

Brian Loo
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Professor Larry Karp

Consumer Information, Consumer Rights and WTO Trade Law

Abstract

The following paper is devoted to a case study of the Beef Hormone Trade Dispute, focusing on the viability of a labeling solution in response to European consumers' demand for food-safety and United States interest groups' demand for European compliance with World Trade Organization trade law. It concludes that WTO trade law poses a significant barrier to such a solution and to consumers' right to information and food-safety.

Key terms:

Voluntary positive labeling: Labeling of products as having desirable qualities, in which compliance is voluntary for producers.

Mandatory negative labeling: Labeling of products as having undesirable qualities, in which compliance is mandatory for producers.

Risk-Aversion: The subjective value a person or persons place on avoiding some risk, in this paper often meaning health hazards related to food safety.

The ongoing Beef Hormone dispute between the European Union (EU) and other World Trade Organization (WTO) Members States, namely Canada and the United States (US)¹, offers a unique case study of two interrelated issues: consumers' right to differentiate/discriminate between otherwise like-products based on their subjective preferences, and the legality of eco-labeling as a means to do so under the WTO. Unlike most other trade disputes, which arise due to disguised producer protectionism, the Beef Hormone case has been brought about by European consumers' unusually high risk-aversion in matters of food safety (Vogel, 2001). Thus one possible less trade restrictive solution is to label the beef differently and allow consumers to choose. Such a labeling solution would differ from the typical EU eco-label in important respects, and thus our study of said solution sidesteps some of the controversies surrounding eco-labeling, its practicality and legality, to focus directly on others. For instance EU eco-labeling uses non-product related Product and Production Methods (hereafter, simply PPMs) as product criteria, making their program highly contentious legality under WTO trade law, which does not recognize PPMs as a legitimate difference in otherwise like products. Moreover the development of eco-labeling criteria is typically biased towards domestic producers with more input and political sway than foreign producers, creating a potentially discriminatory trade barrier. There is also controversy surrounding the actual environmental significance of eco-labeling criteria irrespective of their fairness to trade. Our examination of potential labeling solutions to the Beef Hormone dispute circumvents these issues because the sole criteria for the label would likely be fixed as the six hormones currently under EU moratorium, which of course constitute product *related* PPMs.

¹ Australia, Mexico, China and Chinese Taipei also reserved their rights to have input into the settlement as third parties with invested interests.

Nevertheless a host of issues, legal, political, and economic, remains. After discussing the benefits of a labeling solution in the Beef Hormone dispute, this paper examines the significant factors that may have swayed EU policymakers not to undertake such a solution, and concludes that *despite the efficiency of a labeling solution, strong political pressure from EU consumers would demand a mandatory labeling scheme, which is both irreconcilable with US political interests and likely to be struck down by WTO trade law.*

It is fairly clear that the Beef Hormone dispute was neither propelled by strong EU producer protectionism nor by heavy US trade losses. This is not to say, however, that there were never incentives for disguised protectionist measures. Lane (2002) notes that the consolidation of the Common Agricultural Policy (CAP) in the 1980's led to "large and costly beef surpluses, perhaps making any measure to limit beef imports likely to compete with domestic production quite tempting". And in more recent years EU beef producers have had to struggle with Bovine Spongiform Encephalopathy (BSE), or mad cow disease, losing significantly in its EU market share, which might be easily taken up by foreign competitors (US Meat Export Federation, 2005). However, clearly at the time of the dispute filing the value and extent of disputed trade distortions were relatively small compared to total EU production and imports of beef, as well as US exports of beef. The US and Canada each claimed a mere US\$202 and CDN\$75 million respectively; the arbitration panel determined the levels to be closer to US\$116.8 and CDN\$11.3 million respectively (WTO Panel Reports – EC Measures Concerning Meat and Meat Products, 1997). The amount of damages claimed by the US amounted to one-tenth of one percent of its total exports to the EU in 1999 (Lane, 2002). By means of further comparison the total value of US beef exports in 1997 was approximately \$2.5 billion dollars US

(FAOSTAT²). While I could not get 1997 numbers for the value of EU's net beef production in currency, to give an idea of the size of European beef producing sector, 7.4 billion metric tons of slaughtered beef were produced in the original EU 15 in 2004, which nets approximately 19 billion Euros at average 2004 EU market prices (FAOSTAT and EU Agriculture Database³). Clearly the financial losses EU producers might face from US competition were relatively small, as were the US producers' potential immediate gains if the EU moratorium had been dropped. Thus the EU moratorium seems to have been created primarily to address the genuine fears of European consumers about the health risks of hormone-fed beef. A 1998 Eurobarometer poll found that 54% of those surveyed felt a product's being "hormone-free" determined its safety; the criterion of being hormone-free was the second highest response after "pesticide-free". In general, EU consumers are much more risk-averse than other consumers in developed countries, a fact that has direct implications for any potential labeling solution, and which will be returned to later.

In recent history situations caused by similar consumer pressure have been resolved with labeling schemes. Melser (2005) points out that policymakers met demands for illegal trade embargoes from environmentally minded consumers by creating eco-labeling programs; this happened to the forestry industry in the 1980's through forestry certification programs, and similarly in the US's disputes over Mexican Tuna and, to a limited extent, the Shrimp-Turtle dispute. But the most closely related example is the EU's pending proposal for mandatory labeling of GMO's should they be allowed into the EU; said

² Statistical Database of the United Nation's Food and Agriculture Organization.

³ I have taken the given weekly market prices for the EU from their Agriculture Database, averaged all of them, and multiplied by the amount produced that year as given by FAOSTAT, after correcting for units. The average exchange rate between the Euro and dollar in 2004 was 1.2 American per the Euro; I refrained from converting over yet another average to avoid increasing the margin of error.

proposal has drawn “lengthy objections” from the US, Canada and others (Unnever, 2003). As in the Beef Hormone dispute, such a labeling scheme would differentiate products from each other and allow consumers to choose as best suits their preferences.

It is little surprise then that a February 10, 1999 Communication from the European Commission to the European Council and Parliament includes labeling as one of three possible solutions to the trade dispute: negotiations with complainants, altering the moratorium to fall under the Sanitary and Phytosanitary (SPS) Agreement’s clause for adopting provisional measures ““on the basis of available pertinent information””, or lifting the ban so long as a suitable labeling scheme is agreed upon (CEC Communication 81, 1999). The idea of labeling was brought onto the negotiating table and US Trade Representative Charlene Barshefsky responded by proposing labels such as “USDA Choice”, “USDA Prime”, or “USDA approved beef” (Barshefsky, 1999). EU officials rejected the proposal on the grounds that any label would have to specifically mention hormones (Meat Industry News, 1999). We will later examine possible explanations for the failure of negotiators to take to a labeling solution, but I first wish to examine the potential benefits of such a solution.

Ignoring implementation and maintenance costs for the moment, an ideal labeling scheme increases net social welfare assuming it effectively differentiates products (See Appendix 1 for the duration of this paragraph). I assume zero externalities because, despite Europeans’ fears, scientific consensus holds that there are no perceivable health risks from the six beef hormones under dispute so long as they are administered properly. Appendix 1 shows very simple supply and demand graphs for the individual European

consumer who is risk-averse and another who is risk-indifferent. Hormone-free beef (S1) is assumed to be more expensive to produce than hormone-fed beef (S2)(thus shifting its supply curve up) because US producers would otherwise simply transition to hormone-free beef with no long-term costs. In the presence of the EU's moratorium, the risk-indifferent consumer is paying more and consuming less than he would if hormone-fed beef were on the market (B). In the absence of any regulation the risk-averse consumer's utility from consuming beef decreases significantly (indicated by the inward shifted demand curve, D2) and he consumes at lower utility (L) because he does not know if his beef is hormone-fed or hormone-free. Similarly, in these two possibilities, a moratorium or insufficient product differentiation, producers lose potential profits from one or the other consumer. But if the embargo is dropped in conjunction with the creation of a labeling scheme that successfully differentiates the two products, then the equilibrium points move such that consumer and producer surpluses are maximized (E,E) over the sum of the two graphs, thus demonstrating the theoretical economic viability of such a solution for consumers with significantly differing preferences.

In practice, there is some doubt as to the exact effectiveness of eco-labeling. But most are in consensus that the relative success of an eco-label broadly depends on 'Green demand', or consumers demand for environmentally friendly goods (OECD, 1997; Unnevehr 2003 and Gallastegui, 2002). With regards to labeling beef products, a non-environmental issue, this simply implies that the relative success of a labeling product will depend on consumers' desire to eat hormone-free meat. If demand for hormone-free meat were low then the number of consumers falling under Graph 1 of Appendix 1 would be so low as to not warrant the costs and efforts of maintaining such a labeling scheme.

However, as previously mentioned and later argued in greater detail, the strength of European consumer objections to hormone-fed beef seems to indicate that demand for hormone-free beef is not a problem.

In addition, policymakers caught in between consumer interest groups and poor consumer confidence in regulatory bodies on the one hand, foreign political pressure and impending trade retaliations on the other, would be bound to see the political advantages to a labeling solution. Unnevehr (2003) says that labeling is an expedient policy tool in the face of uncertainty, in this case uncertainty as to health risks from beef hormones, because it absolves the policy maker of absolute responsibility, allowing the consumer to make his or her own decision, and is also less trade restrictive than outright bans or tariffs. The last would help policymakers save face in the international trade regime, in which WTO statute requires the adaptation of least trade restrictive measures (SPS, 1994).

With regards to the implementation costs of such a scheme, exact information is difficult to come by. Normal EU eco-labeling is a costly program, which requires monitoring of PPMs at all points of a product's life-cycle (Melser, 2005). Of course, a labeling solution for beef would be quite different because there is only one pertinent product attribute, which is not a non-product related PPM. Currently the EU inspect US hormone-free beef facilities before and after their approval; presumably the cost of monitoring a single criterion, hormones or none, is less expensive than monitoring a slew of criteria throughout a product's entire life-cycle as the normal EU eco-labeling program necessitates, but more exact evidence has been unattainable. This is not to say that implementation costs will be cheap. Unnevehr (2003) notes that because EU labeling requirements are far more stringent than anywhere else, substantial costs are expected just

in gathering data. Present labeling regulations on beef imports require that the meat be traced from its country of birth, country of rearing, country and slaughterhouse where it was slaughtered, country and plant where it was cut at, and a “traceability code” linking it back to the animal or group of animals it was from; EU regulations also require that approved facilities be continuously inspected and reviewed (EC Regulations 1760/200 and 1825/200). The cost of affixing the label could have been pushed onto US producers through negotiations, although this would have in turn made the solution less appealing to them. A fairly high level of continual monitoring and/or testing would be necessary because whether or not beef has been raised with hormones is not verifiable without testing for traces in the meat or monitoring facilities; this could incur substantial costs.

The groundwork for any solution, including labeling, must address the EU consumers’ abnormally high risk-aversion to hazards in food safety, which originally sparked the EU moratorium on hormone-fed beef. These fears are vehement, rooted in history, and empowered by lobbying from strong consumer interest groups. As Vogel (2001) argues, compared to consumers in other developed countries, Europeans are the most risk-averse, especially to food safety hazards. The European Consumers’ Organization’s position paper on ‘hormone-treated meat’ states that “EU governments are correct to place public health interests above all other interests”. The strength of these concerns, which many, if not most European consumers share, about food-safety and beef in particular, derives from a history of unprevented food-safety disasters. “It is impossible to exaggerate the significance of the regulatory failure associated with BSE on the attitude of the European public”, Vogel (2001) contends. The failure of the EU and EU member

states to prevent the disastrous outbreak of mad-cow disease, even though they had received warnings as early as 1982, brought the issue of food safety to the forefront of European consciousness and shattered consumer confidence in governmental regulatory bodies, giving rise to consumers' belief that they have a *right* to know exactly what they are eating (Vogel, 2001). Furthermore, the EU's increased political clout since the 1990's has decreased Member State's sway in regulatory matters, and thus created a larger political space for consumers' rights groups to contend with government over regulatory issues like food-safety without having to overcome entrenched national governments; their influence has flourished ever since (Vogel, 2001). Environmental groups also flourished at the same time, and they also contribute to the strength of the grassroots opposition to hormone-fed beef imports. Lane (2002) notes that the effort to ban hormone-fed beef gained the environmental lobby's support as part of a larger move towards more 'natural' foods. In sum, for historical reasons European consumers have much higher risk-aversion to food-safety hazards and their fears are given voice through a consumer lobby with increased strength.

Such fears are not easily allayed. Most European consumer groups view hormone-fed beef as an unquestionable health risk. The European Consumers' Organization boldly says, "European consumers wish to avoid unnecessary risks to our health from the food we eat", and "European consumers simply do not want hormone treated meat". Given the intensity of consumers' objections to letting *any* hormone-fed beef into the EU, it is unlikely that anything but a mandatory negative labeling scheme would appease them, that is a labeling scheme which compels hormone-fed beef to be labeled as such, rather than a voluntary label scheme for hormone-free beef to be labeled 'hormone-free'. The

proposition of a mandatory negative labeling scheme, essentially putting fault with hormone-fed beef despite its apparent scientific safety, would also be displeasing to the US interest groups who took a strong interest in the matter, seeing it as precedent setting with regards to the threat the EU's abnormally high, and unscientific health standards posed to the US's comparative advantage in agricultural technological advances (Lane, 2002). The US and EU's respective positions on mandatory negative labeling, as I have laid them out, is corroborated by the previously cited refusals of US negotiators to accept labels with mention of beef hormones on them, and the EU negotiators refusal to accept them without (Barshefsky, 1999 and Meat Industry News, 1999). In other words, it seems that the disagreement over what kind of label or labeling system would best resolve the dispute revolved around political interests rather than economic efficiency⁴. US interest groups and US negotiators refused labels that implied something was wrong or abnormal with their beef; EU consumers and EU negotiators refused labels that

EU policymakers must have considered the questionable legality of a mandatory labeling solution under WTO law when abandoning it. At present, there is a dearth of legal rulings on the status of eco-labeling programs in WTO trade law. Droge (2001) tentatively argues that, as 'regulation' and 'standard' are defined in the Agreement on Technical Barriers to Trade (TBT), the first being compulsory, the second optional, mandatory labeling programs would fall under regulations and voluntary ones under standards. Regulations are, naturally, subject to more stringent requirements than standards. The TBT Agreement (1994) allows for regulations to protect human health or

⁴ For the sake of argument I assume that voluntary positive and mandatory negative labeling schemes would differentiate between hormone-free and hormone-fed beef equally effectively. That's of course not exactly the case, but because the differences are highly dependent on subjective consumer attitudes, it's almost impossible to approximate on a case-by-case basis, especially in a situation with such unique consumer attitudes towards the products.

safety but only after such a risk is evaluated using, among other things, “available scientific information”, whereas the creation of standards can be expedited when problems of health or safety “*threaten to arise*” (Article 2, paragraph 2 and Annex 3, paragraph L). Assuming that Droge’s conjecture about the classification of eco-labeling in the TBT holds true, it seems that even if the EU were to unilaterally impose a mandatory negative labeling scheme, the only type likely to satisfy consumer demands, it would be subject to the same legal criticism that its present moratorium is receiving in WTO dispute settlement panels, namely the lack of scientific evidence as required in WTO trade law for SPS measures and TBT regulations. The legality of mandatory label systems is also relevant to the EU’s current proposal for a mandatory labeling regime for any potential GMO imports.

In the case of hormone-fed beef and GMO’s as well, the European Union could feasibly implement a voluntary positive labeling system: “hormone-free” “GMO-free”. In which case the TBT allows for standards to exist without scientific assessment of assumed health risks. Or perhaps the TBT will be expanded or amended to clarify the legal status of mandatory labeling programs meant to address consumers’ concerns about health and safety, as the EU has proposed for upcoming WTO rounds (Unneverh, 2003). In either case, if the EU implements a voluntary or mandatory labeling scheme the next legal issue will be whether or not FDA approved hormones at FDA approved levels constitute a significant difference in beef.

There are a whole slew of clauses requiring that like treatment be given to foreign imports of “like products”. The TBT Agreement requires that both technical standards and technical regulations treat foreign products no less favorable than like domestic products. The problem then becomes defining the term ‘like products. So far only one WTO trade

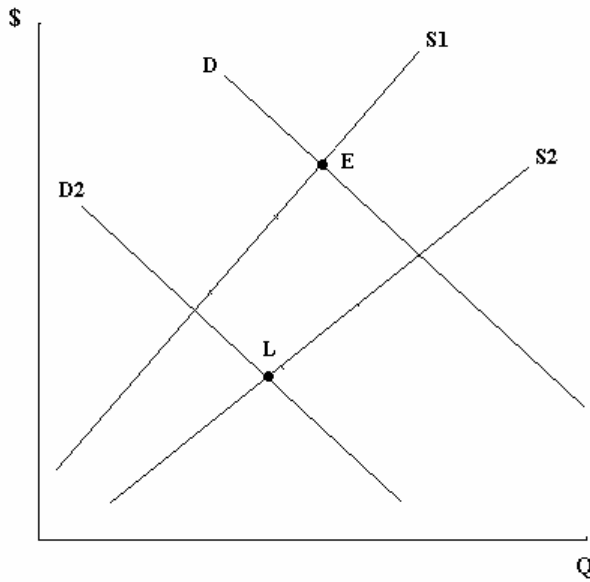
dispute, *Japan – Taxes on Alcoholic Beverages* (1996), has clarified the definition to some extent (Droge, 2001). The WTO Panel that arbitrated the dispute is most known for its exclusion of non-product related PPMs from the definition of “like products”. But, the Panel also allowed evidence from the complainants (US, EU, and Canada) that argued for the likeness of the products under dispute, domestically produced sochu vs. foreign spirits, based on the similarity of “consumers’ tastes and habits” concerning the products in question (WTO – Alcoholic Beverages Panel, 1996). Although a very technical argument, one could contend that this sets precedence for future rulings on the definition of “like products” to allow evidence for products’ “likeness” based on consumers’ tastes and habits. More abstractly, the permissibility of consumers’ attitudes as evidence indirectly acknowledges the utter subjectivity of determining which qualities among similar products constitute significant differences and which constitute insignificant differences.

I have little doubt that the legal barriers to any viable label scheme provided a significant disincentive for policymakers when they abandoned the idea in six years ago. There were, of course, a number of other factors as well. Maintaining the EU’s high standards for labeling and food-safety would have necessitated substantial implementation costs for the program, which would have been split to some degree of equality or inequality between the EU and US consumers, producers, and/or governments. The US and EU faced different demands from domestic lobby and interest groups, whose agendas made agreement over the nature of a label solution nearly impossible. The European consumers’ enduring fervor on matters of beef and food-safety excluded voluntary positive labeling as a solution, and mandatory negative labeling is both more contentious with foreign importers and WTO trade law.

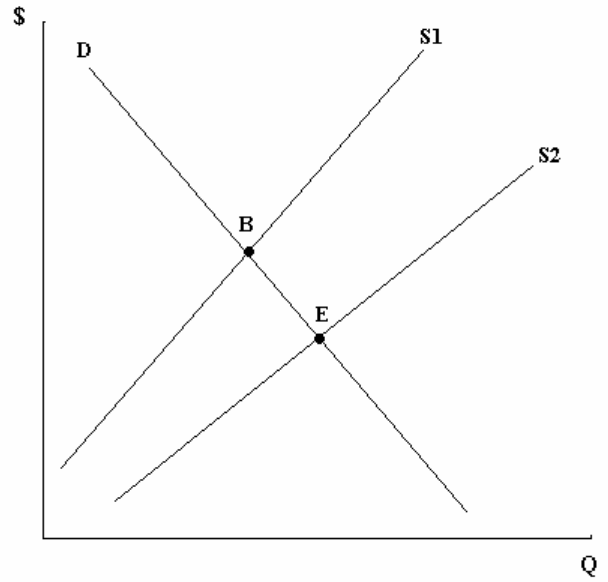
If “like products” were to be defined in part by consumers’ preferences, drastic changes to current WTO trade law would be required to maintain its integrity. Injecting such subjectivity into the Non-Discrimination clauses, for instance, would wreak havoc on enforcement and encourage disguised protectionist measures on the justification of consumer preferences that distinguish between otherwise like products based on any number of wants, needs, tastes, habits, *ad infinitum*. The catch is that different people really do perceive the same things in infinitely different ways. In some cases the difference may be relatively minimal and/or unimportant, as with sochu and US, EU, Canadian spirits. In other cases the differences in perception may be of the utmost of importance to people, as with European consumers’ attitudes toward food-safety. The current trade regime, designed primarily to restrict Member’s legal freedom to create disguised discriminatory trade barriers, will have a very hard time incorporating consumers’ subjective risk assessment and their right to *feel* safe, rather than *be* safe as defined by scientific evidence and dispute panel rulings. But the differences are inevitable. Consumers’ preferences and risk-aversion often differ greatly from country to country, region to region, income group to income group. Eventually citizens the world over will realize their right to complete information is inadvertently under threat from anti-protectionist WTO trade law aimed at their national governments. If the strength of European opposition to WTO rulings thus far is any indication of consumer trends to come, legal reform in the WTO may be in order sooner rather than later.

Appendix 1

S1 = Supply of hormone-free beef, S2 = Supply of hormone-fed beef,
D = Consumer demand for beef, D2 = lowered demand for risk-averse consumer in the absence of labeling or moratorium
E = efficient points of consumption under any program that effectively distinguishes products with perfect information



Risk-Averse Consumer



Risk-Indifferent Consumer

The illustration is of course very simplistic. For instance, without the moratorium hormone-free consumers might cut costs to deal with the new competition, shifting S1 down. Regardless, I merely intended to demonstrate the possible gains from perfect information.

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