2011 Report on Sanitary and Phytosanitary Measures

Beef Hormones

In 1996, the United States challenged the European Union's (EU) ban on beef derived from U.S. cattle that have been treated with certain growth-promoting hormones. In 1998, the WTO found that the EU's ban was not supported by science and was thus inconsistent with the EU's obligations under the SPS Agreement. Accordingly, in 1999, following authorization from the WTO's Dispute Settlement Body, the United States raised its duties on a list of EU products.

In May 2009, the United States and the EU concluded a Memorandum of Understanding (MOU) that has enabled U.S. producers to gain additional duty-free access to the EU market for high-quality beef produced from U.S. cattle that have not received growth-promoting hormones. The MOU, which took effect in August 2009, is currently providing additional duty-free access to the EU market for high-quality beef produced from cattle that have not been raised with growth-promoting hormones – 20,000 tons in each of the first three years, with the possibility of increasing to 45,000 tons beginning in the fourth year. Under the MOU, the United States may maintain the additional duties it had in place on EU products in March 2009 and will not impose new duties on EU products during the initial three-year period, and may eliminate all sanctions during the fourth year. In February 2011, the United States and EU held consultations under the MOU to discuss the possibility of moving into the next phase, which would provide up to 45,000 tons of duty-free access for U.S. high-quality beef. Before the four-year period ends, the United States and the EU will seek to conclude a longer-term agreement.

European Communities – Biotech

In 2003, the United States challenged the EU's *de facto* moratorium on approvals of U.S. biotechnology agricultural products, such as certain corn and soybeans varieties, and marketing prohibitions that individual EU Member States had imposed on biotechnology products that the EU had previously approved. In 2006, a WTO panel found that EU and Member State measures were inconsistent with WTO rules. This dispute remains unresolved. A large backlog of applications remains pending in the EU approval system, which has the effect of blocking U.S. exports of certain agricultural products. The EU approved several products early last year, but there have been no approvals issued since July 2010. The United States continues to press the EU for fundamental improvements in its regulatory system with the goal of normalizing biotech trade.

European Union – Poultry

At the request of the United States, the WTO established a dispute settlement panel in November 2009 to examine whether the EU's restrictions on imports of U.S. poultry are consistent with its obligations under the SPS Agreement. The dispute is focused on the EU's ban on the import and marketing of poultry meat and poultry meat products processed with certain pathogen reduction treatments (PRTs) used in the United States that both U.S. and European scientists have judged to be safe.

Poultry
In 1997, the EU began blocking imports of U.S. poultry products that have been processed with PRTs. The EU has further prohibited the marketing of poultry as "poultry meat" if it has been processed with PRTs. In late 2002, the United States requested the EU to approve the use in processing poultry intended for the EU market of four PRTs that are approved for use in the United States: chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids.

Between 1998 and 2008, various EU agencies issued scientific reports concerning poultry processed with these PRTs. Taken together, the reports conclude that residues of these PRTs do not pose a health risk to consumers.

In May 2008, the European Commission, after years of delay, prepared a proposal that approved the use of the four PRTs for processing of poultry, but imposed highly traderestrictive conditions that did not appear to be based on science. EU Member States rejected the Commission's flawed proposal, first at the regulatory committee level and then, in December 2008, at the ministerial level.

In January 2009, the United States requested consultations with the EU on whether the EU's failure to approve the four PRTs was consistent with the EU's commitments under various WTO agreements, including the SPS Agreement. The United States and the EU held those consultations in February 2009 but failed to resolve the matter. In November 2009, the WTO Dispute Settlement Body established a panel to address the matter. That litigation is pending.

Ractopamine
The EU currently maintains a ban on pork produced with ractopamine, a veterinary drug that promotes lean meat growth in pigs and certain other farm animals, despite scientific evidence indicating that ractopamine is safe. As a consequence of this ban, U.S. pork exporters must participate in the burdensome *Pork for the EU Program* to verify that the pork has not been produced using ractopamine. In addition, U.S. pork shipments to the EU must undergo expensive laboratory testing to verify the absence of ractopamine residue. These requirements, which appear to lack scientific justification, act as a major impediment to U.S. pork exports to the EU, confining U.S. exports to a small group of U.S. suppliers.

Animal ByProducts
In 2002, the EU published Regulation (EC) 1774/2002, which established problematic new requirements for marketing animal by-products that are not intended for human consumption, including by-products used in materials intended for animal consumption. Some of the previously high volume U.S. exports that this regulation barred included pet food, tallow, and other animal protein products. In most cases, the requirements appeared to be unwarranted.

Starting in 2002, APHIS met with EU representatives repeatedly in an attempt to shape revisions to Regulation (EC) 1774/2002. In 2009, the EU published Regulation (EU) 1069/2009 to begin the replacement of Regulation (EC) 1774/2002. The new regulation does appear to address many major U.S. concerns, but also imposes some new requirements about which the United States remains concerned. It did not change the requirements for import into the EU, but laid the groundwork for Regulation (EU) 142/2011, which does replace the requirements for import.

APHIS is currently reviewing Regulation (EU) 142/2011 to determine the extent of U.S. concerns which will be remedied by the revisions. While review is ongoing, the initial indication is that the new regulation will allow significantly more U.S. product to be eligible for export to the EU.

Technical Barriers to Trade (TBT Report)

Wine – Labeling Requirements

As described in last year's report, the EU continues to seek exclusive use of so-called "traditional terms" such as tawny, ruby, reserve, classic, and chateau on wine labels, but may allow third country producers to use such terms pursuant to an agreement with the EU or contingent on the regulation of those terms in their home market. Under the United States – EU wine agreement, the EU permitted the use of certain terms on U.S. wines sold in the EU for a three-year extendable period, but then declined to extend the period past March 2009. As part of its effort to redesign its Common Market Organization on wine, the EU published its new regulation (EC No 607/2009) on July 14, 2009, laying down detailed rules for implementation of EC regulation 479/2008 with regard to protected designations of origin and geographical indication, traditional terms, labeling, and presentation of certain wine products. The regulation leaves enforcement to EU Member States. It is unclear how Member States will enforce the regulation or how the Commission plans to ensure consistency of interpretation across Member States.

The United States continues to have serious concerns regarding these measures, which severely restrict the ability of non-EU wine producers to use common or descriptive and commercially valuable terms to describe their products, on the grounds that those terms are traditionally associated with European wines. The United States is also concerned about continued EU efforts to expand the list of so-called "traditional terms" to include additional commercially valuable terms. Some of these terms do not have a common definition across all EU Member States, and the United States is not aware of any effort to monitor or limit the use of those terms within the EU. Additionally, the United States remains concerned about the EU's decision to withdraw permission to use certain "traditional terms" under the U.S. – EU wine agreement, as well as the EU's limitation on the use of traditional expressions in trademarks.

While the EU attempts to justify limitations on the use of traditional terms by indicating that they could be used to mislead consumers, these terms have been used without incident on U.S. wines in the EU market for many years, which suggests that there is no such risk. During 2011, the United States will continue to coordinate with the U.S. wine exporters on how best to address and resolve concerns regarding the EU's wine policy.

The Rise of "Voluntary" Measures as Trade Barriers

The EU often issues voluntary standards (*e.g.,* for lawnmowers and pressure vessels, among other products) and then later clarifies that there is a "presumption of compliance" with a mandatory requirement if these voluntary standard are followed. Because the EU's voluntary standards are developed in a system where each EU Member State has a vote and U.S. companies without a European presence are excluded, this puts U.S. companies at a disadvantage because the standard often does not reflect their input.

European Union–Measures concerning meat and meat products (hormones) (DS26, 48):
The United States and Canada challenged the EU ban on imports of meat from animals to which any of six hormones for growth promotional purposes had been administered. The panel found that the EU ban is inconsistent with the EU's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), and that the ban is not based on science, a risk assessment, or relevant international standards.

Upon appeal, the Appellate Body affirmed the panel's findings that the EU ban fails to satisfy the requirements of the SPS Agreement. The Appellate Body also found that, while a country has broad discretion in electing what level of protection it wishes to implement, in doing so it must fulfill the requirements of the SPS Agreement. In this case, the ban imposed is not rationally related to the conclusions of the risk assessments the EU had performed.

Because the EU did not comply with the recommendations and rulings of the DSB by May 13, 1999, the final date of its compliance period as set by arbitration, the United States sought WTO authorization to suspend concessions with respect to certain products of the EU. The value of the suspension of concessions represents an estimate of the annual harm to U.S. exports resulting from the EU's failure to lift its ban on imports of U.S. meat. The EU exercised its right to request arbitration concerning the amount of the suspension. On July 12, 1999, the arbitrators determined the level of suspension to be $116.8 million. On July 26, 1999, the DSB authorized the United States to suspend such concessions and the United States proceeded to impose 100 percent *ad valorem* duties on a list of EU products with an annual trade value of $116.8 million. On May 26, 2000, USTR announced that it was considering changes to that list of EU products, but did not make any changes.

On November 3, 2003, the EU notified the WTO that it had amended its hormones ban. As discussed below (DS320), on November 8, 2004, the EU requested consultations with respect to "the United States' continued suspension of concessions and other obligations under the covered agreements" in the EU – Hormones dispute. The Appellate Body issued its report in the *U.S. – Continued Suspension* (WT/DS320) dispute on October 16, 2008.

On October 31, 2008, USTR again announced that it was considering changes to the list of EU products on which 100 percent *ad valorem* duties had been imposed in 1999. A modified list of EU products was announced by USTR on January 15, 2009.

On December 22, 2008, the EU requested consultations with the United States and Canada pursuant to Articles 4 and 21.5 of the DSU, regarding the EU's implementation of the DSB's recommendations and rulings in the EU – Hormones dispute. In its consultations request, the EU stated that it considered that it has brought into compliance the measures found inconsistent in EU – Hormones by, among other things, adopting its revised ban in 2003. Consultations took place in February 2009.

Discussions between the United States and the EU resulted in the conclusion of a Memorandum of Understanding ("Beef MOU") on May 13, 2009. The Beef MOU provides for increased, duty-

free access to the EU market for beef produced without certain growth promoting hormones and maintains increased duties on a reduced list of EU products. Under the terms of the Beef MOU, after three years, duty-free access to the EU market for beef produced without certain growth promoting hormones may increase and the application of all remaining increased duties imposed on EU products may be suspended. The Beef MOU also suspends further litigation in the *EU – Hormones* compliance proceeding until at least
February 3, 2011.

European Union–Measures affecting the approval and marketing of biotechnology products (DS291):
Since the late 1990s, the EU has pursued policies that undermine agricultural biotechnology and trade in biotechnological foods. After approving a number of biotechnological products through October 1998, the EU adopted an across-the-board moratorium under which no further biotechnology applications were allowed to reach final approval. In addition, six Member States (Austria, France, Germany, Greece, Italy, and Luxemburg) adopted unjustified bans on certain biotechnological crops that had been approved by the EU prior to the adoption of the moratorium. These measures have caused a growing portion of U.S. agricultural exports to be excluded from EU markets, and unfairly cast concerns about biotechnology products around the world, particularly in developing countries.

On May 13, 2003, the United States filed a consultation request with respect to: (1) the EU's moratorium on all new biotechnology approvals; (2) delays in the processing of specific biotech product applications; and (3) the product-specific bans adopted by six EU Member States (Austria, France, Germany, Greece, Italy, and Luxembourg). The United States requested the establishment of a panel on August 7, 2003. Argentina and Canada submitted similar consultation and panel requests. On August 29, 2003, the DSB established a panel to consider the claims of the United States, Argentina and Canada. On March 4, 2003, the Director-General composed the panel as follows: Mr. Christian Häberli, Chair; and Mr. Mohan Kumar and Mr. Akio Shimizu, Members.

The panel issued its report on September 29, 2006. The panel agreed with the United States, Argentina, and Canada that the disputed measures of the EU, Austria, France, Germany, Greece, Italy, and Luxembourg are inconsistent with the obligations set out in the SPS Agreement. In particular:

- The panel found that the EU adopted a *de facto*, across-the-board moratorium on the final approval of biotechnological products, starting in 1999 up through the time the panel was established in August 2003.
- The panel found that the EU had presented no scientific or regulatory justification for the moratorium, and thus that the moratorium resulted in "undue delays" in violation of the EU's obligations under the SPS Agreement.
- The panel identified specific, WTO-inconsistent "undue delays" with regard to 24 of the 27 pending product applications that were listed in the U.S. panel request.
- The panel upheld the United States' claims that, in light of positive safety assessments issued by the EU's own scientists, the bans adopted by six EU Member States on products approved in the EU prior to the moratorium were not supported by scientific evidence, and were thus inconsistent with WTO rules.

The DSB adopted the panel report on November 21, 2006. At the meeting of the DSB held on December 19, 2006, the EU notified the DSB that the EU intends to implement the recommendations and rulings of the DSB in these disputes, and stated that it would need a reasonable period of time for implementation. On June 21, 2006, the United States, Argentina, and Canada notified the DSB that they had agreed with the EU on a one-year period of time for implementation, to end on November 21, 2007. On November 21, 2007, the United States, Argentina, and Canada notified the DSB that they had agreed with the EU to extend the implementation period to January 11, 2008.

On January 17, 2008, the United States submitted a request for authorization to suspend concessions and other obligations with respect to the EU under the covered agreements at an annual level equivalent to the annual level of nullification or impairment of benefits accruing to the United States resulting from the EU's failure to bring measures concerning the approval and marketing of biotechnology products into compliance with the recommendations and rulings of the DSB. On February 6, 2008, the EU requested arbitration under Article 22.6 of the DSU, claiming that the level of suspension proposed by the United States was not equivalent to the level of nullification or impairment. The EU and the United States mutually agreed to suspend the Article 22.6 arbitration proceedings as of February 18, 2008. The United States may request resumption of the proceedings following a finding by the DSB that the EU has not complied with the recommendations and rulings of the DSB.

Subsequent to the suspension of the Article 22.6 proceeding, the United States has been monitoring EU developments, and has been engaged with the EU in discussions with the goal of normalizing trade in biotechnology products.

European Communities–Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (DS389):

On January 16, 2009, the United States requested consultations regarding certain EU measures that prohibit the import of poultry meat and poultry meat products that have been processed with chemical treatments designed to reduce the amount of microbes on poultry meat, unless such pathogen reduction treatments ("PRTs") have been approved. The EU further prohibits the marketing of poultry meat and poultry meat products if they have been processed with PRTs. In December 2008, the EU formally rejected the approval of four PRTs whose approval had been requested by the United States, despite the fact that EU scientists have repeatedly concluded that poultry meat and poultry meat products treated with any of these four PRTs does not present a health risk to European consumers. The EU's maintenance of its import ban and marketing regulation against PRT poultry appears to be inconsistent with its obligations under the SPS Agreement, the Agreement on Agriculture, the GATT 1994, and the TBT Agreement. Consultations were held on February 11, 2009, but those consultations failed to resolve the dispute. The United States requested the establishment of a panel on October 8, 2009, and the DSB established a panel on November 19, 2009.

European Union–Regime for the importation, sale, and distribution of bananas – Recourse to Article 21.5 of the DSU by the United States (WT/DS27):

On June 29, 2007, the United States requested the establishment of a panel under Article 21.5 of the DSU to review whether the EU had failed to bring its import regime for bananas into compliance with its WTO obligations and the DSB recommendations and rulings adopted on September 25, 1997. The request related to the EU's apparent failure to implement the WTO rulings in a proceeding initiated by Ecuador, Guatemala, Honduras, Mexico, and the United States. That proceeding had resulted in findings that the EU's banana regime discriminated against bananas originating in Latin American countries and against distributors of such bananas, including a number of U.S. companies. The EU was under an obligation to bring its banana regime into compliance with its WTO obligations by January 1999. The EU committed to shift to a tariff-only regime for bananas no later than January 1, 2006. Despite these commitments, the banana regime implemented by the EU on January 1, 2006 included a zero-duty tariff-rate quota allocated exclusively to bananas from African, Caribbean, and Pacific countries. All other bananas did not have access to this duty-free tariff rate quota and were subject to a 176 euro per ton duty. The United States brought challenges under GATT Articles I:1 and XIII.

Ecuador requested the establishment of a similar compliance panel on February 23, 2007, and a panel was composed in response to that request on June 15. In response to the United States request, the panel was established on July 12, 2007. On August 13, 2007, the Director General composed the panel as follows: Mr. Christian Häberli, Chair; and Mr. Kym Anderson and Mr. Yuqing Zhang, members. Mr. Häberli and Mr. Anderson were members of the original panel in this dispute.

The panel granted the parties' request to open the substantive meeting with the parties, as well as a portion of the third-party session, to the public. The public observed these meetings from a gallery in the room in which the meetings were conducted.
The panel issued its report on May 19, 2008. The panel agreed with the United States that the EU's regime was inconsistent with the EU's obligations under Articles I:1, XIII:1, and XIII:2 of the GATT 1994, and that the EU had failed to implement the recommendations and rulings of the DSB.

On August 28, 2008, the EU filed a notice of appeal. The Appellate Body granted a joint request by the parties to open its hearing to the public, and the public was able to observe the hearing via a closed-circuit television broadcast. The Appellate Body issued its report on November 26, 2008. The Appellate Body found that the EU had failed to bring itself into compliance with the recommendations and rulings of the DSB. In particular, the Appellate Body rejected all of the EU's procedural arguments alleging the United States was barred from bringing the compliance proceeding and agreed with the panel that the EU's duty free tariff rate quota reserved only for some countries was inconsistent with Article XIII of the GATT 1994. The panel in this dispute had also found that the EU's banana import regime was in violation of GATT Article I. The EU did not appeal that finding. The DSB adopted the Appellate Body report on December 22, 2008.

On December 15, 2009, the United States and the EU initialed an agreement designed to lead to settlement of the dispute. In the agreement, the EU undertakes not to reintroduce measures that

discriminate among bananas distributors based on the ownership or control of the distributor or the source of the bananas, and to maintain a non-discriminatory, tariff-only regime for the importation of bananas. The U.S.-EU agreement complements an agreement initialed on the same date between the EU and several Latin American banana-supplying countries (the GATB). That agreement provides for staged EU tariff cuts that will bring the EU into compliance with its obligations under the WTO Agreement. The GATB was signed on May 31, 2010, and the U.S.-EU agreement was signed on June 8, 2010. The agreements will enter into force following completion of certain domestic procedures. Upon entry into force, the EU will need to request formal WTO certification of its new tariffs on bananas. The GATB provides that once the certification process is concluded, the EU and the Latin American signatories to the GATB will settle their disputes and claims. Once that has occurred, the United States will also settle its dispute with the EU.