

**BSE AND THE SPS AGREEMENT**

**Paper prepared by Switzerland**

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**Introduction**

1. Bovine spongiform encephalopathy (BSE) is a serious disease affecting bovines. Reports on a possible link with the Creutzfeld-Jacob Disease affecting the human brain (CJD) make government attention in all countries all the more necessary. It is therefore only natural and indeed legitimate that measures are taken in order to protect human and animal health and, in particular, to prevent the spreading of BSE into hitherto unaffected countries and regions.

2. This being said, the measures described below are also trade-related; in the opinion of the Swiss authorities, there is a high probability that some are incompatible with the obligations entered into by all WTO Members, primarily but not exclusively under the SPS Agreement. Given the actual or potential impact of the BSE problem on agricultural trade, on consumer attitudes and on the rural economy, the SPS Committee should therefore examine and address it as a matter of high priority.

3. In the terms of the International Animal Health Code of the OIE, Switzerland is a low incidence BSE country; as a result of sanitary measures introduced since 1990, it is expected that Switzerland will be completely free of BSE within a foreseeable future (cf. Annex). Nevertheless, as one of the countries having been affected both by the disease and by trade-related BSE measures of its trading partners, Switzerland has a substantial interest in this matter and trusts WTO Members will cooperate together in order to strictly avoid measures which could affect agricultural trade beyond what is necessary and legitimate in the fight against BSE.

**Trade Measures taken by WTO Members / Available Scientific Evidence**

4. Some WTO Members presently apply or have applied import bans affecting the following products:

- (a) Live cattle (HS 0102)  
Such prohibitions apply to importation for breeding or slaughtering purposes, for pasturing during the summer months and, in several cases, even to transit.
- (b) Semen, eggs, embryos (e.g. HS 0511)
- (c) Meat and meat products (e.g. HS 0201, 0202, 0206, 0210)  
Different types of beef are sometimes treated differently, according to their risk level; however, in some cases, all meat imports are prohibited, often without any scientific evidence being offered for the reasons of such prohibitions.
- (d) Hides and skins (including for technical purposes) (e.g. HS 0507, 4101)

- (e) Horns, bones, fats, meat and bone meal (including for technical purposes) (e.g. HS 0210, 0506, 0507, 1502, 1518)
- (f) Milk and milk products, Lactose (despite the fact that, according to WHO experts, milk and milk products have to be considered safe and that there is no international standard recommending to restrict the import of dairy products from low incidence countries) (e.g. HS 0401-0406); some countries even apply restrictions to processed agricultural products containing milk products.

5. In some countries, there are no or less extensive import bans, but very rigorous health certificates are required which in some cases are extremely demanding (e.g. cattle from herds without BSE during the last six years).

6. According to information available to Swiss veterinary authorities, 24 countries are presently applying at least one of the above measures. Switzerland's trade-relevant measures as well as the actual status of BSE in Switzerland are described in the Annex.

### **Preliminary Assessment in the light of WTO Obligations**

7. The above measures have to be assessed in respect of a number of WTO provisions, namely, but not exclusively, GATT 1994, the SPS Agreement and the Agreement on Import Licensing Procedures.

8. **GATT 1994** contains a number of provisions which may be of relevance here:

- Article III (national treatment) applies to "internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products." *In casu* this implies that certificates, controls and standards "should not be applied to imported or domestic products so as to afford protection to domestic production."
- Article V (freedom of transit) seems to prohibit all transit impediments, at least for goods which cannot endanger the animal or human health while in transit. BSE being a non-contagious disease and none of the qualifying provisions to Article V being of relevance in this context, a measure such as the German prohibition of cattle transiting on lorries is in clear contradiction with the provisions of this Article.
- Article VIII: Border procedures are to be limited to a minimum. This provision may be violated by measures requiring health certificates reaching back for many years and entire herds when, as is the case with BSE, no contagion or other form of spreading from one animal to the other has been established.
- Article X requires the prompt publication of these measures "in such a manner as to enable governments and traders to become acquainted with them". Most of these measures have not been notified to WTO, and in many instances the publication at the national level has not been implemented in conformity with Article X, without there being sufficient urgency or another reason justifying the delay.
- Articles XI and XIII contain procedural obligations in connection with Article I (MFN); according to GATT practice, they also apply to import bans (cf. Art. XIII:1: "no prohibition or restriction shall be applied ... unless the importation of the like product to all third parties is similarly prohibited or restricted").

9. **The SPS Agreement** allows all WTO Members "to take sanitary measures necessary for the protection of human, animal or plant life or health" (Art.2.1). Such measures must be in conformity *inter alia* with Articles 2 (rights and obligations), 3 (harmonization), 4 (equivalence) and 5 (risk assessment and appropriate level of sanitary protection) and be notified according to Article 7. Different supplying countries and regions may be treated according to their specific situation, according to Article 6, but the above principles are to be respected in each case, in other words differentiating but not discriminatory treatment is allowed.

- At present there are few international standards relating to BSE. In such cases, the establishment of an appropriate level of sanitary protection must take the following elements into account (Art.5): risk assessment techniques developed by the relevant international organizations, available scientific evidence, relevant processes and production methods, prevalence of specific diseases etc.
- Protection measures taken by other countries must be considered as equivalent if they allow for the same appropriate level of sanitary protection "even if these measures differ from their own" (Art.4.1).
- In addition, economically relevant factors such as "the potential damage in terms of loss of production" must be taken into account (Art.5.3).
- Notification and consultation procedures as per Article 7 and Annex B provide for information to be supplied on request, and such information must contain *inter alia* the risk assessment methods used and the level of protection considered appropriate.

10. The **Agreement on Import Licensing Procedures** (ILA) may have been violated in a number of instances as well, even when one allows for a high degree of risk and urgency surrounding the BSE problem. Indeed, according to Article 3.2 of the ILA the administrative procedures (non-automatic licensing) "shall not have trade- restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction" (even when those conditions are justifiable under the other WTO provisions) and they "shall be no more administratively burdensome than absolutely necessary" for their implementation. *In casu* the following violations of the ILA may have occurred:

- notification and consultation obligations have not been observed (Art.3.3; Art.5.1, 5.2 etc.);
- measures have been maintained for a longer period than necessary (Art.3.2);
- possible exemptions have not been communicated (Art.3.4);
- full and prompt information was not provided (Art.3.5);
- health certificate requirements (for whole regions and herds and/or for a very long time back) are not always commensurate with the risk involved (Art.3.2).

11. The question arises whether Article XX of GATT 1994 may justify some or all of these measures, since this provision allows for any measure protecting the health of humans and animals. However, this general exception applies under two conditions:

- "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail"
- "or a disguised restriction on international trade" (emphasis added).

12. It is obvious that the relevance of these conditions has to be examined in respect of each measure (cf. Art.3.2 SPS). However, it can be presumed in a preliminary manner that, at least, measures affecting imports more rigorously than domestic products and applying to products without any risk of spreading BSE do not fulfil the conditions laid down in Article XX, in other words such measures cannot be exempted, by way of Article XX, from the other WTO obligations mentioned above (e.g. products which are not for human or animal consumption such as hides and skins, the import of which is prohibited, inter alia, in the Czech Republic; prohibitions of semen and embryo, for instance by Austria and Italy, are another case in point, since the OIE has declared trade in these products as safe).

### **Conclusions**

13. At this point in time, no final conclusion has been reached with regard to the individual measures taken by each country - perhaps including Switzerland's own measures. It can however be said that, at least, the following measures seem to be clearly incompatible with one or several WTO obligations:

- (a) measures discriminating against imported goods and deviating without scientific justification from either national or international standards;
- (b) measures affecting products which are neither for human or animal consumption;
- (c) transit prohibitions;
- (d) measures affecting goods where no danger of spreading BSE can be presumed, and where no scientific evidence whatsoever allows for the conclusion that measures preventing such imports should be taken.

14. The SPS Committee should deal with these problems on a priority and urgency basis in order to avoid an escalation of trade restrictions. Switzerland is concerned that such restrictions could well undermine the whole rationale of the SPS Agreement which is namely to allow for all sanitary measures which are not a form of disguised protectionism.

15. The SPS Committee should invite all Members having taken BSE trade-related measures in this area, whether or not they are related to BSE, to notify them urgently.

16. The SPS Committee Chair should be invited to hold consultations as soon as possible between all interested WTO Members - at the least with those presently applying relevant border measures. The purpose of these consultations would be to enable the Committee to arrive at a conclusion as to which of the aforementioned border measures are legal under the WTO obligations.

17. Switzerland is willing to provide a list with all relevant information on such country measures at its disposal. While reserving all their WTO rights, the Swiss authorities are also committed to actively work towards a solution with our trading partners under the auspices of the Chair.

## **Annex: Switzerland and BSE**

### **Statistical Information**

Bovine spongiform encephalopathy was identified in Switzerland for the first time in 1990. Until 1994 the number of cases doubled from one year to the next. From 1994 to 1995, when the curve reached its peak with 68 cases, the increase of BSE cases was markedly smaller than in previous years. In 1996, the number of cases receded to 45, which corresponds to a reduction by 33%. This recession was more accentuated in the second half of the year, when only 10 cases occurred, compared with 35 cases during the first six months.

With a total cattle inventory of approximately 1.75 million, the incidence of BSE amounts to 0.26 cases per 10'000 animals in 1996. Therefore, in accordance with international standards, Switzerland is rated among the countries with low BSE incidence. Among the low incidence countries (e.g. France, Germany, Ireland, Portugal), Switzerland is the only one where a considerable reduction of the number of cases was observed in 1996. A further characteristic of the disease in Switzerland is that only one single animal was affected in 97% of the affected herds. Up to now there are no indications of vertical (from the cow to the calf) or horizontal transmission (from one animal to another).

As of February 1997, only 19 out of the total of 240 animals affected by BSE since 1990 were born after the feed ban was introduced (BAB), most of them within 12 months after the introduction of the ban.

### **Internal Measures**

#### **Intensified control of central nervous diseases continues**

Already in 1989 a diagnostic laboratory was installed and research on diagnostic methods and on epidemiology of BSE was promoted. Compared to other countries, Switzerland has practised ever since an intensified control of central nervous disorders in cattle. A total of more than 600 BSE suspected cases in cattle have been investigated by two assigned institutes since 1990, including 95 suspicions in the year 1996.

#### **Good discipline of notification due to generous payment of compensation**

A stimulus to complete notification of BSE cases showing clinical signs was created by generous payment of compensation (up to 5400 CHF i.e. US\$ 3800 per animal) for slaughtered BSE affected or suspected animals.

#### **Tightened measures in 1996**

Even though the measures taken in 1990 are highly effective, and the risk for consumers is minimal, the following additional measures were adopted in 1996:

On 17 April 1996, the Federal Council (government) decreed that domestic animal carcasses of all species as well as certain parts of cows (brain within the skull, spinal cord, eyes) must not be processed any longer into feed for commercial stock. Henceforward, carcasses of cows have to be incinerated.

On 16 September 1996, the Federal Council decided that all direct offspring of cows affected by BSE must be identified and killed.

On 13 December 1996, the Federal Parliament decided additional measures to be taken in herds where an animal died or had to be killed because of BSE, and in holdings where such animals were born or raised. These measures include the slaughter and destruction of all animals born before 1 December 1990, i.e. prior to the implementation of the ruminant feed ban, and in the case of holdings affected by a BAB case, of all bovines in the holding.

### **Border Measures**

On 3 April 1996, the Federal Council decided - as a confidence-building measure - to make compulsory the declaration of the producer country for meat and meat products on open sale, effective May 1, 1996.

On 17 April 1996, the Swiss Federal Veterinary Office stopped the import of feedingstuff until all suppliers have been controlled. Henceforward, only suppliers producing according to domestic standards will be recognised.

On 29 November 1996, the Swiss Federal Veterinary Office decided to accept for importation only bovines, ovines and caprines originating from countries having prohibited the feeding of mammalian protein (except milk derived protein) to ruminants. The animals to be imported must be born not earlier than 18 months after the implementation of such a feed ban. Simultaneously, the Office decreed new conditions for the import of meat products with a view to preventing the import of products containing specified bovine offal. These measures became effective on 1 January 1997.