

Food Safety & Trade

BSE & Sanitary/Phytosanitary Measures

By Kazuhito YAMASHITA



BOVINE spongiform encephalopathy (BSE), often referred to as mad cow disease, is a central nervous system (CNS) disease that causes a sponge-like perforation in brain tissues of infected cattle, triggering symptoms such as the inability to stand and ataxia. An abnormal prion is believed to be the infectious agent and the spread of BSE is thought to have been caused by the practice of feeding cattle with meat and bone meal (MBM) derived from BSE-infected cows containing the abnormal prions.

In March 1996, the British government acknowledged a possible link between BSE and its variant Creutzfeldt-Jakob disease (vCJD) that causes a spongy degeneration of the human brain. This prompted countries to impose a ban on beef imports from Britain. Japan found its first BSE-infected cow in 2001, throwing the domestic beef market into turmoil. When the United States discovered its first case of BSE-infected cattle in 2003, the Japanese government moved quickly to stop US beef imports. The two countries held several rounds of talks before Japan in 2005 lifted the ban on imported US beef and beef products, excluding spinal columns and other specified risk materials (SRMs), from cattle aged 20 months or younger. However, shortly afterward, prohibited spinal columns were found in a US veal shipment, and Japan reinstated the ban in January 2006. Subsequently, that July, Japan resumed imports of US beef. But then, in February 2007, beef from cows aged over 20 months was

found. In 2008, following the January outbreak of food poisoning linked to frozen dumplings imported from China, a spinal column was found in April in a box of US beef imported by Yoshinoya, a beef bowl restaurant chain operator.

Food Safety & International Trade

Numerous issues surrounding food safety today are associated with two major characteristics of modern society. First, scientific and technological advances have brought significant changes to the agriculture and food industries. For instance, a range of once highly inaccessible high-quality, delicious foods, such as the *koshihikari* variety of rice and *shimofuri* marbled beef, are readily available today. The cost of producing food has been reduced to such a great extent that we have fish, meat, dairy products, fruits and vegetables, in addition to cereals, within our budget. These are the fruits of technological progress, for instance crop variety and livestock breed improvement.

Today, there are a wide variety of easy-to-prepare frozen foods, also the result of technological progress in food processing and distribution. This progress, however, is not without its share of problems. Pesticides and food additives came into wide use, farmers began to feed MBM to their cattle, and this resulted in the new disease called BSE. The second modern characteristic is globalization and trade expansion. We have food from all over the world. However, BSE might not have occurred in Japan had it not been for international trade. For Japan, the world's largest net importer of agricultural products, and a country that relies heavily on imports for its supply of foods and agricultural produce, food safety and trade issues are of particularly great public concern.

Sovereign Right to Implement SPS Steps & Disguised Trade Curbs

Every country has the sovereign right to protect the lives, physical safety and health of its people. Sanitary and phytosanitary (SPS) measures introduced to prevent the entry of harmful pests and diseases via the import of foods, animals and plants are a justifiable means to protect life, physical safety and health. Consumers express strong concern that food safety could be jeopardized if appropriate SPS measures become difficult to implement in the face of increasing globalization.

On the other hand, it has been pointed out that SPS measures are used to protect domestic (agriculture, forestry, fishery, and food) industries because traditional trade measures are not as readily available or effective as they used to be now that overall tariff levels have been lowered after a series of

international negotiations. From the standpoint of promoting trade liberalization, SPS measures used as disguised trade restrictions (fronts for protectionism) should be restricted or eliminated. However, any SPS measures – including those truly intended to protect life, safety and health – will undeniably have some sort of impact on trade. It is thus not easy to distinguish bona fide SPS measures for the protection of life, safety and health from those actually intended to restrict trade. Because SPS measures directly affect life, safety and health, it is all the more difficult to reconcile the two goals of implementing appropriate and necessary SPS measures, and promoting trade.

■ SPS Agreement & Harmonization

As part of the Uruguay Round of trade negotiations under the General Agreement on Tariffs and Trade (GATT) launched in 1986, an attempt was made to balance the imperatives of protecting life, safety and health, and promoting trade liberalization. This resulted in the 1994 conclusion of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization (WTO), which sets out that measures without sufficient scientific evidence are not allowed. In other words, a country is strongly suspected of attempting to protect domestic industries if it cannot provide scientific evidence to prove that a certain risk to human, animal or plant life or health does exist *and* the risk can be alleviated by its proposed measure. This has also created a situation where measures without scientific evidence can be found in violation of the SPS Agreement even when they are in fact not intended to protect domestic industries.

Even if member countries agree to acquire scientific evidence for their SPS measures, a conflict of interest exists between exporters hoping to promote trade and importers that stand to bear the costs incurred by diseases entering via food and agricultural imports, and the resulting health damage if the scientific justification turns out to have been wrong. Scientific views and opinions are diverse and subject to periodic change. It is not uncommon that a new risk, such as a carcinogen, is found in food additives that were previously judged to be safe. BSE is a typical example of this. Until 1996 when the British government announced the possible link between BSE and human vCJD, it was denied scientifically. Had Japan banned beef imports from Britain before 1996, it might have been found in violation of WTO rules. In environmental issues, a “precautionary principle” has been advocated. Principle 15 of the Rio declaration issued at the Earth Summit in 1992 states that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. There is a provision that reflects this principle in the SPS Agreement. When scientific evidence is insufficient, we should apply this



provision flexibly so that we could let the above cases consistent with WTO rules.

Moreover, domestic regulations have been increasingly integrated into relevant international disciplines; “negative integration” during the GATT era, in which the contents of domestic regulations were not called into question so long as they did not discriminate against imported goods, is now moving to “positive integration,” under the WTO, that imposes discipline on the contents of domestic regulations. Among the many WTO agreements, the SPS Agreement exerts particularly high demands that domestic policies and regulations be based on scientific evidence, and aims to harmonize SPS measures of member countries to further promote trade. However, because SPS measures are concerned with the protection of people’s lives and health, seeking to internationally harmonize these measures is prone to clash with the sovereign rights of member countries. A particularly large amount of criticism has been leveled at “downward harmonization,” wherein member countries are forced to loosen their domestic standards or requirements to accommodate less-stringent international levels. Before the SPS Agreement came into force, GATT was criticized for failing to impose sufficient discipline to regulate the trade-restrictive aspects of SPS measures. In contrast today, consumer groups and others are voicing concern that member countries’ sovereign right to protect people’s lives and health might be undermined by the WTO, which is intrinsically a trade-promotion body.

■ BSE & Harmonization: Are Japan’s Standards WTO-consistent?

In the case of BSE, “international standards” referred to in the SPS Agreement mean those set out by the World Organization for Animal Health (OIE). Currently, Japan limits beef imports from the United States to those of cows 20 months or younger. However, under the OIE standards on BSE, importing countries must accept beef from cows 30 months or younger. Furthermore, the OIE classifies the United States as a “controlled-risk” country for BSE, mean-



ing that importing countries must accept US beef and beef products from cows of all ages (including those aged above 30 months) provided that SRMs are removed, and those not removing certain SRMs such as spinal columns from cows 30 months or younger. Some in the United States now criticize Japan's import restrictions as unnecessarily stringent, which they say are to blame for recent US beef exporters' violations. That is, even though based on the bilateral agreement, Japan, by restricting the import of US beef and beef products only to cows 20 months or younger with SRMs including spinal columns removed, is implementing SPS measures stricter than the international standards. These measures' consistency with the WTO SPS Agreement, which calls for harmonization of SPS measures, may be called into question.

The SPS Agreement provides that member countries may deviate from (or introduce measures not consistent with) international standards if: 1) there is scientific justification (for instance, when international standards are found to lack scientific evidence); 2) a country implements measures that may result in a higher level of protection than would have been achieved by measures based on the relevant international standards; or 3) scientific uncertainty surrounding risk-assessments justifies implementing extended measures, or the level of intake of foods in question differs among countries. Thus, the question is whether the current Japanese measures fall under one of these three cases. How will Japan contend cases of BSE infection found in 21- and 23-month-old cattle in Japan? And how will the Ministry of Health, Labor and Welfare's interim report be evaluated when it concludes that infectiousness in mice could not be confirmed for BSE from these cattle? A recent media uproar in South Korea arose in reaction to a thesis claiming that Koreans are at higher risk for contracting disease caused by abnormal prion proteins. To what extent will Japan be able to similarly argue that Japanese are less resistant to prion-caused diseases as com-

pared to Americans and Europeans? The US-Japan beef dispute may be taken to the WTO dispute settlement procedures if the two countries fail to find a bilateral solution.

Some Proposals for Improvements of SPS Agreement

I recommend some improvements to the SPS Agreement for future negotiations.

Firstly, the SPS Agreement puts emphasis on harmonization. The standards of international standard-setting organizations such as the OIE or Codex Alimentarius Commission relating to food additives or pesticide residues are in themselves not binding but voluntary for their member countries. The SPS Agreement, however, has turned the nature of those standards into legally binding or compulsory ones by permitting exporting countries to take countermeasures against countries that do not adopt those standards without legitimate reasons. It is pointed out that some standards are out of date or subject to change frequently or that they are influenced by not consumers but producers. Now that Codex or the OIE is an international public good, we should increase their resources. As regards human resources, 10 people for Codex and 50 people for the OIE are on the staff in contrast with 600 people for the WTO.

Secondly, though the SPS Agreement demands that a member shall avoid arbitrary and unjustifiable distinctions in the level of protection against risks to human life or health in comparable different situations with the objective of achieving consistency in the application of the concept of an appropriate level of protection, strict application of this consistency principle should be avoided. The more benefits people get from consumption, the more risk they are willing to accept. The attitude for or against genetically modified organisms (GMOs) in the United States is different from that in the EU. The difference of societal benefits or concerns will lead to different appropriate levels of protection among countries, though the level of risks assessed by science is the same. In order to determine an appropriate level of protection, we had better introduce the notion of cost-benefit analysis into the SPS Agreement.

Finally, application of non-fault liability according to the "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities" adopted in 2006 by the United Nations International Law Commission (UNILC) to the issue of food safety or introduction of the advance informed agreement specified in the Cartagena Protocol on Biosafety will not only address the concerns in the importing countries by compensating for actual loss but have effects to prevent damage to human or animal health. **JS**

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