## 超市裡的WTO-以日本進口輻射 食品為例

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- ▶ 前言
- 自由貿易與食品安全的權衡
- 當前日本進口食品限制措施與分析
- ▶ 代結論

## 自由貿易與食品安全之權衡

- ► SPS協定主要規範與目的
  - ▶ 定義檢驗或防檢疫措施 係指適用於下列項目之任何措施:
  - (a) 保護會員境內動物或植物生命或健康,以防範因害蟲、疫病、帶病體或病原體的入侵、立足或傳播而導致的風險;
  - (b) 保護會員境內人類或動物生命或健康,以防範因食品、飲料或飼料中的添加物、污染物、毒素、或病原體而導致的風險;
  - (c) 保護會員境內人類生命或健康,以防範因動物、植物或動植物產品所攜帶的疾病或因疫病害蟲入侵、立足或傳播所導致的風險;或
  - (d) 防範或限制在會員境內因疫病害蟲入侵、立足或傳播而造成的其它損害
  - ▶ 檢驗或防檢疫措施包括所有相關法律、政令、規定、要件和程序,特別是包括最終產品的標準;加工與生產方法;測試、檢驗、發證與核可程序;檢疫處理,包括有關動物或植物運輸或運輸中維持動植物生存所需材料的規定;相關統計方法、取樣程序與風險評估方法的規定;以及與食品安全有直接關係的包裝與標示規定。

- ▶目的 (SPS 協定序文)
  - ► 為基於對於會員主權之尊重,授權會員為保護人類、動植物生命或健康,採 取或執行必要之 SPS 措施;
  - ■對於會員基於前述原因而採用之措施,不得對於具有相同條件之會員間,構成恣意或無理的歧視,或對於國際貿易形成隱藏性的設限
- ► Harmonization (Art. 3)
  - ■國際標準
  - The Three Sisters
- Equivalence (Art. 4)
- Risk Assessment (Art. 2 & 5)
- Notification and Transparency (Art. 7)

#### ■ SPS與食品安全:

- Question:
  - ■SPS保障食品安全?
  - ■SPS強化或弱化食品安全?
- SPS 的本質
- ▶科學證據

日本進口食品有輻射嗎?輻射食品安全嗎?

日該便侵台



#### 283項日災區產品偷天換日輸台







# 會員國間貿易關切事項 (SPS Specific Trade Concern)

- STC 354
  - Import restrictions in response to the Japanese nuclear power plant accident
  - **27/06/2013**
  - China, Chinese Taipei, Hong Kong, China,
- STC 359
  - Strengthened import restrictions on food and feeds products with regard to radionuclides
  - **1**6/10/2013
  - Korea, Republic of
- STC 387
  - Chinese Taipei's strengthened import restrictions on food with regard to radionuclides
  - **2**6/03/2015
  - Chinese Taipei

## 日本進口食品有輻射嗎?輻射食品安全嗎?

			我國標準				
	管制核種	食品類別	現行標準	預告草案	日本 標準	Codex 標準	備註
	銫-134+137	乳品及嬰兒食品	370	200	50	1000	日本輸台食品應先符合日本有關 銫之規定後始能輸台。
		一般食品	370	600	100	1000	
	碘-131	乳品、嬰兒食品	55	55		100	1.左列核種日本均尚未管制。 2.以預告草案標準管制為例,日本輸台食品除應符合該國有關 。
		一般食品	300	100		100	
	鍶-90	乳品、嬰兒食品		100		100	
		一般食品		100		100	
	鍶-89	乳品、嬰兒食品		1000		1000	
		一般食品		1000		1000	
	釕-106	乳品、嬰兒食品		100		100	
		一般食品		100		100	
	釕-103	乳品、嬰兒食品		1000		1000	
		一般食品		1000		1000	
	鈽-238	乳品、嬰兒食品		1		1	
		一般食品		10		10	
	鈽-239	乳品、嬰兒食品		1		1	
		一般食品		10		10	
	鋂-241	乳品、嬰兒食品		1		1	
		一般食品		10		10	

## 台灣當前關於日本進口食品之管制措施

- ▶ 禁止輸入五縣產品
  - 日本受輻射污染地區(目前為福島、茨城、櫪木、群馬、千葉縣)生產製造之食品,均暫 停受理輸入報驗
- 日本輸入之八大類食品(生鮮冷藏蔬果、冷凍蔬果、活生鮮冷藏水產品、冷凍水產品、乳製品、嬰幼兒食品、礦泉水或飲水、海草類)逐批查驗輻射量
- 查驗標準---Codex 及較嚴格標準
- ▶ 2014年 預告管制措施 (2015已實施)
  - 產地證明
    - → 台灣認可的官方產地證明文件包括日本官方產地證明、日本農林水產省檢疫證明、日本厚生勞動 省自由銷售證明、日本中央或地方政府提供的衛生證明,還有日本經濟產業省公布的日本商工會 所,核發的產地證明
  - 日本檢測報告
    - 日本官方公布輻射檢驗機構核發,或經日本官方或國際認證機關出具的輻射檢測報告,皆被台灣認可

## 日本控訴南韓違反SPS協定 DS495

- ▶ 2015. 5. 21 要求諮商
- 台灣加入第三方諮商 (Third-party consultation)
- 措施
  - (a) import bans on certain food products 特定食品進口限制
  - ► (b) additional testing and certification requirements regarding the presence of certain radionuclides 額外的檢驗與證明
  - (c) a number of alleged omissions concerning transparency obligations under the SPS Agreement. 透明化義務
- At its meeting on 28 September 2015, the DSB established a panel.
- China, the European Union, Guatemala, India, New Zealand, Norway, Russia, Chinese Taipei and the United States reserved their third-party rights.

## SPS協定

- Art. 2.2
  - Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
- Art. 2.2
  - 會員應保證任一檢驗或防檢疫措施之實施,係以保護人類、動物或植物的生命或健康之需要程度為限,且應基於科學原理,若無充分的科學證據即不應維持該措施,惟依第五條第七項之規定者不在此限。

#### Art. 5.7

- In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members.
- In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.
- 如相關的科學證據不充分時,會員可依現有有關資訊,包括相關國際組織及其他會員的檢驗或 防檢疫措施資訊,暫時採行某些檢驗或防檢疫措施。
- 惟在此情況下,會員應設法取得更多必要之資訊以進行客觀的風險評估,並應在合理期限內 檢討該檢驗或防檢疫措施。

#### SPS 2.2

- Requirement
- 會員應保證任一檢驗或防檢疫措施之實施,係以保護人類、動物或植物的生命或健康之需要程度為限,且應基於科學原理,若無充分的科學證據即不應維持該措施,惟依第五條第七項之規定者不在此限。
- EC Approval and Marketing of Biotech Products
  - (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health;
  - (ii) the requirement that SPS measures be based on <u>scientific</u> <u>principles</u>; and
  - (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence."

## "sufficient scientific evidence"

- EC Hormones
- a Member's precautionary approach is one element that a panel should bear in mind when appraising the scientific basis underlying their SPS measures
- EC Hormones
- the balance between promotion of international trade and protection of human life and health within the Agreement

#### Sufficient

- 'Sufficiency' requires the existence of a sufficient or adequate relationship between two elements, in casu, between the SPS measure and the scientific evidence". Japan — Agricultural Products II
- for scientific evidence to support a measure sufficiently it must also demonstrate the existence of the risk which the measure is supposed to address. Japan — Apples (Article 21.5 — US)
- The Appellate Body in Japan Agricultural Products II stated that "[t]he context of the word 'sufficient' or, more generally, the phrase 'maintained without sufficient scientific evidence' in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the SPS Agreement"

- "Scientific evidence"
  - Japan Apples
  - the evidence to be considered should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method. We further note that scientific evidence may include evidence that a particular risk may occur ... as well as evidence that a particular requirement may reduce or eliminate that risk

- A rational and objective relationship between the SPS measure and the scientific evidence
  - Japan Agricultural Products II (AB)
  - there be a rational or objective relationship between the SPS measure and the scientific evidence
  - a case-by-case basis
  - characteristics of the measure at issue and the quality and quantity of the scientific evidence.

## SPS 5.7 暫時性措施

- Whether Article 5.7 operates as a qualified exemption or an autonomous right?
  - Japan Agricultural Products II (AB)
    - ► Article 5.7 as a "qualified exemption" 5.7為2.2的例外規定
  - EC Approval and Marketing of Biotech Products (Panel)
    - Article 5.7 establishes an autonomous right (獨立的權利) of the importing Member
    - Article 5.7 does not establish an absolute or unqualified right.但有限制
    - In US/Canada Continued Suspension, the Appellate Body clarified the purpose of Article 5.7. The Appellate Body held that this provision intervenes in cases
      - where a Member would revise its SPS measure in light of scientific progress (
      - but where relevant scientific evidence does not allow performance of an adequate risk assessment:

- 5.1 和 5.7 的關係 (EC-Biotech)
  - 如果系爭SPS措施符合5.7要件
  - 則SPS 5.1條SPS措施基於風險評估(based on risk assessment)的要求不適用於系爭措施
- ▶ 小結
  - 5.7 is not a carve-out of 2.2/5/1 (not exemption)
  - But mutually exclusive operation (相互排除適用)

- Burden of proof
  - EC-Biotech
    - 5.7 as a right not an exception
    - the complaining party bears the burden of proving inconsistency of a challenged SPS measure with Article 5.7 first
    - to demonstrate that the challenged measure is inconsistent with at least one of the four requirements set forth in Article 5.7.
    - only if an inconsistency with Article 5.7 was established could a claimant sustain an allegation of a violation of Article 5.1
    - ▶本案: 日本為控訴方須先證明韓國的SPS措施不符合5.7要件之一即足

- ► Scope(範圍)
  - EC-Biotech (Panel)
    - ■適用條件(condition): where relevant scientific evidence is insufficient
    - ■可以採取暫時性措施
  - Article 5.7 is applicable whenever the relevant condition is met, that is to say, in every case where relevant scientific evidence is insufficient
  - In US/Canada Continued Suspension,
    - the Appellate Body held that Article 5.7 is concerned with situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk.

- Art. 5.7 Four cumulative requirements (四個要件均須符合)
  - 第一段 暫時採行某些檢驗或防檢疫措施的條件
  - a Member may provisionally adopt an SPS measure if this measure
    - imposed in respect of a situation where 'relevant scientific information is insufficient';科學證據不充分
    - adopted 'on the basis of available pertinent information'. 依現有有關 資訊
  - 第二段 會員國欲維持其採行暫時性措施時所應負的義務
  - a provisional measure may not be maintained unless the Member which adopted the measure
    - → 'seek[s] to obtain the additional information necessary for a more objective assessment of risk'; 應設法取得更多必要之資訊以進行客觀的風 險評估
    - → 'review[s] the ... measure accordingly within a reasonable period of time' 在合理時間內審查

### 要件一科學證據不充分

- where relevant scientific evidence is insufficient
  - Japan Apples (AB)
  - "relevant scientific evidence" will be "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement

#### 質與量均不足

- the application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence and these two concepts "insufficiency of scientific evidence" and "scientific uncertainty" are not interchangeable (兩者需區分)
- ■無足夠科學證據可以做正確的風險評估(adequate risk assessment)

- Existence of an international standard does not prove sufficiency of evidence for purposes of Article 5.7 of the SPS Agreement
  - US/Canada Continued Suspension
  - the existence of an international standard does not prove sufficiency of the scientific evidence supporting provisional SPS measures, especially when a Member has chosen a higher level of protection
  - while it is reasonable for a WTO Member challenging the inconsistency with Article 5.7 of provisional measure to put forward an international standard as evidence that the scientific evidence is not insufficient to perform a risk, this evidence is not dispositive and may be rebutted by the Member taking the provisional SPS measure

#### ▶ "不足夠"

The 'insufficiency' requirement in Article 5.7 does not imply that new scientific evidence must entirely displace the scientific evidence upon which an international standard relies. It suffices that new scientific developments call into question whether the body of scientific evidence still permits of a sufficiently objective assessment of risk."

#### ➡ 時間點:

whether there was insufficient relevant scientific evidence must be assessed by reference to the time the measure was adopted (EC-Biotech)

#### ▶ 本案:

- **■** 現行CODEX及其他相關國際組織標準
- ▶ 科學不確定性與科學證據不充分之區隔

### 要件二依現有有關資訊

- adopted on the basis of available pertinent information
  - US/Canada Continued Suspension
  - Such information may include information from 'the relevant international organizations' or deriving from SPS measures applied by other WTO Members

#### 相關國際組織資訊或其他會員國措施

where there is some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment

#### 風險存在可能性但不足以做風險評估

- a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure
- 暫時性措施與特定風險相關資訊間須有合理及客觀的關係

## 要件三尋求額外的資訊 (SHALL) seek to obtain the additional information necessary for a more objective

- assessment of risk
  - Japan Agricultural Products II
    - Additional information to be sought must be "germane" to conducting a more objective risk assessment
    - ▶ 取得資訊需適切以足以進行客觀風險評估
  - US/Canada Continued Suspension
    - as of the adoption of the provisional measure, a WTO Member must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources. Otherwise, the provisional nature of measures taken pursuant to Article 5.7 would lose meaning."
    - "A Member is required under Article 5.7 to seek to obtain additional information but is not expected to guarantee specific results. Nor is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure. Finally, the Member taking the provisional SPS measure must review it within a reasonable period of time."

#### ▶ 問題:

- ▶取得資訊需適切以足以進行客觀風險評估
  - ▶5.7前提假設就是因為無足夠證據故無法符合5.1之風險評估
- 尋求額外資訊但不問結果?

### 要件四合理時間內審查

- review the SPS measure accordingly within a reasonable period of time
  - Temporary or provisional nature of the measure
    - Japan Agricultural Products II
    - the "reasonable period of time" had to be established on a case-by-case basis
- 本案: 2011-2015? Reasonable period of Time?

## 結論

- SPS協定是貿易協定非食品安全管理協定
- SPS 5.7要件似乎過於嚴格,尤其是第二段的義務。