NATIONAL CHICKEN COUNCIL

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BEFORE THE U.S. SENATE COMMITTEE ON FINANCE

Testimony of

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On behalf of
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Mr. Chairman and Members of the Committee:

My name is Kevin J. Brosch. I am an international trade lawyer and consultant here in Washington DC. I have specialized in agricultural trade for more than 30 years. I started my legal career in the international trade practice at Steptoe & Johnson, and spent ten years at the U.S. Department of Agriculture where I did trade negotiations in the Uruguay Round and NAFTA. I served as special trade advisor to Senator Lugar and the Senate Committee on Agriculture, Nutrition and Forestry in 1998-99; and have been in private practice for the past fifteen years working with the U.S poultry export industry and other agricultural clients. Today I appear before you on behalf of the National Chicken Council, the organization that represents companies that produce and process over 95 percent of the chicken in the United States. The 30-plus vertically-integrated firms that comprise the federally-inspected chicken industry, I can assure the committee, are a very dynamic, forward-looking and essential part of American agribusiness.

Chicken is one of our most important agricultural products, and one of our most important agricultural exports. The U.S. is the most efficient producer of poultry products in the world. U.S. production value in 2013 was $30.7 billion. We are the world's second largest exporter, only narrowly behind Brazil, and in 2013 we exported nearly 20% of our total volume of production, with an export value of more than $4.7 billion. U.S. poultry is our 6th most important agricultural export, with product being exported to nearly 100 countries each year. It has also been an important growth sector for U.S. agriculture with exports increasing from 5.2% of production volume in 1990, to nearly 20% in 2013.

The topic you have chosen for today's hearing, Mr. Chairman, -- Enforcement of U.S. Rights under Trade Agreements -- is an issue of paramount importance to the U.S. poultry industry. The U.S. poultry industry has long been one of the strongest advocates of free and fair trade, and has supported the efforts of both Democrat and Republican administrations to negotiate important trade agreements such as the Tokyo Round of General Agreement on Tariffs and Trade (1975-79); the Uruguay Round resulting in the World Trade Organization agreements (1986-1994); and the North American Free Trade Agreement (1992-94). The United States is the most efficient poultry producing country in the world

and the potential benefits from free and fair trade for the U.S. poultry industry are very substantial.

In general, trade agreements, both multilateral structures (e.g. WTO) and plurilateral free trade (e.g., NAFTA, CAFTA) have been a success story for the U.S. poultry industry. We have worked hard to support these arrangements and to expand our export trade using the trade liberalizing tariff rates and rules to our advantage. U.S. poultry exports have increased significantly over the past 20 years and our industry can attest to the benefits of having an aggressive and liberal trade policy.

In specifically addressing the issue of enforcement, I should begin by thanking the Obama Administration for a very significant and recent success. China is the best example we can point to of vigorous and timely trade enforcement. In 2009, China imposed antidumping duties on U.S. chicken using the so-called "weight-based cost of production" theory. (I will describe the problem with that dumping theory later in this testimony). Immediately after China announced its decision to impose antidumping duties, the Obama Administration requested dispute settlement, and aggressively litigated the case before the WTO. Last summer a WTO panel ruled in our favor. China elected not to appeal that decision and we are currently awaiting China's announcement of how it will change its antidumping decision to come into compliance with WTO rules. Hopefully, China will act in good faith and honor its WTO commitments, but there are no assurances. We expect an announcement in July.

We are grateful to this Administration for pursuing our rights in this case; to former Deputy USTR Isi Siddiqui who provided great leadership on this issue; and to the USTR legal team that, in coordination with the team of private lawyers who were paid by our industry to assist in preparation of the case, presented a very strong and coherent case. (Even with USTR's efforts, the China case cost U.S. industry millions of dollars in legal fees to pursue). China represented a 700,000 MT market for U.S. poultry at the time the antidumping duties were imposed, and is potentially an even larger market for our products in the future. We have been out of the market now for several years, and hope that China will lift its restrictions now that an international legal panel has ruled against it. In our view, the prosecution of the China antidumping case before the WTO represents U.S. trade policy at its best; enforcing those trade rights we have already negotiated for.

Unfortunately, not all unfair trade practices have been pursued this aggressively or this successfully. There have been some very significant disappointments and we have learned some difficult lessons over the past 20 years. The first is that enforcement of trade agreements must become more automatic and timely. Mexico has become one of our most important export markets with U.S exports now exceeding 300,000 MT annually. Several years ago, U.S. poultry exports became the target of an antidumping case in Mexico, which was also brought on the very dubious "weight-based cost of production" theory. The Mexican trade tribunal ruled in favor of its domestic industry and was poised to impose punitive duties on U.S. imports when Mexico was suddenly struck by a particularly virulent outbreak of Avian Influenza that resulted in the reported loss of more than 30 million chickens in Mexico. Because of the resulting shortage of poultry meat in its market, Mexico elected to hold the imposition of antidumping duties in abeyance.

While the U.S. currently continues to export poultry to Mexico, the threat that antidumping duties will be imposed when the Mexican Avian Influenza epidemic recedes remains a dark

cloud over our industry. As a result, we took action to challenge the Mexican decision under the terms of the NAFTA agreement. In this instance, we did not have to wait for our government to bring the case because, as you are aware, NAFTA rules include a private right of action by an affected industry. Our industry spent considerable sums on lawyers both in Mexico and in the United States to prepare the case. Our problem has been that, even though we have a private right of action, the NAFTA dispute settlement system depends upon the governments agreeing to the formation of a panel. Our case against Mexico was instituted nearly two years ago, and at present, we still do not have a panel to hear the case. It would seem that this would be a simple matter. We believe there is a significant problem here of enforcement that needs to be addressed.

There have been similar but even more troubling problems with enforcement under WTO rules. Prior to 1996, the United States enjoyed significant trade in poultry products with the European Union. In that year, however, the EU enacted new rules that prevented the U.S. from exporting chicken to Europe if the chicken had been processed using hyper-chlorinated water.

The use of hyper-chlorinated water to combat potential surface contamination of chicken has been standard practice in the U.S. chicken industry for decades, and has long been approved as safe and efficacious by U.S. regulators, specifically the Food Safety & Inspection Service (FSIS) of the U.S. Department of Agriculture. Every week, Americans safely consume approximately 156 million chickens that have been processed under FSIS rules. The FSIS system for poultry processing and inspection is the best and safest system in the world. It is a national embarrassment – and an insult to our citizens who rely on the FSIS system of inspection to protect their health -- that the United States continues to allow the European Union to block poultry imports from the United States on the grounds that FSIS-inspected chicken is somehow unsafe for European consumers.

The U.S. poultry industry asked that the EU be taken to dispute settlement as there was no scientific basis for the EU's restrictions on U.S. imports. However, in 1998, in the context of the U.S.-E.U. Equivalency Agreement negotiations, the United States agreed to forego insistence on our right to use hyper-chlorinated water in poultry processing, and agreed instead to provide the EU with scientific *dossiers* demonstrating the safety and efficacy of four alternative anti-microbial treatments that the industry could used in lieu of hyper-chlorinated water. The European Commission agreed to submit question of alternative anti-microbials to its scientific advisory committee within a year.

The EU did not do as it had promised. It failed to pursue this issue with its scientific advisory committee for nearly seven years. Ultimately several (but not all) of the proposed alternative anti-microbials were presented, and the EU scientific advisory committee opined that they were safe and efficacious and presented no health risk to consumers. However, when the European Commission presented a proposal for acceptance of the use of these anti-microbials, the EU Member States defeated that proposal 27-0.

The U.S. was excluded from the EU market for more than a decade and our government took no action until 2008 when, just a few months before the Bush Administration left office, it requested dispute settlement before the WTO. The responsibility for pursuing the case to its conclusions was passed to the incoming Obama Administration. After approximately one year of preliminary procedures, the case moved to the panel selection phase, and then came to a sudden halt. For reasons that have never been explained, the

U.S. and the EU have taken no actions to form a panel over the past four years, and there is no indication that our government is pursuing enforcement of the case at present.

Another longstanding problem has been with enforcement of our right against the Republic of South Africa (RSA). In 2000, the Republic of South Africa, a WTO signatory, began imposing punitive antidumping duties on U.S. poultry imports based on the economically unsound theory of "weight-based cost of production." Under this approach all parts of an animal are given the same value per unit of weight; and so, hamburger has the same value as filet mignon; pig's ears have the same value as pork loin; chicken paws have the same value as chicken breast meat. Clearly, this theory is economically unsound and, for several reasons, is legally impermissible under WTO rules.

The U.S. industry asked the Bush Administration on a number of occasions over eight years to invoke WTO dispute settlement, but no action was ever taken. In 2009, when the Obama Administration came to office, we renewed our requests but were told that this was a "cold case," too old for it to pursue at the WTO.

Prior to 2000, the U.S. industry had 55,000 MT in annual sales to the RSA. Given the rise in the number of middle class citizens in the RSA over the past decade, and the price competitiveness of U.S. chicken, that market would have grown substantially since that time. But because the U.S. has not challenged the RSA at the WTO and enforced our rights, the U.S has been entirely shut out of the South African market for 15 years.

Had the United States pursued enforcement against South Africa, it would have prevailed. We are confident in saying that because the South Africa case presented substantially the same legal issue upon which the United States prevailed when it successfully invoked dispute settlement against China.

In 2000, about the same time that South Africa began imposing unfair and punitive antidumping duties on our products, Congress passed the African Growth Opportunity Act (AGOA), which gave preferential market access and lower import duties to about 35 African countries including South Africa. Our industry supported AGOA. But, for the past 14 years while South Africa benefitted from preferential duties under AGOA, it has simultaneously and unfairly excluded U.S. poultry from its market. Trade data show that in every year since 2000, South Africa has consistently benefitted from a trade surplus with the United States, generally in the range of $1-3 billion annually. For 2012, the most recent year for which trade data is available, South Africa's exports to the United States are valued at roughly $1 billion more than the imports that it accepts from the United States. *See,* http://agoa.info/profiles/south-africa.html.

In September 2015, AGOA will expire if not renewed. Congress will have to consider whether to extend those preferences in the future. In our view, South Africa's unfair and protectionist practices must be addressed before Congress would be justified in extending the AGOA program; it makes no sense for the United States to give special preferences to countries that treat our trade unfairly.

Finally, I would like to turn my attention to TPP and TTIP. Trade is a big part of the future for the poultry industry, and we are generally supportive of all major initiatives to promote free trade. But it can also be frustrating to support free trade initiatives only to discover later that the rights that were negotiated are not being effectively enforced. We must make

sure our existing agreements and processes work as well as possible; and, looking forward, we must insist that all new agreements provide strong market access and adequate systems to enforce that access.

With respect to TPP, our major goals are to get a strong commitment on enforcement, in particular in the area of sanitary and phytosanitary measures. We are aware that work has been pursued in this area with the hope of achieving an "SPS plus" chapter in the TPP; i.e., SPS provisions that are even better than those currently in the WTO Agreement. We support that effort; but, once again, stronger rules are only a benefit if there is timely, aggressive and consistent enforcement of those rules.

Our second major ambition in TPP is to see that the long-protected Canadian market is finally opened to trade. In our view, the Canadian market should have been opened to free trade as a result of NAFTA. If TPP is truly a free trade agreement, then there should be free trade in poultry between the United States and Canada, not just one-way market access for Canada.

We are frankly, less sanguine about the prospects for poultry under the proposed TTIP free trade agreement with Europe. The ban currently imposed by EU regulations on importation of U.S. chicken is not based on sound science and is inconsistent with WTO rules. TTIP would only be of use to our industry if the negotiations resulted in the removal of these SPS barriers that Europe has had in place for nearly 18 years. However, we have thus far seen no indication that Europe is willing to negotiate with the U.S. on these issues. Moreover, three weeks ago, at a political rally in Worms, Germany, Chancellor Angela Merkel vowed that she would never permit U.S. chicken to be imported into Europe. So much for free trade. The industry might have a more positive view of the TTIP initiative if the Administration had taken effective action to enforce our WTO rights. We have been shut out of the European market now for 18 years, and there is no current indication that the TTIP will remedy that situation.

In conclusion, Mr. Chairman, the question that you have asked by calling this hearing today is extremely important and timely. With the Administration actively negotiating new free trade agreements with Asia and Europe, one question that must be asked is how effective is the enforcement of the trade agreements that we already have. Trade is a big part of the future for the U.S. poultry industry. We are generally supportive of all major initiatives to promote free trade, but we must make sure both our existing agreements and new agreements provide not only strong market access but also adequate means to enforce that access.