

BSE and vCJD : Analysing Past GATT Panel Reports to Justify the Banning of Beef Imports

By

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Many a time when mention of Bovine Spongiform Encephalopathy (BSE) or Mad Cow Disease is made, people failed to recognize the seriousness of the matter. The implications of the disease – to the cattle, to the consumers and to the beef industries are very grave. When the Malaysian Government imposed a ban on imports of beef from the EU early this year, they had to consider the legality of imposing the ban under the GATT/WTO provisions which generally prohibit any restrictions to international trade.

BSE belongs to a group of diseases called transmissible spongiform encephalopathies (TSEs) which can be transmitted from one animal to another.¹ The principal human TSE is Creutzfeld-Jakob disease (CJD), clinical disease of which is prevalent between 55 and 75 years of age. There are still many unanswered questions on TSEs – the infective agent has not been clearly described and debates still continue as to its potential sources and routes of infection. Most importantly, it is not known if humans are susceptible to TSE agents from other animal species.² In addition, early diagnosis is difficult as there is no definitive diagnostic test for TSEs.

This article is by no means an attempt to educate readers on the diagnosis or prognosis on BSE, or even on the new variant Creutzfeld–Jakob Disease (vCJD) – said to be the human equivalent of BSE, whereby instead of occurring in the elderly, the clinical disease is prevalent in younger age group patients. Neither too, is this article an attempt to link the two diseases together. This article aims to analyze past GATT Panel Reports and apply the principles established in same to justify the banning of beef imports in the light of BSE and vCJD.

As the “origin” of the disease is said to be from British beef, I have mainly referred to and used materials and sources gathered during the peak of the beef crisis in Britain in 1985 and also during the health scare in 1996 during which vCJD was first linked to the consumption of BSE infected beef in the United Kingdom.

BSE AND VCJD IN BRITAIN

BSE was unheard of really, that was, until its outbreak in Britain in the mid-1980's. The onset of clinical disease in cattle infected with BSE usually lasts between two weeks and six months and is heralded in most cases by nervousness, kicking, abnormal gait and pelvic limb ataxia and if not destroyed, affected animals develop a swaying gait, weight loss and behavioural problems. Injuries are common because of repeated falling.³ The cattle will lose its ability to stand and death will be preceded by coma. Studies on the probable cause of the disease have been done, however, the findings have not been consistent.

Cattle in Britain are used for milk production, breeding and beef. The dairy and beef industries are highly integrated : the waste products of one industry function as the raw material for the other.⁴ Calves born of dairy cows are considered as waste products and are rarely allowed to drink milk from their mothers which is considered as a valuable commodity. Instead they are fed with milk from the European intervention stores. They are then either kept alive for 12 to 16 weeks – ending as veal, or grown fast on high energy food stuff before being slaughtered at about 18 months.⁵ Calves too feeble for veal serve as a raw material for pet food. Burnt out dairy cows become cheap cuts of meats or hamburgers. Sick or dying cows used to be converted into cattle feed, that was before the BSE outbreak in 1985.

The BSE outbreak in the mid 1980's in Britain is claimed by some to be traceable to the changes in the rendering industry in Britain during the early 1980's. Plants stopped treating their animal matter with certain hydrocarbon solvents which had been used to increase the yield of tallow and fat but which then was considered to be unsafe for the rendering-plant workforce. The absence of these chemicals was argued to have enabled sheep infected with scrapie (another form of TSE) or cows infected with the then unknown disease of BSE, to be recycled through the feed which was in turn fed back to the cows,⁶ which gave the world BSE which tore through British cattle in the mid-1980's.

However, some vets believe BSE is not principally caused by cattle eating infected cattle feed, but by treatment based on organo-phosphorous (OP) dip to protect cattle from warble flies.⁷ These views are not taken seriously by the mainstream scientific community,⁸ thus the concern has focused mainly on the regulation of cattle feeding rather than switching to alternative treatment against the flies. There are also those in the minority who believe that there is a possible risk of infection through maternal transmission.⁹

However, an inquiry on BSE¹⁰ had published its report and its findings in October 2000, which *inter alia* stated that all but one of the above said probable causes of BSE were reasonable, but fallacious. The cases of BSE identified between 1986 and 1988, according to the Report,¹¹ were not index cases, nor were they the result of the transmission of scrapie. They were the consequences of recycling of cattle infected with BSE itself and BSE agent was spread in meat and bone meal (MBM) which was made from animal carcasses and incorporated in cattle feed.¹²

According to the Report, BSE probably originated from a novel source early in the 1970s, possibly a cow or other animals that developed diseases as a consequence of a gene mutation. The origin of the disease will never be known with certainty. However, a recent claim had traced the original source of the disease to an antelope which was imported into Britain from South Africa in 1977 which died in captivity and its carcass was processed as part of the MBM feed meal that went to about 1000 dairy cows in 1977 and 1978.¹³

In June 1988, a statutory ban on the feeding of ruminant-derived protein and regulations for compulsory destruction of all animals exhibiting signs of BSE were introduced.¹⁴ Back calculations of trends of infection incidence suggests that the 1988 feed ban had an immediate and lasting impact,¹⁵ and the second BSE crisis which occurred in 1993 was the result of offal feeding which

took place during the peak of the first crisis in the mid-1980's before it was banned.

Concerns over possible transmission of this disorder to the human population by consumption of beef or other tissues from infected cattle also led to the removal of offal of potentially infected cattle from the human food chain in 1988.¹⁶ However, by early 1996 there were strong indications that the disease had spread to humans in the form of a new variant of CJD (vCJD) which affects victims below the age of 40, with several cases amongst adolescents.¹⁷ It is not clear if there is any link between BSE and vCJD in humans. However, as the incubation period of spongiform encephalopathies is thought to be between 10 to 15 years, mainstream scientists believe that the rising number of vCJD in the mid-1990s is the result of the victims' consumption of BSE infected beef during its first outbreak in the mid 1980's.¹⁸ The appearance of these vCJD cases would correspond to a period in the late 1980's prior to the ban on the use of specified bovine offal and, lacking an alternative explanation, these data strongly suggests that the vCJD cases are the result of transmission of BSE to the human population.¹⁹

When Professor John Pattison, Chairman of the Spongiform Encephalopathies Advisory Committee (SEAC) in Britain announced evidence of a probable link between BSE and vCJD on 20 March 1996,²⁰ the beef market promptly collapsed across Europe. The EU declared on 27 March 1996 that until BSE had been eradicated from Britain, British beef exports are banned.²¹ More than thirty thousand people lost their jobs in the beef industry and the likely costs of the crisis were estimated at more than 2.4 billion Pound Sterling over two years.²² The British Government continued to insist that British beef was safe but agreed nevertheless to take all necessary measures to ensure that the epidemic was brought under control.²³

There has been a test developed in the United States to diagnose CJD with more than 98% accuracy, but there is no evidence that the test could work equally well to diagnose BSE-infected cows.²⁴ The American researchers believe that it could, and investigations have begun as to how early an infection indicator proteins in spinal fluid can be detected in cows.

If the disease is endemic, the only solution is to destroy all infected herds, but, due to the long incubation period, it is difficult to distinguish between those cattle that are infected and those that are not. The worst case scenario is thus to kill the entire national herd! Such a scenario did not (and may not)

materialize. However, beef industries around the world must be prepared for the worst. Consumer confidence and behaviour can change unexpectedly. The dive in beef futures on the commodities exchanges and a collapse in the US beef demand and prices in April-May, 1996 culminating from a statement made by the American talk-show queen Oprah Winfrey may be taken as a warning.²⁵ BSE was the subject of one of her shows and "I'll never eat a hamburger again" was her statement. What would it be like for beef industries around the world if everybody in all the continents (considering the huge capture of Miss Winfrey's audience) decided to stop eating beef and impose pressures on their respective governments to ban its imports?

In the event of such a ban by any GATT/WTO²⁶ members on the beef of fellow member states, how may the beef-exporting states defend their beef? Will any of the GATT provisions or its side agreements, in particular, the Sanitary and Phytosanitary Agreement (the SPA), work in their favour? And may the beef-importing states rely on the provisions of the same Agreements to justify the ban?

This article aims to explore only the provisions of GATT 1947 which may be relied on by beef importing states to justify their decision to ban beef imports. In order to do so, past cases on trade disputes which were brought to the GATT Panel and the WTO Dispute Settlement Body (DSB) will be referred to. For easier understanding, British beef will be used as example throughout this article.

THE BANNING OF BEEF UNDER GATT

The basic purpose of the General Agreement of Tariffs and Trade 1947 (GATT) is to constraint governments from imposing variety of measures restraining international trade. Its objective is to liberalize trade.

ARTICLE XI

Prima facie, the banning of the importation of British beef by a GATT contracting party is in violation of Article XI:1 of the GATT which prohibits any quantitative restrictions on the importation and exportation of any product from or to the territory of any other contracting party. A violation of Article XI will occur where there is an explicit ban on imports of beef from a member state. It

could be in the form of a total ban, or a limitation on the quantity of British beef entering the country made effective through quotas, or in the form of measures which have the effect of preventing or limiting imports of British beef, for example, a requirement for domestic traders to obtain licenses to import British beef.²⁷

EXCEPTIONS TO ARTICLE XI

However, there are exceptions to this obligation, one of which is provided for in Article XI:2(b) of GATT, where such an import restriction is necessary for the application of standards and regulations to the classification, grading or marketing of commodities in international trade. Another exception is provided for in Article XI:2(c), i.e. if an import restriction on any agricultural or fisheries product is necessary for the enforcement of the importing country's governmental measures to restrict the quantity of like products to be marketed or produced or to remove a temporary surplus of a like product within its own market. As with all exceptions to any general rules, they are to be interpreted narrowly and there are limitations to the Article XI exceptions.

LIMITATIONS TO THE EXCEPTIONS

The above said latter exception, i.e. "restrictions on imports on any agricultural or fisheries product when it is deemed necessary for the enforcement of the importing country's governmental measures to restrict the quantity of like products to be marketed or produced or to remove a temporary surplus of a like product within its own market", is subject to several limitations which were summarized in the *Canadian Ice Cream* case²⁸. The dispute in this case was between the US and Canada which concerned import restrictions maintained by Canada on yoghurt and various ice cream products. The governmental measure concerned was a scheme by the Canadian dairy management board which restricted total raw milk production in Canada.

The Panel Report which was adopted on 4 December 1989 deliberated on the question as to whether these measures could be justified under Article XI:2(c)(i).

It was considered that ice cream and yoghurt did not compete directly with raw milk in terms of Article XI:2(c)(i) and that there was no reason to broaden the scope of this requirement to include the concept of displacement or indirect competition. It was found that Canada's restrictions on the importation of ice cream and yoghurt were inconsistent with Article XI:I and could not be justified under the provisions of Article XI:2(c)(i).

The findings of the Panel in the *Canada Ice Cream* case are as follows and we may attempt to apply the principles to the issue of the banning British beef. They are, *inter alia* :-²⁹

- (i) *Temporary surplus or governmental policy already in place to restrict the quantity of the product concerned (in our case – beef) or its like product*

The first limitation is, of course – the importing state must be facing with the problem of temporary surpluses of beef (or its like product) or, there is a governmental policy to restrict the quantity of beef or its like product to be marketed or produced, which is already in place before the move to restrict the importation of British beef is taken.

This would mean that only countries which are genuinely faced with the problem of an excess supply of beef in their domestic markets may impose restrictions on British beef imports, and in addition, they should not just restrict British beef imports but also beef from other beef-importing member countries because of the most-favoured nation (mfn) principle. (The point on the mfn principle will be discussed under a special heading later in this article).

- (ii) *The measure must constitute an import restrictions (and not a prohibition)*³⁰

This would mean that a total ban on the importation of British beef is not covered by the exception. Should a contracting party wish to rely on this latter exception, they should not impose a total ban, but instead pose a certain restriction. The importing party could limit the import of British beef to a certain fixed quota, provided that the quota does not result in a *de facto* prohibition on the importation of British beef. The question as to what amounts to

a *de facto* prohibition was tackled in the *Japan Agricultural Products* case³¹ whereby the United States contested an import quota imposed by Japan for imports for use in a certain region for use in international tourist hotels and international shipping vessels between Japan and foreign countries. The Panel in this case concluded that Article XI:1 covers restrictions not only on the importation of any product made effective through quotas but also through import licenses and other measures which may also comprise restrictions made effective through an import monopoly. The Panel found that the restrictions imposed by Japan amounted to a *de facto* prohibition on the importation of the product into the general custom territory of Japan.

It is clear from this Panel Report, which was adopted on 22 March, 1988 that total prohibition or a *de facto* prohibition is not allowed under the GATT, thus, the only measure which is open to beef importing countries is not to totally ban the imports, but to just restrict it in accordance to the principles above. But, this will beat the whole purpose of restricting the importation of British beef because the underlying intention is to stop the spread of BSE or vCJD in the importing countries. With the uncertainties surrounding the causes, the safest option for the government of the importing countries is to ban all imports of British beef and not just restrict the amount of total imports.

The government is also restricted by the following third limitation.

(iii) *The import restriction must be "necessary" to the enforcement of the domestic supply restriction*³²

The Panel in the *Canada Ice Cream* case observed that if unrestricted imports would render a government measure ineffective, it would be difficult not to conclude that some restriction of the imports was necessary.³³ Further, the absence of an import restriction must be shown to present an imminent threat to the importing countries operation of the governmental restrictions.³⁴ If an unrestricted import attains "a very limited market share amounting to a miniscule proportion of the domestic market",³⁵ an import restriction on British beef cannot be said to be necessary to contribute to the success of the governmental measure to enforce the domestic supply restriction.

In the *Canada Ice Cream* case, it was concluded that the Canadian governmental measures restricting production had not fulfilled this requirement of

“necessary” as imports of ice cream and yoghurt had gained only a half percent share of the Canadian market and accounted for less than ten one thousands of one percent of total raw milk production.

- (iv) *Should the importing countries restrict the importation of British beef, it must give public notice of the total quality or value of product, in this case – beef, to be imported during a specified future period.*³⁶

This requirement should be construed as requiring the importing countries to send a copy of the notice of the quantities or values to be imported to the “CONTRACTING PARTIES”³⁷ which would circulate the information to all contracting parties concerned.³⁸ The notice should include the quantities or values to be imported³⁹ and not just a “basket” quota for which only a global value or quantity is announced.⁴⁰ The importing countries must also specify the exact period in which the said quota is operative. Thus, if any importing countries wish to impose a quota on British beef import, they must state, for example, a limitation of 2000 tons for the period between January 2001 to December 2002, failing which, they are not allowed to restrict the importation of British beef into their customs territory.

- (v) *The import restriction must also not reduce the proportion of total imports relative to total domestic production of beef, as compared with the proportion which might reasonably be expected to rule between the two in the absence of the import restriction.*⁴¹

This is the requirement whereby the proportion between imports and domestic supplies that would prevail in the absence of the quota restriction on British beef must be maintained.⁴² The proportion is the one prevailing during a previous representative period and according to GATT practice, this means a three-year period before the quota is imposed.⁴³ Assuming there is no existing quota on the import of British beef, there is little problem in determining the proportion, as it can be assumed that the proportion resembles the one prevailing during the three years previously.⁴⁴

BURDEN OF PROVIDING EVIDENCE

The Panel in the *Japan Agricultural Products* case⁴⁵ considered that the burden of providing the evidence that all of the requirements regarding the above said limitations to the exceptions under Article XI had been met must remain fully with the contracting party invoking that provision. The Panel found that Japan had not discharged the burden to prove that their restrictive measures satisfied the conditions inherent in Article XI:2(c)1). Thus, Japan was required to eliminate or otherwise to bring into conformity with the GATT its quantitative restrictions subject to the complaint brought by the US. Following this decision, the importing country which imposes the ban or restricts the importation of British beef based on the provisions of Article XI:2 above would bear the burden of establishing all of the above said criteria (i) to (v). It was also noted by the same Panel that being exceptions, they were to be interpreted narrowly.⁴⁶

Justifying the ban on importation of British beef will be a task which may prove to be difficult. With the narrow interpretation requirement and the extensive coverage on the uncertainty as to the cause of BSE and the link between BSE and vCJD (which some may view as a scare-mongering publicity), it may be hard to convince a GATT Panel that the true purpose for the restriction is truly concerned with the relevant Article XI exceptions, rather than the sole concern over the spread of BSE or vCJD. Further, the importing countries are also obliged to adhere to the most-favoured-nation and the national treatment obligations under Articles I and III of the GATT, respectively.

ARTICLE I AND III OF THE GATT

Article I of the GATT contains the most-favoured-nation (mfn) treatment principle, under which any custom duties and charges of any kind, and any rules and formalities in connection with the importation or exportation, are to be accorded immediately and unconditionally to the like product originating from or destined for the territories of all other contracting parties. If an importing country imposes quotas or any other restrictions on British beef, they will have to impose similar quotas and restrictions on beef imported from other contracting members. This may result in the overall fall of beef imports from GATT contracting members and consequently limit the supply for domes-

tic consumers. This could end with the country facing a sudden deficit of beef supply. When market dynamics operate, when the demand for beef is higher than its supply, the price will rise. This will not be favourable to domestic consumers. While having to pay a higher price, their choice will only be limited to domestic beef.

The importing countries are also to adhere to Article III which provides for the national treatment principle in imposing internal taxes⁴⁷ or other internal non-tariff measures.⁴⁸ The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or charges of any kind in excess of those like domestic products so as to afford protection to domestic production. Similarly, the products of the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like domestic products in respect of all laws, regulations and requirements affecting, *inter alia*, their sale, purchase, distribution or use. Any import restriction and/or any internal charges or regulations imposed on British beef should be justified by imposing similar domestic marketing/production restrictions on domestic beef or its substitute. The reduction in imports must be matched by a reduction in domestic production.⁴⁹

The importing countries may be reluctant to impose the same restrictions on their domestic beef if they feel that it does not pose any risks. By imposing such domestic restrictions, the government may be under enormous pressure, coming from the local farmers and beef industries – a pressure which any government can do without! This may cause the importing countries to rethink their plans to restrict the importation of British beef. This may work in favour of British beef.

To determine whether the charge or regulation/requirement is discriminatory, the 'like product' test is to be used whereby the charges or regulations imposed on British beef are compared against those imposed on a domestic 'like product'. If the products are considered to be 'like products', the charge imposed on British beef must not be in excess of the charge imposed on domestic like product⁵⁰ and the treatment given to British beef in respect of regulations and requirements must not be less favourable than that accorded to the domestic 'like product'.⁵¹

The Panel in the *Tuna Dolphin* case⁵², emphasized the “product-as-such” requirement, whereby any regulations which does not affect products’ inherent physical characteristics were not seen as being covered by Article III.

“PRODUCT-AS-SUCH”

According to the *Tuna Dolphin* case, the issue of ‘product-as-such’ is linked with the issue of Production, Processing and Manufacturing (PPM) requirements. PPM requirements can be divided into two. Firstly, are product-related requirements which must be embodied in and somehow alter the final characteristics of the product (and therefore are covered by Article III) and which are concerned with the possible output/pollutant from the end use of the product itself. And, secondly, process-related requirements which are imposed within the territory of the producing or exporting countries – requirements which are not reflected in the product’s final characteristics and are seen as being extraterritorial.

The *Tuna Dolphin* dispute was between the US and Mexico whereby the latter challenged the prohibition of imports of certain yellowfin tuna (and its products) by the US under its Marine Mammal Protection Act (MMPA) 1972. The MMPA required the US to prohibit imports of tuna caught using purse seine nets which resulted in killing dolphins which have the habit of swimming with schools of tuna. The Panel held that the MMPA was in violation of the US obligations under the GATT, and that legal treatment may not differ for otherwise like products based upon how the product was produced. Apart from emphasizing on the inherent characteristics of the products, the argument that the MMPA was extraterritorial in nature was also deliberated by the Panel. The MMPA was said to have imposed methods of harvesting tuna outside the American jurisdiction.

Applying the findings of the *Tuna Dolphin’s* Panel above, we shall again ponder upon our earlier discussion on the several views as to the causes of BSE, i.e. through offal feeding, OP dip treatments and through maternal transmission. Thus, importing countries may ban British beef based, *inter alia*, on the reason that the cattle are fed with offal or treated with OP dips. However, these would be seen as a process-related restriction – it is the way the cattle are bred in Britain which forms the objection of the importing countries, and if we were

to apply the product-as-such test, Britain may argue that the regulations on feeding methods do not affect the cattle's inherent physical characteristics, and thus the importing countries must not discriminate against British beef. However, on the other hand, the importing countries may argue that feeding methods do affect the physical characteristics of cattle, whereby those fed with offal will be infected with BSE and eventually will present clinical disease, such as abnormal gait and weight loss.

What if the ban is specifically on British beef infected with BSE? *Prima facie*, the "product-as-such" test will be satisfied as the characteristics of the beef itself form the basis of differentiation. But, how do you go about identifying affected cattle, considering the long incubation period of BSE and the uncertainty of the onset of the symptomatic disease in cattle?

Following the *U.S. Automobile Taxes* case,⁵³ which was adopted in 1994, a possible solution is to monitor across the range of the product – in the present scenario, across the whole herd of British cattle intended for import! But, of course, monitoring cattle and monitoring automobiles manufactured by a producer are two totally different tasks. One cannot regulate matters of which one is not certain and in this case, there are so many uncertainties surrounding the issues of BSE and vCJD that, as discussed earlier, it is rather impossible to pinpoint infected cattle at this stage.

Further, what is there to regulate? If the regulation is entirely on processing methods, i.e. the feeding of and/or veterinary practices in cattle, this would be inconsistent with the *Tuna Dolphin* case as this is considered to be extraterritorial, unless we can argue that the said practices affect the physical characteristics of the product.

Should the requirements provided for by the exceptions to Article XI and the like product or product-as-such test fail to be fulfilled by the importing countries, a ban on the import of British beef can be challenged by Britain as being a violation of Articles XI, I and III of the GATT. However, Britain may still face the possibility of the importing countries relying on the general exceptions under Article XX of the GATT, in particular Article XX(b), as their defence.

ARTICLE XX(b) – AVAILABLE DEFENCE TO GATT/WTO MEMBERS BANNING BRITISH BEEF?

The Preamble of Article XX provides that "subject to the requirement that such measures are not applied in a manner which would constitute a means of

arbitrary/unjustifiable discrimination between countries when the same condition prevails, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of such measures”.

Article XX goes on to provide a list of the measures accepted, mainly based on public policies. The measures which are relevant for the purpose of the issues at hand in this article are measures “necessary to protect human, animal and plant life”, which are provided for in paragraph (b) of Article XX.

The Panel in the *Tuna Dolphin II* case⁵⁴ between the US and Canada observed that the text of Article XX suggested a three-step analysis. The Panel had dealt with the issue in terms of the application of Article XX in general and thus they are applicable to the interpretation and the workings of Article XX(b). The measure in question in the *Tuna Dolphin II* dispute was the prohibition of imports of Canadian tuna products imposed pursuant to the US Fishery Conservation and Management Act 1976. The three-step analysis suggested is as follows :-

- (i) the measure must fall within the range of policies stated in Article XX – in the *Tuna Dolphin II* case, the US relied on Article XX(g), i.e. relating to the conservation of exhaustible natural resources;
- (ii) the measure must be necessary to achieve the aim or objectives – in the *Tuna Dolphin II* case, the measure must be proven to be necessary to conserve exhaustible resources (do note that in this case the aim was to protect dolphins and not tuna!)

and

- (iii) the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or in a manner which would constitute a disguised restriction on international trade.

The Panel in this case concluded that the action by the US did not qualify under paragraph of Article XX(g) on protection of exhaustible natural resources, as US found itself unable to establish that import restrictions had been made effective in conjunction with equivalent restrictions on domestic production or

consumption. In other words, the US had failed the second step of the three step analysis.

Applying the three-step analysis in relation to a ban of British beef import, the following requirements must be fulfilled:-

- (i) *the measure falls within the range of policies to protect human, animal or plant life*

In using this exception to justify the banning of British beef, the contracting party may argue that the banning of British beef is to protect its population from vCJD and/or also to protect its own cattle from being infected with BSE. The entailing question would be – how valid a reason is it to protect your population from vCJD in the light of the uncertainty surrounding the link between BSE and vCJD or the uncertainty as to how BSE itself is spread? Evidence so far pointing to any link between BSE and vCJD is only circumstantial, being merely an inference drawn from the length of the incubation period for BSE which relates to the first incidence of vCJD.

With respect to measures to protect “animal” in this provision, if we were to accept that the conclusive cause of BSE was the MBM feed, the only beef/cattle product which an importing country could ban would be MBM feed from Britain and not beef or parts of cattle which are meant for breeding or dairy purposes. But, then again, how sure are we that maternal transmission of BSE is not likely to take place? Further, how transparent and efficient would government authorities be to ensure that cattle/beef cuts entering into their country would not end up as MBM feed, which would then be used to feed their local cattle?

There is no provision under the GATT which deals with issues of scientific uncertainty on which Britain may rely to challenge the ban on the import of its beef. Britain would be entitled to argue that the lack of proof of the link means that the banning of its beef is not justified under the GATT. However the banning member could, on the other hand, rely on the precautionary principle as the basis on which it has formulated its policy.

There are no provisions in the GATT which deal with this principle. There are some who argue that it is not yet a principle of law.⁵⁵ Others argue that its vagueness prevents it from being adopted as a regulatory standard and that a cautious attitude should be taken towards the principle.⁵⁶ However, it has

also been argued that lack of definition does not mean it does not carry any weight and that the principle actually reflects a principle of customary law through evidence of state practice⁵⁷ which can be deduced through diplomatic correspondence, recitals and patterns of treaties, and adoption in domestic law, and policy-making statements and decisions. For the purpose of this article, we shall assume that the precautionary principle is a principle of law.

According to this principle, "unless something can be proved to be safe, do not do it".⁵⁸ Once a risk has been identified, the lack of scientific proof of cause and effect shall not be used as a reason for not taking action, in this case, to protect a country's population and/or its cattle.⁵⁹ It does not matter how minimal the risk is, precautionary steps must be taken to avoid the risk. Until it can be proved that BSE does not cause vCJD, then, beef and beef products are to be avoided.⁶⁰

Assuming that the policy of protecting human or animal life was accepted, the next step would be to show that the following requirements were met.

(ii) *The banning of British beef is necessary to protect human, animal or plant life and health.*

It was established by the Panel in the *s 337 case*⁶¹ which was adopted on 7 November, 1989 that a measure would not be considered as necessary if an alternative measure was available which was the least trade restrictive and which was not inconsistent with the GATT provisions and which a contracting party could reasonably be expected to employ. If no GATT-consistent measure were reasonably available, the contracting party would have to use the measure that entailed the least degree of inconsistency with other GATT provisions.

The dispute in the *s 337 case* was between the US and the EEC concerning Section 337 of the US Tariff Act 1930 which was contended by the EEC to have accorded treatment to imported products challenged as infringing US patents less favourable than the treatment accorded to products of US origin similarly challenged. The EEC had contended that the Act cannot be justified under Article XX(d) which allows measures necessary to secure compliance with laws relating to the protection of intellectual property rights.

Following the 1991 Panel Report on the *Thai Cigarette case*⁶² which was adopted on 7 November 1990, the interpretation of "necessary" under Article XX(b) should be the same as the interpretation for Article XX(d).

Charnovitz⁶³ has made several observations about this interpretation of "necessary". First, it is not clear by what is meant by "measures that entail the least degree of GATT inconsistency". Which of the GATT provisions carries more weight? Should not all of its provisions count equally? In the context of banning beef inconsistently with Article XI of the GATT, what other alternative measures should be adopted which is less inconsistent with the GATT? Would imposing a 200% tariff on British beef, which may be inconsistent with Article II⁶⁴ of the GATT, be considered as a measure which is less inconsistent with the GATT compared to a violation of Article XI?

Secondly, what is meant by "the least trade restrictive"? Which measure would cause the least possible injury to the British beef trade? Banning the imports of British beef may cause less injury to the industry compared to the imposition of internal charges or regulations under Article II when, at the end of the day, the consumer may decide not to consume British beef after all, due to fear of BSE and vCJD. This may cause more injury to British beef trade in the sense that having being able to enter the foreign market and then faced with strict internal regulations or charges and having incurred the costs of, *inter alia*, obtaining export licenses, transportation and meeting specific requirements, the demand for British beef is not forthcoming, due to the consumers' choice not to buy British beef.

Based on the s 337 Panel Report, Britain may argue that, rather than banning all British beef, an alternative measure available to the contracting party would be to just ban beef from cattle of more than a certain age which may have run the risk of being infected with BSE during its first and second outbreak in Britain. But, the incubation period for BSE is prolonged and it is usually between 3 to 5 years.

What age would be set as the threshold for cattle which are allowed to be imported? Beef cattle are normally slaughtered around 2 years of age, but there are cases where clinical disease has developed in cattle as young as 2 years and as old as 12 years.⁶⁵ There is a possibility that the majority of infected cattle will have been slaughtered before the onset of clinical disease⁶⁶ and will have already ended in the human food-chain, and putting a specific age threshold may not be an alternative which is reasonably available to importing countries.

How could the importing countries adopt an alternative measure which involved banning beef based on cattle age group when there is no assurance as to whether any of the younger cattle have not been infected with BSE? Research

on this problem is being carried out by scientists now. A test to diagnose CJD has been developed in the US,⁶⁷ but there is no evidence that it could work equally well to diagnose cows infected with BSE. If the test works accurately for BSE, it could be in production once an agreement is made with a manufacturer. However, the researchers are still in the process of patenting the test (in relation to CJD) and are reluctant to reveal specific details on it. Britain cannot argue that an importing country could reasonably be expected to employ the alternative measure of banning beef from cattle aged, say, over 2 years, if Britain cannot provide clear evidence that the younger cattle are all free of BSE – a task which, at this stage is still not possible.

The progressive decline in the number of confirmed cases of BSE in British cattle following the removal of offal of potentially infected cattle from animal feed in 1988 is seen to be evidence that the offal feed was the cause of BSE in British cattle. For the purpose of this article, assuming that the correlation is genuine, Britain may argue that another reasonably available measure is to ban only beef from cattle fed with offal, and not the whole herd. In addition, as some vets believe that BSE is caused by treatments based on OP dips, another reasonably available measure is to ban cattle treated with the same.

The importing countries may insist upon and impose measures allowing only the imports of cattle which have not been fed with offal feed and/or alternatively, or cattle which have never been treated with OP dips. But, the problem would be that the ban would be considered as a coercive and extraterritorial measure.

The Panel in the *Tuna Dolphin II* case concluded that measures taken in so far as to force other countries to change their policies and effective only if such changes occurred, could not be considered “necessary” for the protection of animal life or health in the sense of Article XX(b).⁶⁸ Article XX is a provision for exceptions, therefore, it should be interpreted narrowly and in a way that preserves the basic objectives and principles of the GATT. To impose trade embargoes so as to force other countries to change their policies within their jurisdiction would seriously impair the objectives of the GATT.⁶⁹

The point about coerciveness is also about directness. The Panel in the *Tuna Dolphin II* case also approached the issue of “necessity” by examining the directness of the measure in question. In examining Article XX(g) which covers measures “relating to” (and not “necessary for”) the conservation of natural resources, the argument of directness was used. In that case, the natural re-

sources in question was tuna, but the measure concerned was to do with the conservation of dolphins by attempting to regulate the way tuna was caught in order to control the incidental taking of dolphins. The indirectness of the measure was taken by the Panel to have meant that the measures concerned were not necessary and therefore not covered by Article XX(g).

If it was the intention of the Panel to examine the issue of coerciveness and directness 'within the same breath', it is not clear what would have been the outcome of the Panel Report should the coercive measures directly affect the product concerned. In the present scenario, say that an importing country banned the importation of cattle fed with offal feed and/or treated with OP dips to force Britain to change their feeding and/or veterinary policies, the measure itself could be seen as a coercive measure. On the other hand, it would apply directly to cattle/beef. Where would this leave British beef? The *Tuna Dolphin II* Panel did not linger on the possibility of such a scenario. It may be argued that in this case, the measure can still be seen as a defensive measure, whereas in the *Tuna Dolphin II* case, the only possible reason for the measure was coercion. Under the concept of 'Product-as-such' under Article III discussed above, if process-related restriction does not affect the inherent characteristics of the product, it is seen as being extraterritorial. Under Article XX(b), the measure is seen as being coercive.

Linked with the questions of directness and coerciveness would be the questions of PPM methods and 'like products'. As discussed earlier, product-motivated requirements are allowed because the possible harm would occur within the jurisdiction of the importing countries. The banning of offal-feeding or OP treatment may be argued to be a product-motivated restriction, as there is a possibility that cattle fed with offal feed or treated with OP will be infected with BSE and will eventually present typical physical characteristics of BSE-infected cattle.⁷⁰ If imported to, and not rendered as offal feed in another country, it may not infect other cattle. But, if it is used for breeding purposes, there is a possible risk of infection through maternal transmission. If imported for human consumption, there may be a risk of the population contracting vCJD.

Whichever way one looks at it, the problem with the available alternatives is either that it is difficult to balance between them to come up with the one which is the least inconsistent with the GATT, or that there are no definite alternatives which are reasonably available to the importing countries

which bear no risks at all to the population and animal health of the importing countries.

(iii) The ban restriction on the importation of British beef is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.

This is essentially the Preamble to Article XX which must be satisfied when GATT contracting parties invoke any of the Article XX exceptions. If the importing countries discriminate between like products, i.e. beef from Britain and beef from other contracting countries or their domestic beef, it would be an unacceptable measure where the same conditions prevail. It has been argued by Cheyne that "the same condition" do not prevail, (therefore discrimination is allowed), if different environmental circumstances and regulations apply in different countries, and that a distinction based on verifiable differences is not arbitrary.⁷¹

If we were to follow this argument, can we say that the occurrence of BSE in Britain (and not in other countries) amounts to different environmental circumstances and thus importing countries can discriminate against British beef? What is the limit of the differences which the importing countries are allowed to rely upon to discriminate against British beef? What about the differences in regulations applying in different exporting countries? If discrimination is based on internal regulations, does this not relate to the question of extraterritoriality which in turn relates to the question of coerciveness, which as discussed earlier is not to be used to discriminate between like products from contracting parties?

As to the issue of "disguised restrictions on international trade", until recently it was noted only that any measure should not be considered to be a disguised restriction on international trade if such measure is publicly announced.⁷² Thus, an importing country would be able to get away with banning British beef by simply announcing the banning measure publicly irrespective of whether the measure is trade restrictive or not! This ignores the true purpose of the Preamble of Article XX which suggests an intention to investigate and ex-

clude measures which on their face satisfy the measures under Article XX(b) but in fact are being used for trade restricting or protectionist purposes.⁷³

This unsatisfactory test was tackled by the Appellate Body in the *U.S. Gasoline* case⁷⁴ (between the US and Venezuela and Brazil) whereby the importance of the preamble was emphasized. In this case, which was adopted on 20 May, 1996, the US was appealing against the conclusion of an earlier Panel that her measure in setting standards relating to the composition of reformulated and conventional gasoline could not be justified under Article XX(b), (d) and (g) of the GATT.

The Appellate body upheld the results of the earlier Panel and stated that, in order that the justifying protection of Article XX may be extended to it, a measure must not only come under one or another of the particular exceptions listed under Article XX, it must also satisfy the requirements imposed by the Preamble and further appraisal of the measure must be carried out whereby, at this third stage, it is the manner in which a measure is applied that is to be addressed, and not so much the specific contents of the measure. It is thus important to underscore that the purpose and object of the Preamble is generally the prevention of "abuse of the exceptions of Article XX".⁷⁵

Following this case, Britain may find that an investigation under the Preamble may result in a finding that the true purpose of the ban is to limit the choice of domestic consumers to domestic beef. But then again, the importing countries may argue that the true purpose is really to protect their domestic cattle from BSE, and their population from VCJD! The matter is very subjective and it is very difficult if not impossible to investigate the true purpose without interfering with government policy-making process. However, this problem can partly be settled by placing the burden of proof on the countries invoking Article XX to justify the invocation and prove that the true purpose of the ban is really to protect the life and/or health of their population and/or cattle.⁷⁶

CONCLUSION

After analysing the findings and reasoning behind the GATT Panel Reports on past international trade disputes brought to the GATT Panel and the WTO DSB, it seems to be a no-win situation for Britain when dealing with the Article XX three-step test. This is especially so at the second stage when we dealt with the

issue of "necessity". With all of the uncertainties surrounding the cause of BSE and vCJD, it is difficult for Britain to argue that there are other alternative measures to banning the importation of its beef which are reasonably available to the importing countries. The alternative methods concerned may not guarantee a zero risk of infection of BSE and vCJD. If the measure imposed by the importing country qualifies as a measure necessary to protect its human and animal life or health, it is difficult for Britain to prove that the true purpose of the measure is discrimination and protectionism.

It is quite evident that the findings and/or the principles established by past GATT Panels in international trade disputes in the last twenty years may not work in favour of Britain to defend its beef. The Sanitary and Phytosanitary Agreement 1994 (the SPA) – one of the WTO side agreements from the Uruguay Round, which emphasizes on scientific certainties to justify any trade restrictions may offer an alternative to Britain to challenge the banning of its beef by GATT/WTO members. However, the discussion on the SPA will be saved for another place and another time.

NOTE

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- 2 *Ibid.*
- 3 *Ibid*
- 4 Penman, D., The Price of Meat, (London : Victor Golancz, 1996), p.33
- 5 *Loc cit*, pp. 27 & 33
- 6 Lancaster, J., 'How Now Mad Cow?', The Sunday Telegraph (23 February 1997)
- 7 Wigan, M., 'A Protectionist's Charter : The British Beef Ban is a Gift for Those Seeking to Limit Trade', The Financial Times (30 March 1996), p.16.
- 8 *Supra*, Lancaster, note 6
- 9 Anderson, R.M., *et al*, 'Transmission Dynamics and Epidemiology of BSE in British Cattle', (1996) Vol. 382 Nature, p.784
- 10 The BSE Inquiry : The Report, Volume 1 – Findings and Conclusions, Executive Summary of the Report of the Inquiry (Announced in the British Parliament on 22 December 1997, published in October 2000)
- 11 <http://www.bse.org.uk/> (accessed on 28 June 2001)
- 12 These conclusion was made by Mr. John Wilesmith, the HEAD of CVL Epidemiology Department by the end of 1987.
- 13 New Zealand researchers led by Professor Roger Morris from the Massey University in Wellington. Papers to be published in 2002.
- 14 The Bovine Spongiform Encephalopathy Order 1988. Statutory Instrument 1988 No. 1039 (HMSO, London 1988)
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- 16 Epstein, L.G. & Brown, P., 'BSE and a New Variant of Creutzfeld-Jakob Disease', (1997) Vol. 48 Neurology, p.569.
- 17 Will, R.G. *et al*, 'A New Variant of CJD in the United Kingdom', (1996) Vol. 347 Lancet, pp. 921-925.
- 18 *Supra*, Epstein, note 16, p.570
- 19 *Ibid.*
- 20 *Supra*, Lancaster, note 6
- 21 Arthur, C., 'Mad Cow Legacy Will Last into Next Century', The Independent (19 March 1997), p.5
- 22 *Supra*, Penman, note 4, p.42
- 23 *Ibid*
- 24 Cohen, P. & Kleiner, K., 'Mad Cow Test Could Avert Slaughter', New Scientist (06/04/96), p.4 – The test was developed at the California Institute of Technology in

Pasadena in collaboration with Clarence Gibbs and colleagues at the National Institute of Health in Bethesda, Maryland.

- 25 Osborne, D., 'Oprah's Biggest Beef', *The Independent* (10 June 1997)
- 26 The WTO was established in 1994 to take over the role of the GATT 1947 whose function, (due to lack of constitutional basis and unintended role to police world trade) was not clearcut. Under the WTO, previous GATT rules still continue as part of the WTO Agreement, now known as GATT 1994.
- 27 Cheyne, I., 'Environmental Treaties and the GATT', Vol. 1 No. 1 *RECIEL*, p.16
- 28 Panel Reports on "Canada – Import Restrictions on Ice Cream and Yoghurt", GATT : Basic Instruments and Selected Documents (BISD), 36S/68
- 29 Schoenbaum, T.J., 'Free International Trade and Protection of the Environment: Irreconcilable Conflict?', (1992) Vol. 86 *AJIL* p.709
- 30 Canada Ice Cream case, *supra*, note 28 para 62.
- 31 Panel Report on "Japan – Restrictions on Imports of Certain Agricultural Products", GATT, BISD 35S/163, paras 5.3.1.2, 5.3.2.1, 5.3.10.2.
- 32 Canada Ice Cream case, *supra* note 28, para 62.
- 33 *Ibid*, para 80.
- 34 *Ibid*, para 81.
- 35 *Ibid*, para 80.
- 36 *Ibid*, para 62.
- 37 The collective GATT 1947 'governing body'. Under the GATT/WTO 1994, the governing body is the WTO Council.
- 38 The Review Working Party Report on "Quantitative Restrictions", L/332/Rev.1 and Addenda, 3S/170, 190, paras 70-71.
- 39 Panel Report on "EEC – Restrictions on Imports of Apples from Chile", GATT, BISD 27S/98, para 4.7 [hereinafter the EEC Apples case].
- 40 Japan Agricultural Products case, *supra*, note 31, para 5.3.1.3
- 41 Canada Ice Cream case, *supra* note 28, para 62.
- 42 Panel Report on "EEC – Restrictions on Imports of Apples from Chile", GATT, BISD 27S/98, [hereinafter the *EEC Apples* case, para 4.7.
- 43 *Ibid*, para 4.8.
- 44 Japan Agricultural Products case, *supra*, note 31, para 5.1.3.7
- 45 *Ibid*.
- 46 *Ibid*.
- 47 GATT Article III:2.
- 48 GATT Article III:4.
- 49 *Supra*, Cheyne, note 27.
- 50 *Supra*, note 47

- 51 *Supra*, note 48
- 52 Panel Report on "United States – Restrictions on Imports of Tuna", GATT, BISD 39S/155, para 5.11
- 53 Dispute Settlement Panel Report on "United States Taxes on Automobiles, DS1/R, reported in 33 I.L.M. 1397 (1994)
- 54 Panel Reports on "United States – Restrictions on Imports of Tuna", DS29/R, reported in 33 I.L.M. 839, (1994) para 5.29
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- 56 Bodansky, D., Remarks made in (1991) Vol. 85 Proceedings of the American Society of International Law, p.417.
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- 60 Fitzpatrick, M., *supra* note 58.
- 61 Panel Report on "United States – Section 337 of the Tariff Act 1930", GATT, BISD 36S/345, para 5.26
- 62 Panel Report on "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes", GATT, BISD, 37S/200, para 74
- 63 Charnovitz, S., 'Exploring the Environmental Exceptions in GATT Article XX', (1991) 25 *JWT* 37, p.49.
- 64 GATT Article II(1)(a) provides *inter alia*, that each contracting party must accord treatment no less favourable than that provided for in the Scheduled annexed to the GATT. If the agreed tariff is 100%, imposing a 200% tariff would be inconsistent with Article II.
- 65 Patterson, W.J., *supra*, note 1
- 66 *Ibid*
- 67 *Supra*, Cohen & Kleiner, note 24.
- 68 Tuna Dolphin II case, *supra* note 54, para 5.39
- 69 *Ibid*, para 5.38
- 70 *Supra*, Patterson, note 1.
- 71 *Supra*, Cheyne, note 27.
- 72 Panel Report on "United States – Prohibitions of Imports of Tuna and Tuna Products from Canada", GATT, BISD 29S/91, para 4.8

- 73 Cheyne, I., 'Environmental Unilateralism and the WTO/GATT System', (1995) Vol. 24 Ga.J. Int'l & Comp. L., p.462.
- 74 Panel report on "United States – Standards for Reformulated and Conventional Gasoline", WT/DS2/AB/R (29/4/96)
- 75 *Ibid*, para 2 of Part IV
- 76 Following the decision in the Panel Report on "Canada – Administration of the Foreign Investment Review Act", GATT, BISD 30S/140, para 5.20. Also, the Tuna Dolphin case, *supra*, note 52, para 5.22