. *Id.*

128. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608,

success for mitigating diseases and pests in past cases and for being supported by a scientifically sound risk assessment model.[129]

In response to concerns regarding the risk of diseases and pests from Argentina entering the United States, APHIS pointed to the layering approach as well as the distribution limitations in its systems approach. In 1996, APHIS tested the effectiveness of the systems approach on a grove in Argentina and found that none of the 30,000 oranges and 45,000 lemons examined showed disease symptoms.[130] The U.S. Department of Agriculture reported that following its final rule, and prior to the *Harlan Land* decision, Argentine imports entered the U.S. market in both 2000 and 2001 without incident.[131] This fact helped support APHIS's claim that SENASA was capable of overseeing the phases of the approach that were to take place in Argentina, particularly after the President of SENASA and Minister of Agriculture were replaced as a result of the foot and mouth cover-up.[132] APHIS pointed out that citrus fruit from Argentina was being exported to other citrus-producing countries without incident.[133] In 1999, Argentina was the world's second-largest lemon producer, exporting millions of boxes to Europe.[134] However, those shipments were reported to have slowed considerably due to an increase in costly phytosanitary restrictions by the European Union.[135] Even so, Argentina is now the world's largest lemon producer and exporter, followed by California and then Spain.[136]

C. *The Court's Ruling*

The court granted the U.S. citrus growers a summary judgment, remanding some issues to APHIS and dismissing others.[137] On the

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37,609 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

129. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1093-94 (E.D. Cal. 2001).

130. *Id.* at 1091.

131. Foreign Agric. Serv., U.S. Dep't of Agric., *Solicitor General Will Not Appeal Court Ruling Against Argentine Citrus* (April 12, 2002), *at* http://www.fas.usda.gov/htp/News/News02/04-02/04-12KD.htm (last modified Oct. 30, 2003) [hereinafter Foreign Agric. Serv., *Court Ruling*]. During the summer of 2001, about one million packages of Argentine citrus had been made available to U.S. purchasers. *Id.*

132. *Harlan Land,* 186 F. Supp. 2d at 1095.

133. Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. at 37,608.

134. Larry Waterfield, *Citrus Council Debated Validity of Assessment,* THE PACKER, Mar. 15, 1999, at A3.

135. RONALD P. MURARO ET AL., UNIV. OF FLA., AN OVERVIEW OF ARGENTINA'S CITRUS CANKER CONTROL PROGRAM (2001), *at* http://edis.ifas.ufl.edu/FE285.

136. Tom Lister, *Prospect of Argentine Lemons Entering U.S. in 2003 Appears Dim,* THE PACKER, Jan. 27, 2003, at B3.

137. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1099 (E.D. Cal. 2001). The standard that the court followed when it judged APHIS's ruling was found in 5 U.S.C. §

issue of APHIS lacking a definition for the "negligible risk" standard utilized in the risk assessment, the court found that the agency's determination was deficient.[138] The Court remanded the final rule, granting APHIS the opportunity to develop specific risk levels for each pest and disease.[139] It held that "APHIS exceeded [its] authority by failing to define 'negligible risk' in the context of the Argentine Citrus Rule."[140] The court stated that the agency had not adequately described the standard it used for deciding that Argentine citrus imports from the four states should be permitted.[141] As a result, the court was unable to determine whether APHIS's decision was arbitrary, capricious, or an abuse of its discretion.[142]

The court affirmed the systems approach as "an acceptable method for phytosanitary regulation to protect the agricultural economy" and spoke out in support of APHIS's method for testing the approach and submitting it to expert review. [143] The court also complimented the knowledge and qualifications of APHIS's scientists who conducted the risk assessment. [144] However, with regard to the use of the systems approach for Argentine citrus, the risk assessment used to design the approach was judged faulty because the documents and data were not linked to each independent stage being tested. "One of the principles of risk assessment is the complete and transparent documentation of data used in the assessment."[145]

The court ruled that the findings APHIS reported lacked specificity as to what information and data were used to determine the accuracy of each stage of the systems approach and that "[m]ost of the input values were calculated without data or without reference to scientific or regulatory information."[146] Therefore, it was not possible to reproduce the calculations or to verify their

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706(2)(A), which allows U.S. courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court "must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 1084 (quoting Morongo Band of Mission Indians v. Federal Aviation Adm., 161 F. 3d 569, 573 (9th Cir. 1998)). The court must also grant deference to the agency's decision. Ultimately the court is not allowed to "substitute its [own] judgment for that of the agency." *Id.* (quoting Wetlands Action Network v. U. S. Army Corps of Eng'rs, 222 F. 3d 1105, 1114 (9th Cir. 2000)).

138. *Id.* at 1098-99.
139. *Id.* at 1087.
140. *Id.* at 1086.
141. *Id.* at 1086–87.
142. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1086-87 (E.D. Cal. 2001).
143. *Id.* at 1093.
144. *Id.* at 1093–94.
145. *Id.* at 1094.
146. *Id.*

success in determining risk levels. For example, APHIS reported that "[t]here was no scientific information that could be construed as evidence for any particular central tendency value, distribution range, or distribution type."[147] In certain instances, APHIS had no data with which to evaluate the risk at a particular stage in the systems approach.[148] Therefore, the experts relied on their "professional judgment," a process the court noted as devoid of true science.[149]

The court found that because "the scientists failed to follow the risk assessment guidelines when they constructed the Risk Assessment, the court [could not] defer to APHIS'[s] expert determination with respect to the input values for the eight [individual stages]."[150] As a consequence of the faulty risk assessment, the court determined that the final rule was arbitrary and capricious.[151] The determination that the risk assessment was flawed resulted in a remand of the final rule with instructions that APHIS consider the economic impact Argentine imports would have on small businesses.[152] The court also ruled that APHIS's decision not to issue an environmental impact statement violated NEPA and was also arbitrary and capricious.[153]

The court, like the plaintiffs, questioned SENASA's ability to oversee important steps in the systems approach that were to take place solely in Argentina prior to export. Citing unease that not everyone involved in the foot-and-mouth cover-up had been removed from the agency, the court voiced its concern about "whether SENASA can be entrusted to enforce the mitigation measures used by the systems approach."[154]

In accordance with the summary judgment, imports ceased and the Argentine citrus rule was remanded to APHIS and ordered suspended until a new rule could be put in place.[155] The U.S. Solicitor General's office announced on April 10, 2002, that it would not pursue an appeal of the court's decision against APHIS.[156] The court's decision to remand the final rule to APHIS gives the agency the opportunity to address the court's concerns in relation to the

147. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1094 (E.D. Cal. 2001).
148. *Id.* In the court's decision, APHIS is quoted as reporting "*Data*: None" for one stage evaluating citrus black spot detection at harvest. *Id.*
149. *Id.*
150. *Id.* at 1095.
151. *Id.*
152. Harlan Land Co. v. U.S. Dep't of Agric., 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001).
153. *Id.* at 1098–99.
154. *Id.* at 1096.
155. *Id.* at 1099.
156. Foreign Agric. Serv., *Court Ruling*, *supra* note 131.

risk assessment as well as the other issues. As a result of the court's decision, it is necessary that APHIS complete an entirely new rulemaking process, including a new risk assessment evaluating the use of a systems approach for importing Argentine citrus. The agency has initiated that process but has not completed the assessment.[157] As noted earlier, the original Argentine citrus rule was governed by the Plant Quarantine Act, which was repealed when the U.S. Congress passed the Plant Protection Act of 2000.[158] Any new ruling by APHIS on Argentine citrus will fall under the new statute. It is unclear whether a similar ruling on Argentine citrus would result under the new law, but at least two rule changes have been challenged — Spanish clementines and Mexican Hass avocados — and are pending court action.[159]

V. SPS AGREEMENT OF THE WTO

The SPS Agreement of the World Trade Organization provides the framework through which WTO Members may maintain and adopt measures to protect humans, animals, and plants within their territories from threats posed by imported food and agricultural products.[160] The SPS Agreement does not create specific SPS standards. Instead, it provides general rules for governments to follow when establishing such standards. Under the SPS Agreement, WTO members are permitted to maintain measures necessary to protect human, animal, and plant life or health.[161] The SPS Agreement obligates WTO members, however, to base their SPS measures upon science as demonstrated through risk assessments.[162]

In assessing risks, the SPS Agreement requires WTO members to take into account the "relevant inspection, sampling and testing methods; . . . existence of pest- or disease-free areas; . . . and quarantine or other treatment."[163] SPS measures may not be used

157. As of January 2004, APHIS had not published any notices in regards to the new risk assessment reevaluating Argentine citrus. A notice is not usually published until the assessment has been completed; at that time the agency will accept public comments on the risk assessment and the resulting proposed rule. Telephone Interview with Shirley Wager-Pagé, Trade Director for South America, Animal and Plant Health Inspection Serv. (Sept. 23, 2002).

158. Plant Quarantine Act of 1912, *supra* note 4.

159. *See supra* notes 13, 14 and accompanying text.

160. Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization (1995), art. II, para. 1 (1995), *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [hereinafter SPS Agreement].

161. *Id.*

162. *Id.* at art. II, para. 2, art. V, para. 1.

163. *Id.* at art. V, para. 2.

as disguised barriers to trade.[164] Further, a WTO member's SPS measures shall not be "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection . . . ."[165] The SPS Agreement encourages WTO members to harmonize their SPS measures "on as wide a basis as possible" with international standards.[166] The SPS measures of a WTO member may be higher than the international norm if the member's measures are based upon science "or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5," which concern risk assessments.[167]

During negotiations that led to the SPS Agreement, the United States acted to ensure that the agreement's language remained broad, permitting countries to enact measures they deemed necessary to protect their environment and agricultural products against scientifically proven risks.[168] In the case of Argentine citrus, threats definitely existed as a result of the presence of plant pests and diseases. The Medfly, other fruit flies of the *Anastrapha* family, citrus black spot, sweet orange scab, and citrus canker are all recognized as posing serious risks to agriculture and the environment.[169] SPS measures adopted by countries to protect against such threats might include import prohibitions, cold treatments, chemical treatments, and other measures. When applying a number of these measures on one product through a systems approach, a country might, in certain cases, effectively eliminate phytosanitary pests or diseases while comporting with its rights under the SPS Agreement.[170]

Absent a dispute reaching the WTO, it is not possible to know for sure whether a particular SPS measure imposed by a country contravenes the requirements of the SPS Agreement. APHIS contends that continuing to prohibit citrus imports from Argentina may violate the United States' obligations under the SPS Agreement.[171] What is clear is that there are real threats posed by the pests and diseases at issue. While four states in Argentina

164. *Id.* at art. II, para. 3.
165. *Id.* at art. V, para. 6.
166. *Id.* at art. III, para. 1.
167. *Id.* at art. III, para. 3.
168. SIMONETTA ZARRILLI, DIV. ON INT'L TRADE IN GOODS AND SERV., AND COMMODITIES, WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: ISSUES FOR DEVELOPING COUNTRIES (1999), *available at* http://www.southcentre.org/publications/snp/toc.htm.
169. *See* Citrus Council, Comments, *supra* note 15, at 1.
170. *See id.* at 9.
171. *Id.* at 8.

might have been declared free of citrus canker, other invasive species remain present there: the Medfly, other fruit flies of the *Anastrapha* family, citrus black spot, and sweet orange scab.[172] The use of a multiple-layered systems approach to address such a large number of threats might not necessarily succeed in protecting U.S. agriculture from risks. As noted, WTO members, including the United States, are allowed to establish the level of SPS protection desired.[173] Thus, it would appear that the United States could pursue a policy of minimizing risk, seeking a higher standard for citrus based on the number of pests and diseases involved and the costs of an error. It is, of course, the Administration's selection of protection level and relationship to other objectives (including expanding export opportunities for agriculture) that is at the heart of the Argentine citrus and other SPS disputes with APHIS.

For example, the Citrus Science Council has advocated a zero risk standard for protecting U.S. agriculture.[174] By contrast, some in the U.S. agricultural sector, and APHIS itself, have voiced concerns that if the United States imposes a zero tolerance level for any level of scientifically established threat, it would run a great risk of alienating trading partners.[175] Stated differently, a zero tolerance policy could hurt U.S. exports. Still, the decision of a WTO member to adopt a zero risk level appears permissible in light of Article 2.1 of the SPS Agreement, which permits WTO members to take SPS measures necessary to protect the life and health of plants.[176] If scientific evidence exists that a plant or plant product

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172. Importation of Grapefruit, Lemons, and Oranges from Argentina, 63 Fed. Reg. 43,117, 43,118 (Aug. 12, 1998) (to be codified at 7 C.F.R. pts. 300, 319).

173. *See supra* note 160 and accompanying text.

174. Citrus Council, Comments, *supra* note 15, at 37-38.The Citrus Science Council argued in its comments to APHIS on the Argentine rule change that "the standard that is to be applied in reviewing such potential permits appears to be a 'zero risk' standard," which it thought was "clear from a literal reading of 7 C.F.R. [§] 319.56-2 in paragraphs (3) and (4)." The Citrus Science Council argued further that APHIS appeared to have adopted the "zero risk" standard in § 319.56 through the language "without risk." *Id.* APHIS published a proposed rule change in 67 Fed. Reg. 61,547 (Oct. 1, 2002) to delete the "without risk" language from §319.56. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547, 61,548 (Oct. 1, 2000) (to be codified at 7 C.F.R. pts. 300, 319).

175. Allison Wright, *Court Suspends Argentine Citrus Imports*, THE PRODUCE NEWS, October 5, 2001, *at* http://www.theproducenews.com/storydetail.cfm?ID=1563. *See also* Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,542 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

176. SPS Agreement, *supra* note 160, art. II, para. 1. This is not to say that a zero *risk* approach, as opposed to a zero *tolerance* approach, with regard to potential risks posed by a product, necessarily comports with the SPS Agreement. The panel in *EC Measures Concerning Meat and Meat Products (Hormones)* wrote that "zero risk" concerning risks posed by a product, (*e.g.*, hormone-treated beef), is unobtainable as "science can never provide a certainty, *i.e.* exclude once and for all" that a potential risk will never be found in the future. WTO Dispute Panel Report: EC Measures Concerning Meat and Meat Products (Hormones),

poses risks to a WTO member, that member is permitted under Article 2.1 to take whatever measures necessary to protect against that risk.[177] While Article 5.6 provides that "Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection," no indication exists that a country cannot set such an "appropriate" level of protection at a zero tolerance level.[178] Thus, rather than APHIS taking action mandated by international agreements (which it typically claims), it is in fact making a policy decision that risk should be reduced — but not to zero because of the possible fallout for U.S. exports. Because the level of protection is the government's decision, APHIS would appear to be within its zone of authority and expertise to establish a level above zero. However, public debate would be improved if the true bases for decisions were acknowledged.

VI. PLANT PROTECTION ACT OF 2000

A. Provisions

The Plant Protection Act of 2000 was signed into law on June 20, 2000[179] and repealed the Plant Quarantine Act of 1912.[180] The Plant Protection Act, at its most basic, regulates the import and export of plant pests, including agricultural products carrying plant pests.[181] The law states that the Secretary of Agriculture may prohibit or restrict the importation into the United States of any plants or other objects that could harbor pests or noxious weeds.[182] The Plant Protection Act also directs the Secretary of Agriculture to conduct a study on the role and application of the systems approach.[183] The statute mentions the systems approach in several provisions and defines it as "a defined set of phytosanitary procedures, at least two

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Complaint by the United States, WT/DS26/R/USA, at para. 8.150, 8.152 (Aug. 18,1997). While the Appellate Body disagreed with the panel decision on a number of issues, the Appellate Body did agree that a "theoretical uncertainty is not the kind of risk which, under Article 5.1 [of the SPS Agreement], is to be assessed." WTO Appellate Body Report: EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/AB/R, WT/DS48/AB/R, at para. 11.186 (Jan. 16, 1998).

177. SPS Agreement, *supra* note 160, art. II, para. 1.

178. *Id.* at art. V, para. 6.

179. Plant Protection Act of 2000, 7 U.S.C. §§ 7701–7772 (2000).

180. *Id.* § 7758(a), (b).

181. *See id.* § 7711(a).

182. *Id.* § 7712(a).

183. *Id.* § 7712(e). The Secretary of Agriculture completed the study in 2002. *See* NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 1.

of which have an independent effect in mitigating pest risk associated with the movement of commodities."[184]

The Plant Protection Act reflects provisions of the SPS Agreement. The law provides that decisions regarding plant pests, such as whether to grant requests to import foreign agriculture products, be based upon sound science and be transparent.[185] The act also states that the Secretary of Agriculture shall ensure that phytosanitary decisions involving imports and exports be "consistent with applicable international agreements."[186] In its findings section, the statute provides:

> Congress finds that . . . it is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds;[187]
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> . . . .
>
> [t]he smooth movement of enterable plants . . . into, out of, or within the United States is vital to the United State's [sic] economy and should be facilitated to the extent possible.[188]

The Plant Protection Act requires that the Secretary impose limitations on imports "to the extent practicable" to control the risk of pest and disease dissemination.[189] The Act grants the Secretary the discretion to determine how and when to impose those regulations.[190] The Plant Protection Act does not provide a standard for determining the risk other than requiring that "the processes used in developing regulations under [the Secretary's authority to prohibit the unauthorized movement of plant pests] governing consideration of import requests are based on sound science and are transparent and accessible."[191]

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184. 7 U.S.C. § 7702(18) (2000).
185. *Id.* § 7711(b).
186. *Id.* § 7751(e).
187. *Id.* § 7701(3).
188. *Id.* § 7701(5).
189. *Id.* § 7701(3).
190. *See* 7 U.S.C. § 7711(a) (2000).
191. *Id.* § 7711(b).

B. The Systems Approach

As discussed in Part VI, the Plant Protection Act directed the Secretary of Agriculture to conduct a study of the systems approach. The report, released in February 2002, was written by the National Plant Board and is titled *Preventing the Introduction of Plant Pathogens into the United States: The Role and Application of the "Systems Approach"* (Systems Approach Report).[192] As required by the statute, "scientists from State departments of agriculture, colleges and universities, the private sector, and the Agricultural Research Service" of the U.S. Department of Agriculture participated in the study.[193]

The Systems Approach Report describes the systems approach as based on "sound scientific knowledge" and aimed at allowing the movement of plants and plant products.[194] It specifically states that systems approaches "facilitate trade and allow countries to abide by the Sanitary and Phytosanitary Agreement."[195] It also warns that each systems approach will be unique and, as APHIS found in the Argentine case, obtaining the necessary information to develop an adequate systems approach can be challenging.[196] Ultimately, the Systems Approach Report concluded that, by combining quantifiable mitigation measures, a level of phytosanitary security is obtainable that would not be possible if any of the measures were used alone.[197] Thus, the report appeared to validate APHIS's use of systems approaches to combat invasive species, but it recognized that the success of the systems approach's application could vary depending upon the issues presented in each individual case.

C. Legislative History

Challenges and comments in response to APHIS's methodology have claimed that the Plant Protection Act supports the contention that APHIS's primary role is to protect U.S. agriculture from invasive species. APHIS, on the other hand, views the newer act as expanding the Secretary's discretion, noting that the act does not set a threshold of risk for when imports must be permitted or denied.[198] The legislative history of the 2000 Plant Protection Act demonstrates that its authors' principle intent was to strengthen

192. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7.
193. 7 U.S.C. § 7712(e)(2).
194. NAT'L PLANT BOARD, SYSTEMS APPROACH, *supra* note 7, at 28.
195. *Id.*
196. *Id.* at 29.
197. *Id.* at 27.
198. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,531 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

U.S. protections against foreign plant pests, but it does not resolve the tension between the agency and the domestic producers.

1. U.S. House of Representatives

Representative Charles Canady introduced H.R. 1504, the Plant Protection Act, in the U.S. House of Representatives on April 21, 1999. The 12th district of Florida, from which Representative Canady was elected, has an economy based largely upon fruit and vegetable farming.[199] When Representative Canady introduced the legislation, he stated that the impetus behind his bill was to protect U.S. agriculture from threats posed by invasive plants and pests brought into the country.[200] Representative Canady's main concern was the potential increase in exotic pests entering the United States on account of expanded trade. "The rapid growth of international trade has resulted in a vastly increased volume of goods flowing into the country — goods that may carry prohibited foreign plants or noxious weeds."[201] Representative Canady did not discuss two positive aspects of the 2000 Act. The Act enhances APHIS's ability to comport with U.S. requirements under the SPS Agreement and provides APHIS with an improved means of facilitating international trade.[202]

2. Hearing Discussing H.R. 1504

The public was given the opportunity to comment on H.R. 1504 at a public hearing of the Subcommittee on Livestock and Horticulture of the House Agriculture Committee in January 2000 in Lake Alfred, Florida.[203] The Subcommittee's Chairman, Representative Richard Pombo,[204] discussed the Plant Protection

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199. *See* PHILIP D. DUNCAN & CHRISTINE C. LAWRENCE, CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA 1998: THE 105TH CONGRESS 338 (1997).

200. 145 CONG. REC. E722 (Apr. 21, 1999) (statement of Rep. Canady).

201. *Id.*

202. *See id.*

203. *Invasive Species: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee on Agriculture,* 106th Cong. 1 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10642.000/hag10642_0.htm.

204. Representative Pombo serves the 11th district in California. Chairman Pombo discussed H.R. 1504 during another hearing of the Subcommittee on Livestock and Horticulture as well. This hearing, held in Rutherford, California, concerned the presence of Pierce's disease. He mentioned that this legislation was needed as "harmful pests and species represent a serious threat to [the fruits and vegetables] sector of American agriculture." *Pierce's Disease: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee of Agriculture,* 106th Cong. 8 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10644.000/hag10644_0.htm. When speaking of H.R. 1504, he did not mention the promotion of international trade.

Pierce's disease is being spread through California by the glassy-winged sharpshooter

Act in light of the need to determine the best methods for combating the growing problem of invasive species in "an era of increased and expanded agricultural trade between the United States and a growing number of countries."[205] During the hearing, Representative Canady drew attention to the devastating economic consequences of invasive species. He stated that "the enormous effect of invasive species on the movement of agricultural products in international trade cannot be over emphasized."[206]

Some attendees at the hearing voiced concerns that APHIS's responsibilities for protecting U.S. agriculture conflicted with its efforts to promote trade. Florida's Commissioner of Agriculture and Consumer Services, Bob Crawford, registered his overall support for increasing international trade and expanding agricultural markets abroad, but he warned that U.S. agriculture cannot "remain strong with the continued onslaught of foreign invasive pests and diseases" entering the United States.[207] Mr. Carl Loop, President of the Florida Farm Bureau, voiced concerns that agriculture was taking a back seat to trade promotion.[208] Mr. Loop added that the Florida Farm Bureau is concerned that "USDA/APHIS serves two masters – protecting American plant and animal resources while expediting trade."[209]

Mr. Charles Schwalbe, Associate Deputy Administrator of APHIS's Plant Protection and Quarantine Unit, represented the U.S. Department of Agriculture at the Florida hearing.[210] Mr. Schwalbe testified about the threat invasive species pose to U.S. agriculture as well as APHIS's role in preventing and combating this threat.[211] In the course of his comments, Mr. Schwalbe discussed the U.S. Department of Agriculture's support for the Plant Protection Act's passage given the proposed legislation's intent to help "streamline and modernize APHIS' existing statutory authorities regarding invasive species exclusion activities."[212] The

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and is causing serious damage to wine grapes in certain regions. During the U.S. House Agriculture Committee's Subcommittee on Livestock and Horticulture hearing in 2000 held in California, Representative Ken Calvert reported that high populations of the pest were found in San Diego, Orange, Riverside, San Bernardino, Los Angeles, Ventura, and Santa Barbara counties. *Id.* at 13 (statement of Hon. Ken Calvert).

205. *Invasive Species: Hearing Before the Subcommittee on Livestock and Horticulture of the Committee on Agriculture,* 106th Cong. 8 (2000) (statement of Richard Pombo), *available at* http://commdocs.house.gov/committees/ag/hag10642.000/hag10642_0.htm.

206. *Id.* at 12 (statement of Charles Canady).

207. *Id.* at 116 (statement of Bob Crawford, Fla. Comm'r of Agric. and Consumer Serv.).

208. *Id.* at 38 (statement of Carl Loop, President, Fla. Farm Bureau).

209. *Id.*

210. *Id.* at 71 (statement of Charles Schwalbe, Assoc. Deputy Adm'r, Plant Protection & Quarantine, U.S. Dep't of Agric.).

211. *Id.*

212. *Id.* at 78.

agency supported the bill's passage as the Act would consolidate and eliminate gaps in authority as well as outdated and ambiguous provisions.[213] Mr. Schwalbe further stated that in addition to its core mission of safeguarding U.S. agricultural resources and protecting the country's natural ecosystem from damage due to invasive species, APHIS is also responsible for facilitating agricultural trade.[214] However, he did not mention the Plant Protection Act in the context of expanding the agency's role in promoting trade.[215]

D. Conclusion on Plant Protection Act of 2000

The Plant Protection Act has support on almost all sides of the dispute as to how to regulate foreign pests. As noted above, the Plant Protection Act states in its findings section that the Secretary of Agriculture has the responsibility to facilitate exports and imports of agricultural products "in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds."[216] The statute also provides that phytosanitary decisions made by APHIS should be consistent with international agreements, presumably including the SPS Agreement.[217]

By contrast, the legislative history indicates that the primary purpose of this law is to better enable the Secretary of Agriculture to protect the United States from threats posed by invasive species. The starting point for domestic industries facing increased imports is the concern of extraordinary damage where there is no meaningful compensation scheme and no liability for mistakes. The starting point for APHIS is the pursuit of regulations under old procedures and making decisions as to what level of protection is enough on a case-by-case basis to minimize disruption of trade while minimizing risk of pest infestation. While the lines drawn appear contradictory, there may be ways to reduce the concerns of domestic producers while achieving the dual objectives facing APHIS. An examination of some of the more recent regulations will identify the problems confronted.

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213. *Id.*
214. *Id.* at 72.
215. *See id.* at 78.
216. 7 U.S.C. § 7701(3) (2000).
217. *See id.* § 7751(e).

VII. APHIS RULEMAKING UNDER THE 2000 PLANT PROTECTION ACT

A. Regulations Governing the Movement of Plant Pests

The 2000 Plant Protection Act grants the Secretary of Agriculture "broad authority to carry out operations or measures to detect, control, eradicate, suppress, prevent, or retard the spread of plant pests."[218] As the agency responsible for these activities, APHIS has proposed a number of rule changes since the 2000 Act's enactment. These rule changes were possible because of the flexibility the Act grants the agency. They include changes to the criteria used to determine whether an organism qualifies as a "plant pest"[219] as well as to the criteria for deciding when a direct or indirect injury or damage to a plant or plant products is of a type that should be regulated and to what extent.[220]

The published rule changes under the 2000 Act exhibit an inclination by APHIS to apply a more liberal approach to fruit and vegetable imports. One such change, the deletion of the "without risk" requirement from the regulations governing when fruits or vegetables may be imported from disease-free and pest-free areas, is scheduled to result in the importation of a variety of products that were not permitted entry under the old regulations.[221] As dictated by the 2000 Act, APHIS published an amended version of its procedures and standards governing the consideration of import requests within a year of the Act's passage.[222] The procedures and standards are aimed at making the process more transparent and accessible.[223] To that end, every import request that is designated "nonroutine"[224] and results in a final risk assessment will be posted

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218. Plant Pest Regulations; Update of Current Provisions, 66 Fed. Reg. 51,340 (Oct. 9, 2001) (to be codified at 7 C.F.R. pt. 330).

219. The 2000 Plant Protection Act defines a "plant pest" as "any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: (A) A protozoan; (B) A nonhuman; (c) A parasitic plant; (D) A bacterium; (3) A fungus; (F) A virus if vuriud); (G) An infectious agent or other pathogen' and (H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs." 7 U.S.C. § 7702(14).

220. Plant Pest Regulations; Update of Current Provisions, 66 Fed. Reg. at 51,340.

221. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300, 319).

222. 7 U.S.C. § 7712(d).

223. *Id.* § 7712(b).

224. The agency will designate every request as either "routine" or "nonroutine" in place of the former designations, "minor" and "major." The new labels are not intended to connote different types of risk assessments; however, a nonroutine assessment is associated "with issues that may require greater resources, including greater risk communication." Risk communication is defined in the notice as: "The open exchange of information and opinion, which leads to better understanding of risk and risk-related decisions." Procedures and

on APHIS's Plant Protection and Quarantine web site for a 60-day comment period.[225] APHIS is committed to ensuring that the assumptions and uncertainties that were part of the risk assessment process are clearly specified in the risk assessment documents. Those assumptions and uncertainties will include aspects such as mitigation measures aimed at functioning both individually and as components of a system.[226] However, the actual process for conducting the risk assessment is not open to comments until after the assessment is completed.[227]

As a result of the increase in import requests for fruits and vegetables received by APHIS, requesters are now offered the opportunity to conduct their own pest risk assessment.[228] The assessments must be conducted according to APHIS's Plant Protection and Quarantine's pest risk assessment process.[229] According to APHIS's web site, the completed assessments must be submitted to APHIS for review and response.[230]

If APHIS determines that a risk exists, the 2000 Plant Protection Act grants APHIS the authority to control the entry of fruits and vegetables into the United States.[231] The regulations governing importation of fruits and vegetables were promulgated prior to the 2000 Act's passage; however, amendments to certain sections controlling the entry of fruits and vegetables have been adopted since.[232] The regulations require that one of the following four conditions must be met before the agency can allow certain fruit and vegetable imports into the United States:

> 1. [It i]s not attacked in the country of origin by injurious insects, including fruit and melon flies (*Tephritidae);*

Standards Governing the Consideration of Import Requests, 66 Fed. Reg. 32,923, 32,924 & 32,926 (June 19, 2001).

225. *Id.* at 32,927.

226. *Id.* at 32,928.

227. *See id.*

228. Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., *Request for Pest Risk Assessments, available at* http://www.aphis.usda.gov/ppq/pra/commodity/requestforpra.htm (n.d.).

229. *Id.*

230. *Id.*

231. 7 U.S.C. § 7712(a) (2000).

232. *See, e.g.*, Importation of Grapefruit, Lemons, and Oranges from Argentina, 65 Fed. Reg. 37,608 (June 15, 2000) (to be codified at 7 C.F.R. pts. 300, 319); Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319); Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300,319); Importation of Clementines from Spain, 67 Fed. Reg. 64,702 (Oct. 21, 2002) (to be codified at 7 C.F.R. pt. 319).

> 2. [It h]as been treated or is to be treated for all injurious insects that attack it in the country of origin, in accordance with conditions and procedures that may be prescribed by the Administrator;
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> 3. [It i]s imported from a definite area or district in the country of origin that is free from all injurious insects . . . [and] its importation can be authorized *without risk* and its importation is in compliance with the criteria of paragraph (f) [quoted below] of this section; or
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> 4. [It i]s imported from a definite area or district of the country of origin that is free from certain injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and the criteria of paragraph (f) of this section are met with regard to those certain insects, provided that all other injurious insects that attack the fruit or vegetable in the area or district of the country of origin have been eliminated from the fruit or vegetable by treatment or any other procedures that may be prescribed by the Administrator.[233]

In the subsection quoted above, APHIS has two major options when considering a permit request for importing a product from an area either known to contain or to be at risk of containing pests or diseases. APHIS can either (1) ban the import completely or (2) stipulate inspections, treatments and other conditions that must be fulfilled prior to importation.[234] In order to utilize the second option, the U.S. Department of Agriculture's regulations explicitly require that when importing fruits or vegetables from an area that is pest-free with regard to "certain injurious insects" but not all, the imports will only be allowed if they can be authorized "without risk."[235]

However, on October 1, 2002, APHIS published a proposed rule change that would delete the "without risk" requirement. APHIS claimed in the Federal Register notice announcing the change that "[e]ven with strict adherence to the preventive measures that the regulations prescribe, there will always be some risk . . . which

233. 7 C.F.R. § 319.56-2(e) (2003) (emphasis added).
234. *See id.*
235. *See id.* § 319.56-2(e)(4).

makes the 'without risk' criterion a standard that, in practical terms, is impossible to satisfy."[236] The rule change also proposed substituting references in § 319.56-2(e) to "injurious insects" with "quarantine pests."[237]

The requirements in § 319.56-2(e) refer to three criteria located in § 319.56-2(f) that must also be fulfilled before a plant or plant product can be imported:

> 1. Within the past 12 months, the plant protection service of the country of origin has established the absence of infestations of injurious insects known to attack fruits or vegetables in the definite area or district based on surveys performed in accordance with requirements approved by the Administrator as adequate to detect these infestations;
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> 2. The country of origin has adopted and is enforcing requirements to prevent the introduction of injurious insects known to attack fruits and vegetables into the definite area or district of the country of origin that are deemed by the Administrator to be at least equivalent to those requirements imposed under this chapter to prevent the introduction into the United States and interstate spread of injurious insects; and
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> 3. The plant protection service of the country of origin has submitted to the Administrator written detailed procedures for the conduct of surveys and the enforcement of requirements under this paragraph to prevent the introduction of injurious insects.
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> When used to authorize importation under §319.56-2(e)(3), the criteria must be applied to all injurious insects that attack the fruit or vegetable; when used to authorize importation under §319.56-2(e)(4), the criteria must be applied to those particular injurious

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236. Importation of Fruits and Vegetables, 67 Fed. Reg. 61,547, 61,548 (Oct. 1, 2002) (to be codified at 7 C.F.R. pts. 300, 319).

237. "Quarantine pests" would be defined in 7 C.F.R. §319.56-1 as, "A pest of potential economic importance to the area endangered by it and not yet present there, or present but not widely distributed there and being officially controlled." The definition is consistent with the International Plant Protection Convention (IPPC) of the United Nations Food and Agriculture Organization's definition. *Id.*

> insects from which the area or district is to be considered free.[238]

APHIS has also proposed replacing the specific criteria in subsection (f) with "a standard requiring that the area from which the fruit or vegetable is being imported meets the requirements of the IPPC's International Standard for Phytosanitary Measures (ISPM) No.4, 'Requirements for the establishment of pest free areas.'"[239] According to APHIS's proposed rule change, IPPC's requirements for a pest- or disease-free area include having "a system to establish freedom, phytosanitary measures to maintain freedom, and a system for the verification of the maintenance of freedom."[240]

The Department of Agriculture has also promulgated regulations governing the enforcement and administration of plant quarantine and safeguards at 7 C.F.R. § 352.3. Those regulations grant the Deputy Administrator the discretion to modify regulations by making them less stringent when he finds existing conditions make it safe to do so.[241] In such cases, the Administrator must publish his findings in administrative instructions and specify the modification as well as when it will become effective.[242] When taking such actions, the regulations impose a duty on the Administrator to carry out the regulation's purposes in a manner that "will impose a minimum of impediment to foreign commerce, consistent with proper precaution against plant pest dissemination."[243]

B. Current Challenges

1. Hass Avocados

In July 2001, under the 2000 Plant Protection Act, the U.S. Department of Agriculture announced a proposal to amend its regulations on Mexican avocados that would increase the quantity permitted to enter the United States by expanding the permitted distribution of Mexican avocados from 19 to 31 states and the

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238. 7 C.F.R. § 319.56-2(f).

239. Importation of Fruits and Vegetables, 67 Fed. Reg. at 61,548. The United States is a member of the International Plant Protection Convention of the United Nation's Food and Agriculture Organization (IPPC), an organization that establishes international standards aimed at harmonizing phytosanitary measures. *Id.*

240. *Id.*

241. 7 C.F.R. § 352.3(b) (2001).

242. *Id.*

243. *Id.* § 352.3(d).

shipping season by two months.[244] As a result, U.S. avocado growers adopted an approach similar to the U.S. citrus growers and organized through the California Avocado Commission to bring a lawsuit against the U.S. Department of Agriculture to prevent the broadening of import allowances for Mexican Hass avocados.[245] The final rule was published on November 1, 2001. The avocado rule change was similar to the Argentine citrus rule and involved specifically approved orchards in certain Mexican municipalities.[246]

The California Avocado Commission's lawsuit makes claims comparable to those by the Citrus Science Council — that APHIS used a faulty risk assessment and import protocol.[247] It also alleges that APHIS underestimated the risk of Mexican pests and diseases to U.S. producers.[248] The growers argue that APHIS should have taken a more conservative approach under its regulations and the SPS Agreement than the approach used in the proposed rule change.[249] Echoing the sentiments expressed by Joel Nelsen of the Citrus Science Council, the California Farm Bureau Federation quoted the California Avocado Commission complaint as stating that APHIS's avocado decision "was apparently prompted instead by the USDA's desire to facilitate increased trade with Mexico and its other global trading partners."[250] The California Avocado Commission further criticized APHIS's risk assessment as "completely contrary to what the science would suggest."[251]

Focused on the risk Mexican avocados may pose to their product, the domestic growers challenged APHIS's ability to diminish the risk of pest introduction to the zero risk level desired by the domestic producers.[252] The California Avocado Commission filed a petition in October 2001, "requesting that [APHIS] suspend further administrative steps related to" the avocado rule change as a result

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244. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

245. The case was filed in the United States District Court for the Eastern District of California. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

246. Press Release, U.S. Dep't of Agric., USDA Proposes Expansion of Mexican Hass Avocado Import Program (July 9, 2001), *at* http:/www.ceris.purdue.edu/napis/pr-release/pr010709-mxavoc.txt.

247. Tom Karst, *Citrus Growers Threaten Lawsuit Over US Ban of Spanish Clementines*, THE PACKER, Jan. 28, 2002, at A4.

248. *Id.*

249. *Id.*

250. Christine Souza, *Ag. Alert: Avocado Commission Sues U.S. Over Mexican Imports*, CALIFORNIA FARM BUREAU FEDERATION (Jan. 30, 2002), *at* http://www.cfbf.com/agalert/2002/aa-013002b.htm.

251. *Id.*

252. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, 55,542 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).

of the court's decision on the Argentine citrus rule.[253] APHIS denied the petition as well as the suggestion that it conduct, publish, and make available for public comment additional risk information in compliance with the Argentine citrus decision in Harlan Land.[254] The avocado growers had pointed to the Harlan Land determination to support their contention that the definition of "negligible risk" was lacking.[255]

In response, APHIS stated that it "disagree[d] with much of the Harlan Land decision and believe[d] that it was predicated on the unique facts of that case and should, therefore, be limited to the Argentine citrus regulations that were at issue in that litigation."[256] The agency responded to the avocado comments on the "negligible risk" issue saying that it had "deliberately not defined the point at which risk becomes negligible" because that determination might have "important consequences in international trade, as [its] reciprocal use by other countries could adversely affect the export of domestic products . . . ."[257] In APHIS's final rule on Mexican Hass avocados, the agency stated that the 2000 Plant Protection Act "does not require that the Secretary's decision be based on a numerical or quantitative measurement of risk."[258] APHIS noted further that it did not believe that the act "set[s] forth specific factors that the Secretary must consider in making her decision."[259]

In December 2002, Mexican fruit flies were discovered in northern San Diego County, California.[260] That infestation resulted in a 117-square-mile quarantine being set up surrounding the infestation areas.[261] The Mexican fruit fly has been a reoccurring problem in California and attacks more than 40 kinds of fruit, including citrus and avocados, and could reportedly cost California $750 million to $2 billion a year if not eradicated.[262] However, APHIS maintains that its systems approach can successfully mitigate the risks from dangerous pests such as fruit flies.[263]

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253. *Id.* at 55,530.
254. *Id.* at 55,531.
255. *Id.*
256. *Id.*
257. *Id.* at 55,542.
258. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530 (Nov. 1, 2001) (to be codified at 7 C.F.R. pt. 319).
259. *Id.* at 55,531; *see also* 7 U.S.C. § 7712 (2000).
260. Todd Foltz, *Emergency Declared in Fruit Fly Battle,* THE PACKER, Dec. 27, 2002, *available at* http://www.thepacker.com/icms/_dtaa2/content/2002-112259-900.asp. The flies were found in two locations in northern San Diego County, which produce a reported $75 million in crops annually. *Id.*
261. *Id.*
262. *Id.*
263. Souza, *supra* note 250.

The original case challenging the agency's assertions, California Avocado Commission v. Ann Veneman, Secretary of Agriculture,[264] was heard by Judge Coyle, who also presided over the Citrus Science Council's case. The California Avocado Commission's case challenged the USDA's 1997 ruling to allow Mexican Hass avocados into the United States[265] as well as the agency's 2001 amended regulations discussed above.[266] On January 14, 2004, the California Avocado Commission's claim regarding the 1997 rule was dismissed as moot.[267] However, the claim regarding the 2001 amendment, which expanded the areas into which Mexican Hass avocados may be shipped in the United States, is still pending before Judge Coyle.[268]

2. Spanish Clementine Citrus

Until December 2001, Spanish clementine citrus entered the United States pursuant to 7 C.F.R. § 319.56-2(e)(2) under a permit based on the condition that they were cold treated for Medflies. However, Medfly larvae were discovered in shipments of clementine citrus from Spain in November and December of 2001.[269] As a result, the U.S. Department of Agriculture suspended imports of the fruit.[270] According to APHIS, the Medfly is "one of the world's most destructive pests of numerous fruits and vegetables," which "can cause complete loss of crops."[271]

As a result of the suspension, Spanish citrus growers filed a lawsuit against APHIS in the U.S. District Court for the Eastern District of Pennsylvania in February 2002.[272] In August 2002, the court ruled in the U.S. Department of Agriculture's favor, finding that the Secretary's action banning Spanish clementines as a result of Medfly infestation was "rational, prudent and in accord with

264. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

265. Importation of Fresh Hass Avocado Fruit Grown in Michoacan, Mexico, 62 Fed. Reg. 5,293 (Feb. 5, 1997) (to be codified at 7 C.F.R. pt. 319).

266. Mexican Hass Avocado Import Program, 66 Fed. Reg. 55,530, (Nov. 1, 2001) (to be codified at 7 C.F.R. p. 319).

267. Cal. Avocado Comm. v. Veneman, No. 1:01-89 Civ. 6578 (E.D. Cal. Jan. 14, 2004).

268. Telephone Interview with Tom Bellamore, Senior Vice President and Corporate Counsel, Cal. Avocado Comm. (Jan. 21, 2004).

269. Tom Karst, *USDA Says 'bienvenido' to Clementines,* THE PACKER, Oct. 21, 2002, at A2.

270. *Id.*

271. Mediterranean Fruit Fly; Addition to Quarantined Areas, 66 Fed. Reg. 53,123 (Oct. 19, 2001) (to be codified at 7 C.F.R. pt. 301).

272. Intercitrus v. U.S. Dep't of Agric., No. 02 Civ. 1061 (E.D. Pa. Aug. 13, 2002).

applicable law."[273] Spanish growers estimated that they lost $54 million as a result of the U.S. ban.[274]

On July 11, 2002, under the 2000 Plant Protection Act, APHIS published a proposed rule that would allow Spanish clementine imports to resume under the requirement that they be "cold treated en route to the United States" as well as meet other pre- and post-treatment requirements.[275] Some of the comments submitted in response to the proposed rule revoking the suspension on clementine imports criticized APHIS based on the Harlan Land case. As with the U.S. citrus growers in Harlan Land and in the avocado case, APHIS was criticized for not clearly defining what it considers a "negligible level of risk" when authorizing imports from an area with a known pest or disease infestation.[276] The agency again declared its disagreement with the Harlan Land decision, noting that "negligible" is used to "describe risk in a qualitative, descriptive sense."[277]

The final rule, published in October 2002, also prohibited the distribution of Spanish clementines into citrus-growing states[278] during the 2002–2003 shipping season and required all boxes to bear a label noting the shipping limitations.[279] Opponents to the rule change voiced concerns that the rule lacked oversight capabilities, non-compliance penalties, and most importantly, any hard scientific data to prove that the U.S. Department of Agriculture's approach would actually kill Medflies contaminating the fruit.[280] APHIS has offered assurances that the treatments proscribed by the final rule "will prevent the introduction of the Medfly . . . and safeguard American agriculture."[281] Members of the U.S. citrus industry adamantly disagree. They point to failures in APHIS's ability to regulate the Spanish imports, citing the January 2003 discovery of Medfly larvae in a box of Spanish clementines and the November 2002 distribution of 200 cartons of Spanish clementines to a store

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273. Foreign Agric. Serv., U.S. Dep't of Agric., *U.S. District Court Finds in Favor of USDA Concerning the Spanish Clementine Lawsuit* (Aug. 26, 2002), *at* http://www.fas.usda.gov/htp/News/News02/08-02/8-23-02%20KD.htm.

274. Karst, *Citrus Growers Threaten Lawsuit Over US Ban of Spanish Clementines*, *supra* note 247.

275. Importation of Clementines from Spain, 67 Fed. Reg. 64,702 (Oct. 21, 2002) (to be codified at 7 C.F.R. pt. 319).

276. *Id.* at 64,705.

277. *Id.*

278. Those states include Arizona, California, Florida, Louisiana, Texas, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam and American Samoa. *Id.* at 64,711.

279. *Id.*

280. Todd Foltz, *Speakers at Hearing Decry Clementine Rule*, THE PACKER, Aug. 26, 2002, at A4.

281. Karst, *USDA Says 'bienvenido' to Clementines*, *supra* note 269.

in Tallahassee, Florida, to emphasize the merit of their concerns.[282] Requesting that imports halt until a properly conducted risk assessment is completed, California Citrus Mutual joined with the California Grape & Tree Fruit League in Fresno, California, to file a complaint in District Court requesting a judgment to terminate the clementine rule.[283]

VIII. CONCLUSION

The Plant Quarantine Act of 1912 was concerned exclusively with the protection of the United States from foreign plant pests and diseases.[284] The 1912 Act served as the basis for quarantines on agricultural products around the world, including the citrus and avocados discussed in this paper.[285] However, through the implementation of the WTO SPS Agreement and the Plant Protection Act's passage, APHIS's mission has shifted away from the purely protective goals of the 1912 Act.

The shift in APHIS's mission has created increased controversy between the agency and those domestic growers the agency is charged with protecting. The controversy reflects the tension between APHIS's two objectives: pursuing trade-promotion and protecting the U.S. agricultural industry. The National Plant Board's 1999 stakeholder review states that the "emergence of trade facilitation as an important mechanism to assure the continued protection of America's plant resources co-evolved with the development and implementation of the WTO-SPS [Agreement] and NAFTA."[286] The implementation of the SPS Agreement and other trade agreements has reportedly resulted in both internal and external tension.[287] The National Plant Board's report stated that profound change would have to be instituted to alleviate that tension and for APHIS to effectively perform its three major functions: (1) safeguarding the United States' plant resources from invasive species; (2) securely and expeditiously admitting an

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282. Terry Scruton, *Larvae Find Prompts FFVA, USDA Pow-Wow*, THE PACKER, Jan. 27, 2003, at A3; see *also* Jim Offner, *Spanish Clementines Sold in Florida Despite Ban*, THE PACKER, Dec. 2, 2002, at A1.

283. The case was filed in the U.S. District Court in Fresno, California; Chuck Harvey, *2 Groups Challenge Clementine Rule*, THE PACKER, Mar. 31, 2003, at A5. The case is still pending. Robert Rodriguez, *Oh, Rival Clementine*, THE FRESNO BEE, Dec. 4, 2003, *available at* www.fresnobee.com.

284. 7 U.S.C. §§ 151-167 (repealed 2000).

285. *Id.*

286. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 16.

287. *Id.* at 14. The National Plant Board's report notes that the "multiple roles have led to conflicting cultures, competition for attention and resources, and employee confusion regarding the Agency mission." *Id.*

"increasing volume of goods and passengers into the United States;" and (3) complying with international obligations to facilitate agricultural trade.[288]

The external conflicts arising from APHIS's mission shift are evident in disputes between the agency and the domestic industry over Argentine citrus, Mexican Hass avocados, and Spanish clementines. U.S. agricultural producers in all three cases are dissatisfied with APHIS's shift in methodology, particularly the use of systems approaches that they believe are not based on sound science. One recurring complaint by the domestic producers involves the lack of opportunities for participation during the development and testing of the systems approaches. APHIS's process for adopting rule changes such as those discussed before leaves domestic producers in the dark until the last stage when their comments are taken on a fully developed proposal. For example, in February 2003, APHIS announced plans to allow shipments of Mexican citrus to enter the United States untreated. While the plans were announced to domestic producers, in this case no formal proposals were printed in the Federal Register that would give rise to a public comment period. Joel Nelsen, president of California Citrus Mutual, summarized domestic growers' discontent, commenting that the plan's objective seemed acceptable, "[b]ut getting there and bypassing your ability to participate and question the efficacy, that's a problem."[289]

The challenges waged against APHIS's use of the systems approach in Harlan Land and in the other two lawsuits are a further indication of domestic producers' dissatisfaction with APHIS's methodology and perceived lack of transparency. Ensuring transparency in the removal and imposition of phytosanitary measures is important for domestic producers as well as international exporters — it builds confidence that the protective measures are not being posed arbitrarily or unfairly. The avocado industry, like the citrus growers, charged that the approach used in their case was "based on a fatally flawed set of pest risk assessments, unsupported and erroneous factual assumptions, and non-existent scientific data."[290] The various domestic producers are very concerned by what they see as a due process problem. They view APHIS's new trade-promoting methodology as driven by

288. *Id.* at i.

289. Todd Foltz, *APHIS Stance on Mexican Citrus Raises Concerns,* THE PACKER, Feb. 24, 2003, *at* http://thepacker.com/icms/_dtaa2/content/2003-93628-53.asp.

290. Souza, *supra* note 250.

political motives and dismissive of the serious threat invasive species pose to their livelihoods.[291]

Further complicating the problem is the lack of safeguards protecting domestic producers if a systems approach results in disease or pest importation and dissemination. Under current U.S. Department of Agriculture procedure, no federal compensation is available for producers whose crops are damaged as a result of a faulty risk assessment that results in a poorly devised systems approach.[292] The Plant Protection Act contains no such provision. Instead, the burden falls on state governments and the individual producers to pick up the costs of pest or disease eradication.[293] According to the California Avocado Commission's Chairman, Jerome Stehly, avocado production costs have increased by $300 an acre due to pest problems in recent years.[294]

As APHIS attempts successfully to balance trade with its former role that was strictly protective, improving the science used in designing a systems approach is vital. When risk assessments are conducted and systems approaches tested, the data used must be complete, accurate and applicable to the subject commodity and the exporting country. The requirement that sanitary and phytosanitary measures are based on "sound science" is fundamental to the WTO's SPS Agreement. Fulfilling this requirement is crucial to building confidence among domestic growers as well as trading partners.

The Harlan Land case raises a series of questions that the agency could address moving forward. However, subsequent statements by APHIS suggest that it will use the new law as a justification for maintaining the status quo. For example, Harlan Land called into question APHIS's ability to set the risk level without providing a quantifiable risk amount. APHIS currently interprets the Plant Protection Act as granting the agency the discretion to evaluate the risk and set the protection level as appropriate without quantifying it. It is unclear whether the pending clementine and avocado cases will follow the Harlan Land decision or whether the court will uphold APHIS's discretion.

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291. *See* Ben Wood, *D.C. Buzzing with Talk on Medfly, Inspection Fees,* THE PACKER, Jan. 20, 2003, at A8.

292. FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., FACT SHEET: EMERGENCY DISASTER DESIGNATIONS AND DECLARATION PROCESS 1 (Jan. 2004), *available at* http://www.fsa.usda.gov/pas/ publications/facts/html/EMProcess04.htm.

293. *See id.* Federal disaster assistance has only been given where the situation escalated far enough that the infested area was declared a "disaster area," or the U.S. Congress legislated specific assistance amounts through the appropriations process. *See id.*

294. Mark Walker, *Avocado Commission Sues over Inspection Program,* NORTH COUNTY TIMES, Jan. 17, 2002, *available at* http://www.nctimes/news/2002/ 20020117/ 92133. html.

APHIS's justification (to match the protection to the specific threat and not provide a target that other nations could use against U.S. exports) suggests that APHIS may be tipping its balance in favor of keeping export markets open. The unwillingness to quantify the magnitude of risk which is acceptable also suggests the potential for abuse by the agency in either or both directions (too much protection or too little protection). Surely APHIS personnel have some standard that they are using in determining that a systems approach or individual treatment will adequately protect U.S. agriculture. A refusal to articulate that standard denies transparency and understandability to what the agency is seeking to achieve. By contrast, granting domestic growers the ability to participate in a transparent process that assures that sound science is being used to determine and minimize the risks imports pose to their goods would increase their willingness to accept a risk level other than "zero."

APHIS's mission is important, and its job has always been difficult. With expanded international trade being a result of recent trade agreements, APHIS is being asked to perform a difficult balancing act, designing methods that will both protect domestic industry from invasive species and facilitate the importation of goods that pose some level of risk resulting from plant pests or diseases. APHIS could better balance the demands being placed on the agency and avoid some of the challenges it faces from domestic producers if some of the concerns raised by domestic producers and echoed throughout this paper were met. In particular, APHIS needs to give interested parties opportunities to comment or contribute earlier in the decision-making process. This could be accomplished by releasing interim reports followed by the acceptance and incorporation of comments where feasible. Transparency and sound science were an important aspect of the Plant Protection Act of 2000's passage and contributed to the new act's classification as a much-needed modernization of the 1912 Plant Quarantine Act.[295] APHIS has unquestionably moved forward toward achieving the improvements intended to occur through the new law. But APHIS, now a part of the new Homeland Security Department, still needs to improve its processes by further increasing its transparency and ensuring that it is using sound science.

295. SAFEGUARDING PLANT RESOURCES, *supra* note 2, at 7.