ARE CONSUMER-ORIENTED RULES THE NEW FRONTIER OF TRADE LIBERALIZATION?

SONIA E. ROLLAND*

ABSTRACT

Lead paint toys and tainted baby formula milk from China, along with other scares involving consumer goods have focused the public’s attention on the risks of a global supply chain that no state controls. Yet, domestic instruments available to protect consumers against unsafe or undesirable foreign goods and services are limited.

This article explores, from a comparative legal perspective, what shapes international trade regimes to be more or less consumer oriented, using primarily EU law as a counterpoint to the WTO, but also NAFTA and MERCOSUR. Ultimately, it suggests that the WTO’s producer-centered liberalization focus leaves consumers underserved and it seeks to articulate a more holistic understanding of the trade liberalization project that accounts both for producer and consumer interests. Although the WTO may not be the appropriate or optimal forum to fulfill such needs, a more robust examination of the intersection between producer-oriented trade rules and consumer interests is warranted.

INTRODUCTION

The past decade has been replete with major debates involving states’ inability to protect domestic consumers, and their incapacity to enforce policy preferences on risk in relation to international trade. Lead paint toys and tainted baby formula milk from China, as well as

* Associate Professor, Northeastern University School of Law. The author is grateful for the discussion on an earlier version of this paper at the ASIL Inaugural Research Forum (UCLA, Nov. 2011) including comments from Alan Sykes, Sungjoon Cho, Claire Kelly and Michael Waibel. The author also thanks Daniel Danielsen and Rashmi Dyal-Chand for their insightful feedback on the framing of this piece.
numerous other scares involving consumer goods have focused the public’s attention on the risks of a global supply chain that no state controls. Indeed, domestic instruments available to protect consumers against unsafe or undesirable goods and services are limited and blunt.

The World Trade Organization (WTO)’s approach to trade liberalization is unapologetically, and perhaps unreflectively, producer-oriented. It focuses as a first order of priority on ensuring that goods and services can be offered across borders with the least amount of discrimination and administrative barriers. It assumes that consumers necessarily benefit from free trade because they will have access to a greater variety of goods and that products will be cheaper because they will be produced and distributed more efficiently. While such benefits have indeed materialized in a number of ways, they do not reflect the full spectrum of consumer interests. Other interests, such as protection from misleading commercial practices, the ability to obtain truthful information about products and services, the ability to obtain redress for damages caused by defective products, and the protection of privacy\(^1\) are only marginally or imperfectly addressed.

\(^1\) The UN Guidelines for Consumer Protection recognizes eight main goals: “(a) To assist countries in achieving or maintaining adequate protection for their population as consumers; (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers; (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; (d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers; (e) To facilitate the development of independent consumer groups; (f) To further international cooperation in the field of consumer protection; (g) To encourage the development of market conditions which provide consumers with greater choice at lower prices; (h) To promote sustainable consumption.” G.A. Res. 39/248, ¶ 1, U.N. Doc. A/RES/39/248
by the trade regime. While producers’ interest in accessing global markets translates directly in multilateral trade disciplines, consumers’ regulatory interests are not framed explicitly in the agreements. Consumers, as a legal category, are virtually absent from the WTO agreements.

The WTO regime provides some space for consumer-focused regulation (for example, by allowing states to set standards and to impose sanitary or phytosanitary norms), but that space is limited and often restricted by jurisprudential interpretations favoring producer interests. Rather than proposing a framework for addressing consumer interests at the WTO, this article calls for experimentation and reflection on the relationship between trade liberalization and consumer interests along several axes. First, to the extent that the WTO trade regime produces negative spill-over effects on consumers, those need to be better understood. Second, WTO case law suggests some attempt at engaging with consumer issues but a fuller consideration would require a shift in interpretative assumptions. The European trade integration project provides valuable insights in this direction. Third and last, it may be that other institutions including regional and domestic bodies should be the foremost fora for dealing with consumer issues, and the role of the WTO, would be to allow the necessary policy space for these endeavors to fully unfold. The issue explored in this article, then, is how to articulate a more holistic understanding of the trade liberalization project that accounts both for producer and consumer interests.

To be sure, the benefits of the producer-driven liberalization trickle down to consumers in many ways. Classical economic theory as well as empirical evidence have established that consumers benefit from free trade in the form of cheaper goods and services, access to a greater variety of products and services, more reliable supply sources and less risk of shortages. The WTO system, (Apr. 1985), as amended by United Nations Guidelines for Consumer Protection, G.A. Decision 54/449, U.N. GAOR, 54th Sess., ¶ 1 (1999).
which finds its conceptual roots in classical liberal economics, seems to assume that such benefits will more than offset any cost to or needs of consumers imposed by the producer-centeredness. As domestic regulatory regimes readily recognize, though, consumer interests encompass more than simply having access to a broader range of cheaper goods. Consumer interests may include protection from harmful or defective products or services, privacy protection, preserving consumers’ legal interests (see, e.g., bans or restrictions on unfair credit or contract terms etc.) and regulating deceptive commercial practices. States have recognized similar concerns in regimes designed to protect consumers of intermediate goods, in business-to-business transactions.

The European Union’s (EU) trade liberalization and integration model since the 1970s suggests that there are alternative approaches to allocating the burdens and benefits of trade liberalization between producers, consumers (and workers) in ways that are not inconsistent with classical economics. Less favorable treatment of consumers from other EU countries has been seen as a hindrance to the free movement of persons within the EU. Free movement, in turn, was meant to result in a more efficient allocation of labor and capital. For instance, universities cannot charge higher tuition to other EU nationals than they charge to domestic students. Museums cannot charge a higher entrance fee to other EU tourists compared to locals. At a more sophisticated level, the EU directive on distributorships allows a geographic allocation of markets amongst distributors but the latter must allow consumers to buy potentially cheaper goods in other EU

---

Here, the EU explicitly sought to weight the producers’ interest in providing exclusivity to their distributors in certain markets, against the interests of consumer in buying the cheapest available good. In an integrated trade zone, these regulatory choices could not have been implemented simply at the domestic level, but rather required international cooperation.

Undoubtedly, the EC and later the EU have a deep political dimension that the WTO lacks. Some may therefore claim that the discrepancy in the place of consumers in Europe and at the WTO does not result from diverging perspectives on trade liberalization, but rather stems from the original political objective of the European Community (EC) as a peace-building and stabilizing bloc for the region and is therefore inapposite to the WTO system. Nonetheless, the notion that there are common traits between the EU and the WTO as trade law regimes is not a new one. While it is certainly difficult to ascribe regulatory choices to a single feature of a regime, the history of EC and EU consumer protection seems to disprove the purely political explanation and to support the theory that consumer protection in the EC and EU rather reflects a different perspective on the role of market regulation to achieve trade liberalization. The EC has been highly successful at trade integration but consumer interests were not a part of the political genesis of the common market project; rather, they emerged as an unaddressed issue several decades after the creation of the EC. Clearly, then, the WTO is not the only available model

---


when it comes to the normative place of consumers and producers in a trade liberalization system.

This article proceeds in three parts. First, it compares some of the assumptions and characteristics of the producer-centered WTO model of trade liberalization and the European model of mixed producer and consumer interests. If trade liberalization and consumer protection can be complementary, as suggested by the success of the European model, the WTO’s failure to engage these interests cannot be justified purely on the basis of economic theory. In its second part, the article presents evidence that member states have raised the consumer dimension of trade liberalization at the WTO as a distinct matter from benefits trickling down from the producer-centric approach. This in turn suggests that states find domestic instruments to be insufficient in their efforts to protect consumer interests. Focusing on WTO disputes and the text of the agreements, this part critically assesses whether states have successfully asserted consumer interests at the WTO. This section shows that domestic regulatory efforts have international trade effects, and that trade disciplines similarly have spill-over effects in the domestic framework for the protection of consumer interests. It concludes that there is, at present, a major disconnect between the legal framework for trade liberalization at the WTO and regulatory efforts by states to balance producer and consumer interests. Third, this article considers how consumer interests have been incorporated in some regional trade liberalization frameworks. Considering examples from Asia and the Pacific as well as Latin America, it shows reveals alternative models for balancing consumer and producer interests in a trade liberalization project that could hold valuable lessons for the WTO. Ultimately, it also calls for more research, theoretical and empirical, and for a reasoned debate about the extent to which consumer interests should be more explicitly addressed at the WTO level.
I. A Tale of Two Cities: Framing Producer and Consumer Interests in the European and WTO Models for Liberalization

The producer-centeredness of the WTO system is evident from fundamental disciplines permeating the agreements. For instance, the most-favored nation treatment prohibits unfavorable discrimination between similar products or services from different producing countries; the national treatment rule prohibits less favorable treatment of imported goods and services compared to domestically produced equivalents. By contrast, producers or sellers are not restricted from discriminating between domestic and foreign consumers in order to extract higher profits. For example, foreign nationals are charged more for entrance fees in museums than domestic consumers in India and foreign tourists can purchase a cheaper railway pass in Japan than residents. These consumer issues are typically not articulated as trade concerns but they are in fact consumer-oriented trade barriers that the producer-oriented regime is not capturing.

Producer-centeredness also transpires from trade remedies such as safeguards, anti-dumping and countervailing duties, all of which aim to protect domestic producers from certain types of competition. Consumers, on the other hand, might have welcomed cheaper foreign goods now made more expensive by the imposition of such duties.

We might think at first blush that classical economic theory requires a producer-centric model of trade liberalization. There are at least two problems with this claim. First, there is little in trade theory to support this position. Free trade theories help to show that welfare is increased overall by opening trade, which is understood to benefit producers and consumers. They provide extensive models and data as to the inefficiency of certain trade restriction instruments, they recognize that instruments such as tariffs and subsidies have different impacts on producers and consumers domestically and abroad, but they generally make no normative claim as to the
superiority of reducing distortions to trade for producers over the reduction of distortions to consumers. As Baldwin summarizes, “[t]he major conclusion from this positive analysis is that import protection reduces a country’s real income level unless the country possesses enough monopoly power to improve its terms of trade sufficiently to offset the welfare loss to consumers that result from the higher prices of the protected products.”

Second, the EU trade integration and other regional trade liberalization processes provide empirical evidence that a joint consideration of producer and consumer interests to shape trade liberalization policies is possible. The tremendous success of the EC/EU at creating a common market with freedom of circulation of goods and services may be beyond what the WTO aims to achieve, but it is clearly a successful trade liberalization process. This section examines the differences between the WTO trade liberalization process and the EU process to show that there is nothing in trade liberalization theory or practice that is necessarily antithetical to consumer protection.

Both the EU and the WTO frameworks for trade liberalization have a built-in normative position regarding the protection of producer and consumer interests. On the one hand, the General Agreement on Tariffs and Trade (GATT) and the EC both began with a similar producer-focus, which assumed that consumers were adequately served by lower prices and wider availability of goods. However, the EC diverged from that common approach in the 1970s and began to target consumer interests that were not fully addressed by the producer-centric model. The GATT, on the other hand, stayed the original course and the WTO largely avoided revisiting this position.

Section A discusses how the EU first came to view consumer protection as a core pillar of trade liberalization. Section B explores how producer and consumer interests have been meshed in the European trade integration, and how EU institutions have managed the tensions between

producer-oriented laisser-faire and regulatory remedies to market failures in the consumer protection arena.

That said, an important difference between the two regimes is that the EU treaties provide for the free movements of goods, services, and persons, whereas the WTO agreements are mostly silent on the movement of persons. In the WTO legal system, “persons” are seen almost exclusively as factors of production. However, within the EU, “persons” are also consumers, and their ability to obtain goods and services abroad or consume foreign production domestically has been understood as a critical part of the market integration process. As a result, discrimination between domestic and foreign consumers, for example, is sanctioned in ways akin to the prohibition on treating foreign-made goods less favorably than the comparable domestic product. In other words, national treatment and most-favored nation treatment are generally applied to the production, import and offer for sale, as well as to the consumption of goods and services.

A. The Genesis of Consumer-Oriented Trade Liberalization in Europe: A Classical Economics Grounding

Consumer protection initially was not a part of the founding treaties in the European Economic Community (EEC). The Treaty of Rome creating the EEC only touches on consumer protection in reference to the common agricultural policy and competition policy, but it was not until the 1992 Treaty on European Union (Maastricht Treaty) creating the EU that the protection of

---


7 Id., arts. 85(3), 86.
consumers became a part of the founding treaties. The provision was later reiterated in amendments to the founding treaties by the 1997 Treaty of Amsterdam, the aborted EU Constitution and the 2007 Lisbon Treaty. This quasi-constitutional history suggests that the difference in the political ambitions underpinning the WTO and the EU projects are insufficient to account for the divergence in the treatment of consumer interests under the two regimes.

Rather, the EC Commission, in collaboration with the European Parliament, moved to consider the interests of consumers as part of the regional market integration in the 1970s, some fifteen years after the creation of the EEC. The European Parliament noted the need for a coherent and effective consumer policy in 1972 and the Commission responded with a comprehensive report

---

9 Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56 (renumbering the Treaty on European Union former art. 129a to art. 153 (2)).
in 1974. Consumers were presented not only as purchasers of goods, but also as entitled to four rights that should inform sector-specific Community policies. These included the right to protection of health, safety and the protection of economic interests, the right to redress, the right to information and education, and the right of representation.

The Commission’s report explicitly framed in reference to classical free trade economics, rather than any political or normative project. It finds support for its project in Adam Smith’s The Wealth of Nations: “the interests of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.” It notes that the place of consumers has since decreased “despite [the consumer’s] importance as a basic factor in the market place” and that

13 Commission of the European Communities, A Preliminary Community Programme for Consumer Information and Protection, Amended draft presented by the Commission to the Council pursuant to the second paragraph of Article 149 of the EEC Treaty, SEC (74) 1939 final (21 May 1974) [hereinafter 1974 Commission Report for Consumer Information and Protection].

14 Defined as “protect[ing] the consumer against abuse of power by the seller with regard to the drafting of contracts, dissemination of advertising material and definition of conditions of credit. The consumer must likewise be protected against damage resulting from defective products or unsatisfactory services, and be guaranteed after-sales service. The methods to be applied to protect the consumer in this sector will be two-fold: harmonization at Community level, or the adoption of direct measures at that level.” Commission Press Release, Adoption by the Council of a Preliminary Programme for a Consumer Protection and Information Policy, at 2, IP/19/75 (April 1975).


16 Id.
the lack of consumer protection prevents him from “playing his proper role as a balancing factor prescribed by economic theory.”17 The Commission further describes the micro-economic supply and demand dynamics as premised on “a certain balance between the economic strength of the supplier (producer/wholesaler/retailer) and that of the buyer. The tendency has been for that balance to become weighted in favour of the supplier as the market conditions have changed.”18 It concludes “[t]oday, the producer has a greater opportunity to select his market than the consumer has to select his supplier.”

17 Id., at 3.

18 Id. Whether it is classical Ricardian comparative advantage and its contemporary variances including the Heckscher-Ohlin model, or “new trade theories” stressing increasing economies of scale, economic theories of international trade typically begin with conditions of production and the results imply that free trade is welfare-enhancing for consumers because it decreases the price of the goods and increases the types of goods available through a more efficient use of inputs and allocation of production. See generally BERTIL OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE (1967); Terry Barker, International Trade and Economic Growth: An Alternative to the Neoclassical Approach, 1 CAMBRIDGE J. ECON. 153 (1977); Paul Krugman, Increasing Returns, Monopolistic Competition, and International Trade, 9 J. INT’L ECON. 469 (1979). Mobility of the factors of production (labor and capital) are conceptualized as interchangeable with trade for analytical purposes. Mundell first showed that under the Heckscher-Ohlin models, trade and factor mobility were substitutes. Robert Mundell, International Trade and Factor Mobility, 47 AMERICAN ECON. REV. 321 (1957). See also Krugman, supra, at 478.
In response, the Commission identifies a number of regulatory areas that foster this imbalance. Apparently, then a joint consideration of producer and consumer interests in a trade liberalization regime is not incompatible with classical economics and dominant trade theory. Indeed, trade theory since then has attempted to describe the impact of trade liberalization on consumers and producers.\footnote{Over the past two decades, some economists have attempted to consider the responses of producers and consumers in relation to trade policy. Staiger and Tabellini propose a model with three types of actors: producers, consumers and the government. Robert Staiger and Guido Tabellini, \textit{Rules and Discretion in Trade Policy}, 33 EUR. ECON. REV. 1265 (1989). All goods are traded and the model posits that producers decide how much to produce first, with the expectation that the government might impose a tariff. The government sets its tariff at the same time or after the producers have made their production decision, which means, according to the authors, that the government takes the production decision as a given, therefore ignoring the effect of current or expected trade policies on producers’ decisions. Consumers make their decision last. Hence, the government’s tariff will only address trade distortions related to consumption. A tariff has both production implications (it has the effect of a subsidy for the domestic producers and a tax on the foreign producers) and on consumers (it works as a tax on domestic consumers and a subsidy on foreign consumers). In line with Bhagwati’s \textit{General Theory of Distortions and Welfare}, the authors conclude that a trade policy that would be surgically tailored to the distortion requires instruments capable of disaggregating the effect of the tariff on production from its effect on consumption. Staiger and Tabellini, \textit{supra} at 1268-70. \textit{See also} Jagdish Bhagwati, \textit{The Generalized Theory of Distortions and Welfare, in Trade, Balance of Payments, and Growth: Papers in International Economics in Honor of}}
The theory is neutral as to whether trade liberalization should focus on reducing distortions on producers or on consumers. If anything it suggests that it should do both, with instruments that are tailored to each individually. Empirically, Bhagwati had also concluded that “protection in the United States seems particularly aimed at lower-end consumer goods . . . that have virtually gone out of production in the United States by now and where the net effect on our workers’ well-being comes not from the effect on their wages in employment, but overwhelmingly from their role as consumers.” JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 127 (2004). Krugman also sought to demonstrate that the downward pressure on high-income manufacturing jobs due to competition from cheaper foreign products has not resulted in as much of a welfare loss as others have thought. Paul Krugman, Domestic Distortions and the Deindustrialization Hypothesis, in THE POLITICAL ECONOMY OF TRADE POLICY – PAPERS IN HONOR OF JAGDISH BHAGWATI 34-49 (Robert C. Feenstra, Gene M. Grossman, and Douglas A. Irwin, eds., 1996). For the full theory, see Paul Krugman, Competitiveness: A Dangerous Obsession, 73 FOREIGN AFFAIRS 28 (1994); R. Lawrence and Paul Krugman, Trade, Jobs, and Wages, SCIENTIFIC AMERICAN (April 1994). Samuelson, however, vigorously contested the conclusion that Americans may have experienced a slight loss of welfare as producers but that such a loss might be offset by an increase in welfare as consumers. Paul A. Samuelson, The Age of Bhagwati et al., in THE POLITICAL ECONOMY OF TRADE POLICY – PAPERS IN HONOR OF JAGDISH BHAGWATI 29-31 (Robert C. Feenstra, Gene M. Grossman, and Douglas A. Irwin, eds., 1996). The debate between Krugman and Samuelson highlights the fundamental conflict between the interests of producers (including workers, since labor is a factor of production), who want a higher income for their input (capital, labor, land,
The second report of the Commission, in 1978, again emphasizes the need to give greater weight to “the rightful interests of consumers” “as a balance to policies safeguarding the producer.” 20 The Commission member in charge of the report concludes that “[t]he key to that ultimate accomplishment lies in the recognition by all interests of the consumer dimension as a natural and indispensable one in the achievement of balanced development of the Common Market.” 21
document content
The GATT is largely premised on the same classical economics bedrock as the EC; it is therefore not surprising that the producer focus trend identified by the Commission in the 1970s also prevailed at the GATT. As read by EC institutions, classical economic theory appears to support a joint consideration of consumer and producer interests in the trade liberalization project. At any rate, the literature does not reveal any study showing that consumers’ welfare is maximized by

earlier theoretical contributions. Kyle Bagwell and Robert W. Staiger, *The role of export subsidies when product quality is unknown*, 23 J. INT’L ECON. 69 (1989). See also Shabtai Donnenfeld, Shlomo Weber and Uri Ben-Zion, *Import controls under imperfect information*, 19 J. INT’L ECON. 341 (1985) (examining the welfare effects of minimum quality standards on imports which are of unknown quality to domestic consumers); Wolfgang Mayer, *The Infant-Export Industry Argument*, 17 CANADIAN J. ECON. 249 (1984) (considering the benefits of export subsidies when consumers are initially uninformed about the product). Their model shows that but for export subsidies, high quality firms will not be able to sell their product as much as they should because they are unable to sell at prices reflecting their true quality. They conclude that “[e]xport subsidies enable high quality producers to begin exporting profitably even while unable to credibly convey their high quality to consumers in the ‘introductory’ period” when consumers do not have information about the product or firm. Bagwell and Staiger, *supra* at 70. They underline that such an export subsidy is not predatory (as are profit shifting and terms-of-trade shifting subsidies) because the importing country producers are not harmed. *Id.*, at 85. These findings suggest that there is a space for trade policy that specifically targets welfare increase for domestic consumers in certain circumstances. Further empirical analysis would be useful to determine whether countries have indeed implemented the sort of tariff that is described by Bagwell and Staiger.
simply putting in place the best market conditions for producers. Further economics research would help to gain a better understanding of the value of different trade liberalization regimes and how they can best be optimized for producers and consumers. The issue then is how to make good on a trade liberalization process that accounts more comprehensively for consumer and producer interests.

B. Bridging Consumer and Producer Interests in the European Trade Integration Process

Early forays into consumer protection by EC institutions took place in the absence of an express constitutional basis under the Rome Treaty. The legal hook was simply to treat consumer protection as an extension of the broad mandate for freedom of movement of goods and persons under the treaty. In addition to the treaty articles mentioned earlier, Article 100 (and subsequent amendments after the entry into force of the Single Act in 1987) on harmonization (“approximation”) of member states’ laws and regulations having a “direct incidence on the establishment or functioning of the Common Market” has also been used as a basis for Council and Commission directives in the area of consumer protection. Even the Single Act of 1986, which confirmed a number of new common EC policies, did not create a separate Community competence for consumer protection. Rather, consumer interests were to be protected as part of other substantive common policies. Consumer protection was therefore seen as a “cross-cutting” issue that infused other sectoral policies for which there was a clear mandate. We can infer from this evidence that the lack of attention at the WTO to consumer interests similarly cannot be explained by the absence of treaty language alone. Rather, the political ethos at the WTO must help to account for the producer-centeredness.

The European approach to consumer protection first entailed rights-based measures. The first Commission Report of 1974 actually equates “consumer interests” to four basic rights: “the right
to protection, particularly health, safety and economic interests; the right to redress; the right to information and education; the right of representation (the right to be consulted, represented and to participate in decisions of consumer concern).” The Report then recommends that these rights be operationalized within the context of already existing Community policies such as the common agricultural policy, environmental policies, transport and energy policies, etc. The Report also highlights the shift in perspective from commercial practices that were previously sanctioned mostly as a business practice, to a consideration of these business practices as a producer-consumer issue. For instance, contractual terms for credit trading (including hire-purchase and credit cards), which so far had been regulated “solely in terms of unfair competition between producers (such as misleading advertising) are now looked upon also as an aspect of fair trading between producers and consumers.”22 As a result, the Report outlines the principles for a Community policy on consumer protection substantiating the four basic rights. For the first right, it includes setting product standards to protect consumers from dangerous products (including anticipating normal use and “off label” use of the product), instigating expeditious procedures for withdrawing goods and services from the market when they have been proven to pose a danger to consumer health and safety, creating procedures for product approval for new products that may pose a risk, etc. With respect to the “protection against damage to the economic interests of the consumer”, the Report envisions measures ranging from regulation of adhesion contracts to prohibiting misleading advertisement (with a particular concern for financial services) and requiring “reasonable after-sales service for consumer durable goods.”23 With respect to the right of redress and assistance, the Report is more tentative, mostly

---


23 Id. at 9.
proposing consultations with domestic consumer bodies and building on work done by international organizations to enhance the recourses available to consumers. It also calls for an examination of the law of “certain third countries,” presumably non-Community countries which have an important role in the chain of production leading to the EU market.\textsuperscript{24}

The second report, in 1978, moved away from this rights-based approach, emphasizing instead consumer choice as a vector of market integration.\textsuperscript{25} In the year leading up to the report, the EC Commissioner in charge had advocated the shift from a policy of \textit{protecting} consumers to one of “\textit{promoting} consumer interests”\textsuperscript{26} (emphasis added). In particular, the objective was to foster “an active approach to consumer welfare whereby instead of seeking merely to counteract practices prejudicial to consumer interests by corrective legislation or other regulatory measures, one should take the initiative, as far as possible, in ensuring that the rights of consumers were brought into the reckoning from the beginning when decisions were being made on matters which affected their well-being.”\textsuperscript{27} This shift also announced a balancing approach between protecting consumer choices and other possibly conflicting policies that might have favored producers.

In addition, Article 100a(4) of the Single Act allowed states to invoke “major needs” to uphold standards of consumer protection higher than those set by EC institutions under Article 100a(1). The standard of protection applicable to Article 100a(1) is reinforced by Article 100a(3) stating:

\textsuperscript{24} \textit{Id.} at 13.


\textsuperscript{27} \textit{Id.}
“The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.”

The European Court of Justice also played a critical role in building consumer protection at the core of market integration. The Court’s early focus in the 1980s was on rolling back domestic rules that restricted consumer choices and thereby restricted full access by consumers to a larger free market. Domestic tax regulations, rules on marketing contingent on particular process methods that favor domestic industries, and anti-competitive arrangements were all scrutinized for the obstacles they created to consumer choices.28

The Court took on consumer discrimination as a powerful tool to enhance market integration: “Free movement of goods concerns not only traders but also individuals.”29 Freedom of movement in the case of trade in services was also deemed to cover the consumer of such services, including, for instance, tourists, medical patients, and students.30 The Spanish museum case is a more recent illustration.31 Public museums were free for Spanish citizens and residents and other EC nationals under age 21, but Spain charged a fee for non-Spanish EC nationals over age 21. The Commission argued that “discrimination with regard to admission to museums may have an effect on the conditions under which services are provided, including the price thereof,

28 Micklitz and Weatherill, supra note 25, at 286-88.


and may therefore influence the decision of some persons to visit a country.” 32 The Court found that the price discrimination was a violation of Articles 733 and 5934 of the Rome Treaty. Thus, even though the Rome Treaty did not explicitly protect the rights of consumers, the Court construed its provisions to prevent discrimination between consumers of different member states in the same way that it had a long-established jurisprudence prohibiting discrimination among producers.

Conversely, domestic rules that were ostensibly crafted as consumer protection measures, were struck down when the Court found that they did not actually serve a consumer interests and merely acted as a protectionist device. 35

32 Id., at I-919.

33 “Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.” Treaty of Rome, supra note 6, at 5.

34 “Within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished in the course of the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person to whom the services are supplied.” Id. at 24-25.

35 Case C-120/78, Rewe Zentrale v. Bundesmonopolverwaltung fiir Branntwein [1979] E.C.R. I-649 (the so-called “Cassis de Dijon” case, where Germany purported to protect consumer health by restricting the marketing of weak alcoholic beverages). In another case involving restriction on the marketing of strong alcoholic beverages, the Court allowed the measure because the interest of protecting consumer health overrode the free-trade interest in consumer choice. Cases C-l/90 and C-176/90, Aragonesa de Publicidad Exterior SA (APESA) v. Departamento de
In a number of cases, then, the European Court of Justice recognized that free trade could be fostered by allowing consumers to access various products and the court has been skeptical of domestic measures that impeded such free-market oriented consumer choice. Equally, though, the Court has recognized the legitimacy of members states’ regulatory choices to protect consumer interests, even at the cost of a trade restriction for producers.

This tension between consumer’s freedom of choice and public law can also be framed as the ever-conflicting relationship between free markets and government regulation. In effect, the Commission and the European Court of Justice strived to find a balance between bringing down domestic measures that limit consumers free access to foreign goods and services, and supporting regulation of what it considered as legitimate and necessary protections of consumers’ interests. While the first objective involves deregulation, the second commands regulation in the face of market failures (such as a producer’s anti-competitive behavior, deceptive advertising practices, etc.), and sustaining public policies corresponding to the local social mores (social choices about exposure to health risks, to environmental risks, to goods or services offending public moral, etc). Because the EU market integration is not grounded in a neoliberal deregulating ethos, its institutions are perhaps more comfortable with balancing those two concurrent objectives than other fora, such as the WTO.

A separate title on consumer protection eventually became part of the founding treaty with the Maastricht Treaty of 1992 (Title XI). This treaty established a tiered approach:

---

Sanidad y Seguridad Social de la Generalitat de Cataluna (DSSC) 1991 E.C.R. I-04151. This suggests an overt balancing approach by the court between consumer and producer interests.
- Consumer protection measures may be adopted “in the context of completion of the internal market” (Article 129a(1)(a));

- The “health, safety and economic interests of consumer and [providing] adequate information to consumers” is another area for action by EC institutions to “support and supplement” actions by member states (Article 1291(1)(b)); and

- Member states can still adopt more protective measures so long as they are compatible with the treaty (Article 129a(3)).

Hence, the original rationale of consumer protection as part of the market integration mission was maintained, but an independent ground for consumer protection for its own sake now also emerged. This was particularly salient regarding the level of consumer protection. The ability of states to maintain higher standards (provided, for instance, that they are not discriminatory or otherwise in violation of other provisions of the treaty) ensures that the EC will not engage in a race to the bottom of consumer protection. This is particularly important when producer-centered liberalization would command laissez-faire, but consumer interests require a regulatory safeguard. The EC’s independent regulatory competence and the members states’ ability to regulate even more protectively frame the possible conflicts between market deregulation for producers, and the need to protect consumer interests to ensure broader access to goods.

Like the WTO, the EU started with trade liberalization policies that emphasized non-discrimination amongst producers, rather than consumers. Both EC policy-makers and adjudicators, though, soon realized that consumer protection was an essential component of a free and integrated market. They therefore interpreted the non-discrimination mandate of the founding treaties to cover the interests of both producers and consumers. That is not to say that the ECJ or the Commission have systematically upheld member states’ consumer protection
measures to the detriment of foreign producers. To the contrary, they sought to determine the overall impacts of the measures on free markets.

Empirically, then, the EU history and the success of its trade integration mission\(^{36}\) indicate that the assumption that consumers are always fully compensated for producer-oriented trade regulation through lower prices is not necessarily verified. Consumers have interests additional to – and at times even conflicting with – those of producers. It therefore appears that while consumer protection and producer-oriented liberalization are aligned for the broader purpose of creating an open market, they can also at times conflict regarding the ways and means in which to achieve such a market.

That still leaves several questions unresolved. First, while the EU model provides for some arbitrage between consumers and producers, there is no way to tell whether it does so optimally. We need more empirical and theoretical studies regarding the economic costs and benefits of different allocations of welfare between producers and consumers, and the costs and benefits of protecting consumer interests, as compared to a more strictly producer-oriented liberalization.

---

\(^{36}\) The article *The Dynamics of International Trade Integration: 1967-2004* uses a set of indicators to measure the success of trade integration, noting the case of the European Union, between 1967 and 2004. Ivan Arribas, Francisco Perez and Emili Tortosa-Ausina, *The Dynamics of International Trade Integration: 1967-2004*, 181 EMPIRICAL ECONOMICS 377 (2013). See also Ivan Arribas, Francisco Perez and Emili Tortosa-Ausina, *A New Interpretation of the Distance Puzzle Based on Geographic Neutrality*, 87 ECONOMIC GEOGRAPHY 335, 336, 351 (2011) (suggesting that there are a number of studies that attempt to accurately measure the success of trade integration in Europe but often fail to take into account important factors such as distance among countries).
Second, if we accept the plausibility of the hypothesis that increased welfare and deeper trade liberalization might be achieved by addressing those consumer interests, the next question is to determine the optimal regulatory forum (or fora) for doing so. While more theoretical and empirical research in law, economics, and social sciences is needed to answer that question, the second part of this article aims to open the discussion by assessing what states have undertaken at the regulatory, institutional and jurisprudential levels at the WTO with respect to consumer interests. It will be followed by a consideration of consumer interests in other trade law regimes.

II. ASSESSING CONSUMER PROTECTION AND CONSUMER DISCRIMINATION IN WTO LAW

Even though the WTO agreement does not explicitly articulate a prescriptive position with respect to the relationship between trade liberalization and consumers, numerous areas of WTO law have an impact on consumers. Sanitary and phytosanitary measures, labeling requirements, and even anti-dumping and countervailing duty disciplines are some of the relevant areas for this enquiry. In fact, a wide array of WTO disciplines have a direct impact on consumers, even though the rules have not been crafted for consumers as a primary actor of the trade transaction. This section maps the WTO rules that have a direct relationship to consumers by creating

---

37 In the EU, the development of consumer protection at the EC level has not gone without resistance from member states. Germany, for instance, used the principle of subsidiarity to push back on Commission regulatory efforts. Subsidiarity, a principle enshrined in the founding treaties, requires that policies be devised at the lowest possible regulatory level where they would be effective. Hence, if deceptive advertisement can be appropriately regulated at the domestic level, it should be handled at that level, and not at the EC level.
incentives and opportunities for consumer protection and discrimination (Section A). Beyond the black letter of the law, thinking about the intersection between trade liberalization and consumer interests requires to assess the missed opportunities to incorporating consumer interests in trade disciplines. Section B examines how possibly competing interests of domestic consumers, domestic producers and foreign producers permeate a number of trade disciplines, particularly antidumping, subsidies and safeguards. Last, Section C concludes that a deliberate allocation of consumer and producer interests is largely lacking in the law and practice of the WTO because of an insufficient normative understanding regarding the respective roles that consumers and producers play in trade liberalization.

A. Opportunities for Consumer Protection under the WTO Agreement

Protecting consumer interests from an international trade perspective largely matches the domestic set of concerns but also presents additional aspects. First, in its narrowest sense, consumer protection is concerned with conveying truthful and accurate information about the goods and services offered to consumers. Labeling requirements and other measures related to claims about the product or service are typical legal instruments used to further consumer protection and they are in part shaped by the WTO framework. Second, it also deals with product safety. Here again, WTO rules on sanitary and phytosanitary measures, and on the adoption of standards play a significant role. Third, in a somewhat broader sense, consumers’ interests include the price at which goods and services are offered. The trade regime has an impact on pricing in a variety of ways: regular duties and tariffs, and other duties, such as safeguard measures, antidumping duties and countervailing duties. Once the product is imported, internal tax and other sales and distribution measures also affect the traded item’s price for consumers.
Such measures are often, but not always, covered by the WTO agreements. Competition (or antitrust) rules also come into play here, although the on-going debate whether to include such rules in the WTO is mostly focused on the business aspects, rather than the effect of monopolistic behavior, price-fixing, etc. on consumers.\(^ {38} \) Fourth, in an even broader sense, consumers care about the availability of products in a market they can reach. This issue goes to the core of the trade liberalization project, as goods and services that would not be traded due to protectionism would not be available to domestic consumers. That last aspect is relatively self-evident and thus far the main way in which the trade regime and consumer interests have been understood to intersect by lawyers and economists – it will be addressed only briefly in this section.

This section presents an overview of the WTO provisions that address these four aspects of consumer protection. In a number of instances, the WTO agreements explicitly mention consumers in relation to these provisions. Member states have also presented consumer interest arguments in a surprisingly high number of disputes. Thirty-one GATT panel reports mention consumers and 157 panel and AB reports have mentioned consumers since the inception of the WTO, though only a few dozen did so in any significant way. However, in most cases, the argument is side-stepped by the panels or the Appellate Body, in large part because the covered agreements lack a legal basis for the specific claim.

1. Conveying Truthful Information to Consumers

The TBT and SPS Agreements, to some degree, encourage the use of international technical standards, which help to convey uniform information about products. The TBT Agreement

39 Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 33 I.L.M. 1125, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], Preamble (“Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard…Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention”), arts. 3, 4; Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 33 I.L.M. 1125 [hereinafter TBT Agreement], Preamble (“Desiring
explicitly endorses the prevention of deceptive practices in its preamble. Article 2 of the TBT Agreement further states that the prevention of deceptive practices is a legitimate objective for the adoption of domestic technical regulations.40

GATT Article IX, on marks of origin, expressly mentions consumers:

The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

Rules on geographic indications, which feature in the TRIPS and GATT, have a bearing on information to consumers and the prevention of deceptive advertising practices. However, the concern in the GATT, for instance, seems to be protecting products that are genuinely entitled to the indication from competing products that are also using it, rather than preventing confusion amongst consumers.41 By contrast, the TRIPS explicitly mentions preventing the use of

therefore to encourage the development of such international standards and conformity assessment systems”), art. 2.6, 2.7.

40 TBT Agreement, supra note 39, art. 2.2.

geographic indications “which misleads the public as to the geographic origin of the good.”\textsuperscript{42}

The rest of the section, though, is mostly aimed at preventing an illegitimate protectionist use of the geographic indications. An allowance under the TRIPS Agreement to provide limited exceptions to trademark rights has also been interpreted to include the “legitimate interests” of consumers alongside those of the trademark owner.\textsuperscript{43}

The TRIPS provision on geographic indications for wines and spirits also reflects a concern regarding possible consumer confusion between homonymous indications.\textsuperscript{44} More tangentially, the Agreement on Rules of Origin, while it is not explicitly designed to protect consumers, may

origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation.”).


\textsuperscript{44} TRIPS Agreement, \textit{supra} note 42, art. 23.3 (“Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.”).
also indirectly convey information to consumers about the place where a product has been produced, if labeling rules enable or require it. In a world where consumers are increasingly sensitive to the place and manner in which a good has been produced, rules of origin ensure a certain harmonization in the manner in which states can determine the official origin of a good.

The Agreement on Agriculture exempted certain measures from the prohibition on domestic support, including government expenditure for “advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers.”

The case law suggests that panels and the AB have difficulties parsing out the legitimate objective of ensuring that consumers are not mislead by producer claims on the one hand, and disguised protectionism on the other hand.

The Japan–Film case involved a number of “administrative guidance” measures enacted by Japan to regulate certain promotional practices but also resulted in decreased distribution of foreign photographic film. The measures, which were technically not binding on retailers and industry but which in practice heavily influenced distributors, were found to be in violation of the WTO agreements. The parties debated at length on the objective of the measure. Japan argued that it was a consumer protection measure because it addressed unfair commercial


practices, including misleading representations to consumers and other enticements to consumers that had nothing to do with the quality of the product. The United States responded that the measure was merely a protectionist device to keep US film (in practice, Kodak film) out of the Japanese market, to the advantage of Fuji film and other Japanese-made products. The Panel simply bypassed this debate, devising instead a landmark three part test: Is there a measure by the state, is there a legitimate expectation of a trade benefit by the complaining party, and did the measure cause that benefit to be nullified or impaired? That test left no room for an enquiry into the purpose and objective of the measure. Only the trade restrictive effect was relevant, balanced against legitimate expectations of foreign producers wishing to enter the Japanese market. Whether the measure was a consumer protection measure was not even balanced against its trade restrictive impact.

Several other cases involved measures allegedly designed to avoid consumers being misled or deceived about a product. The EC, in particular, was challenged in a number of instances. In EC–Sardines, it described the objective of its regulation on sardine labeling as:

(a) to keep products of unsatisfactory quality off the market; (b) to facilitate trade relations based on fair competition; (c) to ensure transparency of the market; (d) to ensure good market presentation of the product; and (e) to provide appropriate information to consumers. … The European Communities further argues that the third objective pursues consumer protection and the promotion of fair
competition, and that the promotion of fair competition is in the interest of
consumers but also serves wider economic objectives. The Panel noted that since both parties agreed that the objective was legitimate under Article 2.4 of the TBT Agreement it would simply proceed on that assumption without deciding the matter. The Panel also agreed with the EC and a number of third parties that the Codex Alimentarius was a relevant international standard. It provided that “sardines are to be labelled [sic] in a way that does not mislead consumers.” Unlike the Japan–Film case, then, this case suggests that there may be a basis under the WTO agreements to maintain consumer protection measures aiming at the prevention of deceptive commercial practices notwithstanding ancillary trade-restrictive effects. The measure would have to comply with other WTO disciplines as well, particularly in the manner in which the measure is applied. However, technically, the question remained open whether the TBT agreement enabled consumer protection measures regarding deceptive or misleading labeling since the panel assumed, but did not decide, this issue.

48 Id. para. 7.122.
49 Id. para. 2.9. See also paras. 7.137, 7.139 and arguments of third parties Peru, Canada and Venezuela at paras. 4.26-4.27, 5.78.
The recent *US–Tuna II*\(^{50}\) case also relies on a reading of TBT Agreement Article 2.2 that makes the protection of consumer against deceptive practices a legitimate objective. In this case, the US argued that the objective of the Dolphin Protection Consumer Information Act and related regulations were

(1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) contributing to the protection of dolphins. The prevention of deceptive practices and the protection of animal life or health are expressly identified as legitimate objectives in Article 2.2 of the TBT Agreement, and the objectives of the US dolphin-safe labelling [sic] provisions squarely fall within these two objectives.\(^{51}\)

The Panel found the measure to be a technical regulation within the meaning of the TBT Agreement and that it did not treat Mexican products less favorably than US products. However, it found that “in relation to both objectives of the US dolphin-safe provisions, ... these measures are more trade-restrictive than necessary to fulfill their legitimate objectives, taking account of the risks non-fulfillment would create,” ultimately striking down the measures.\(^{52}\) Unlike the *Japan–Film* case, then, the Panel did engage in a balancing exercise here between the consumer protection element of the measure and its trade restrictive impact, using the familiar standard of


\(^{51}\) *Id.* para. 4.176.

\(^{52}\) *Id.* para. 7.620 (finding the measure to breach Article 2.2 of the TBT Agreement).
the “least trade restrictive alternative.” The Appellate Body reversed the Panel’s finding on both issues. First, it ruled that the Panel incorrectly allowed the regulation to be based on a distinction in fishing methods (dolphin-safe, versus not dolphin-safe).\(^53\) Product distinction based on process and production methods, rather than the products’ inherent characteristic or the country of origin, is therefore once again in legal limbo, despite consumers’ increasing concerns regarding the manner in which products are produced, and the ability to distinguish between products based on production method. Fair trade products and sustainably-produced goods, for instance, are products distinctions recognized by consumers, but that might not pass muster as a legal basis for a different treatment at the WTO after this case and another recent case.\(^54\) Second,


the Appellate Body reversed the Panel on its finding that the measure was more trade-restrictive than necessary. Here, the AB confirmed that three elements must be balanced for this determination: how trade-restrictive is the measure, whether it contributes to a legitimate objective, and the risks of not fulfilling that objective.55

Measures to prevent consumers from being misled have also been assessed under the SPS Agreement in the EC–Biotech case. The EC argued that its Directive banning the import of certain genetically-modified (GMO) products was in part meant to prevent consumers being mislead about the novel foods. The Panel attempted to fit this objective within SPS Annex A(1) on “labelling [sic] requirements directly related to food safety.”56 It read the term “food safety” to include the safety of such substances as food additives, contaminants (including pesticide residues) but it concluded that “to the extent Regulation 258/97 is applied to ensure that novel foods not mislead the consumer, it does not constitute a measure applied to protect the life or health of consumers from risks arising from, e.g., additives or contaminants in foods.

gave way to use by consumers in determining that the various kinds of coffee were “like products”).


Accordingly, we consider that the second purpose of Regulation 258/97 falls outside the scope of Annex A(1).”

Geographic indications (such as Genoa salami, Dijon mustard, or Champagne) are another way in which consumers are saved from being misled about the nature and quality of a product. Although the relevant TRIPS Agreement provisions are not primarily aimed at consumer protection, the EC–Trademarks/GIs case emphasized the role of trademarks and geographic indications for consumer protection purposes. With respect to trademarks and exceptions to trademark rights, the Panel asserted that “[c]onsumers have a legitimate interest in being able to distinguish the goods and services of one undertaking from those of another, and to avoid confusion.”

Examining an EU regulation on geographic indications, the Panel found that it “expressly addresses consumers, by providing for the refusal of GI registration where ‘registration is liable to mislead the consumer as to the true identity of the product,’” demonstrating that this provision of the Regulation “was, in fact, applied to take account inter alia of the legitimate interests of consumers.”

Overall, then, labeling is perhaps the area where WTO rules are most consumer-oriented, but labeling standards vary across WTO agreements, including SPS, TBT, rules of origin, and TRIPS. In a number of instances, the rules aimed to prevent a form of unfair competition by

---

57 Id. para. 7.412.


59 Id. para. 7.677.

60 Id. para. 7.678.

61 Wendy Johnecheck, Consumer Information, Marks of Origin and WTO Law: A Case Study of the United States – Certain Country of Origin Labeling Requirements Dispute, Food Policy and
producers rather than at protecting consumers and the case law to some extent also reflects this producer orientation.

2. Protecting Consumers’ Health and Safety

Most obviously, the SPS and the TBT Agreements allow states to impose health and safety standards. The GATT allows members to take measures necessary to protect public health (Article XX(b)) and the environment (Article XX(g)). For instance, the EU bans on meat produced using growth hormones and on genetically modified organisms were both allegedly for purposes of preventing consumers from consuming potentially harmful products. However, Applied Nutrition Program Discussion Paper, No. 43. (March 22, 2010), available at http://ssrn.com/abstract=1579828 (discussing the US–Meat COOL dispute with respect to consumer information labeling regulations).

62 SPS Agreement, supra note 39, Preamble (“Desiring to improve the human health, animal health and phytosanitary situation in all Members… Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade”), art. 2.1; TBT Agreement, supra note 39, Preamble (“Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate”), art. 2.2.

these provisions are not aimed exclusively at consumers, and indeed, have been used for a variety of other purposes, including to protect the public at large, common goods such as the environment, and biodiversity. Under the SPS Agreement, some have also seen opportunities for balancing consumer interests against economic interests (presumably of the producers). 64

A number of cases deal with measures allegedly devised to protect consumer against physical risks from consumption or exposure. EC–Hormones inaugurated this line of cases. 65 The EC presented its measure as a response to consumers’ health concerns, although the measure itself was simply a ban on the import of meat produced with certain growth hormones. 66 Ultimately, however, the measure was assessed against various objective standards relating to the actual risk to health and the proof of the science behind it to decide whether it complied with the WTO agreements. In other words, states can only take measures to protect consumer health if there is

64 Larry A. DiMatteo, Kiren Dosanjh, Paul L. Frantz, Peter Bowal and Clyde Stoltenberg, The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime, 36 VAND. J. TRANSNAT’L L. 95, 100, 130-132 (2003); Alexander Donahue, Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards, 30 ENVTL. L. 363 (2000); Bruce A. Silverglade, The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?, 55 FOOD DRUG L.J. 517, 521 (2000) (arguing that the SPS Agreement is not a meant to protect public health but rather is a business-oriented agreement).

65 EC—Hormones, supra note 63.

66 On the role of consumer protection in the hormones debate, see e.g., Michele D. Carter, Selling Science under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormone Controversy, 6 MINN. J. GLOBAL TRADE 625 (1997).
scientific evidence of a risk to health. The issue is not whether the EC could protect consumers (it is well established, in theory at least, that states can decide what level of risk is acceptable to them), but rather whether there was anything to protect them against. Perception of risk by consumers is irrelevant to that enquiry.

The *EC–Biotech* case raised similar issues regarding the regulation of real or perceived risks to consumers’ health. In addition to the objective of preventing consumers from being mislead, the directive’s “fundamental purpose” was to “ensure that the covered novel foods and food ingredients: (1) not present a danger for the consumer; …and (3) not differ from foods or food ingredients which they are intended to replace to such an extent that their normal consumption would be nutritionally disadvantageous to the consumer.”67 The Panel responded that “the phrase ‘danger for the consumer’ should be understood as referring to a danger for the life or health of the consumer.”68 It then equated the possibility of undesirable substances being present in the GMO products to the potential danger to life or health to conclude that this element of the directive fit within SPS Annex A(1)(b) “to protect human or animal life or health […] from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.”69 With respect to the third purpose of the directive, by contrast, the Panel found that “to the extent that Regulation 258/97 is applied to ensure that novel foods are not nutritionally disadvantageous for the consumer, we think it cannot be considered a measure applied to protect the life or health of consumers from risks arising from, e.g., additives or contaminants. In other words, we consider that the third purpose of Regulation 258/97 is not covered by Annex A(1) [of

---


68 *Id.*, para. 7.404.

69 *Id.*, para. 7.407.
the SPS Agreement].” This reasoning exemplifies the possible disconnect between states’ consumer protection measures and the WTO rules available to support such measures. Because the latter might not have been devised with consumer protection in mind, retrofitting domestic consumer protection measures to match the specific purpose of a WTO measure may be impossible.

In a different case, Chile unsuccessfully defended a measure resulting in higher taxation of imported alcoholic beverages than domestic products by claiming inter alia that it was considering consumer health in deciding to impose a higher tax on beverages with higher alcohol levels (which happened to be the imported products).71

In the services context, a risk to consumers’ health argument was presented by the United States to justify the adverse treatment of online gambling services.72 The United States argued, with the support of experts, that the risk of pathological gambling for consumers was increased in the

70 Id., para. 7.414.
online environment, compared to “brick and mortar” gambling facilities. The Panel rejected the argument and decided the case on different grounds.

Some health-related cases focused on whether the consumer perception of two products as being alike should matter. If goods are “like products” under WTO rules, a measure treating the products differently would be a prohibited discrimination. In EC–Asbestos, the EC argued that consumers did not perceive the asbestos-containing products at issue to be “like” the asbestos-free equivalent. Canada, in response, contested that consumer tastes and habits had any relevance to the likeness determination. Overall, there appears to be a discrepancy between what

73 Id. paras. 6.494-6.513. The Panel, however, recalled a statement by the Appellate Body in a dispute on goods that “[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994.” Id. para. 3.156 (referring to Appellate Body Report, European Communities—Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/AB/R (Mar. 12, 2001) (adopted Apr. 5, 2001) [hereinafter EC–Asbestos], para 113.

74 Likeness comes up in a number of WTO provisions and has been interpreted differently throughout the agreements. In a number of cases discussed below, panels have considered the following factors to determine likeness under Article III of the GATT (national treatment obligation): the product's properties, nature and quality, the product's end-uses in a given market, and consumers' tastes and habits. See, e.g., Panel Report, Philippines–Taxes on Distilled Spirits, WT/DS396/R, WT/DS403/R, as modified by Appellate Body Report, WT/DS396/AB/R, WT/DS403/AB/R (Aug. 15, 2011) (adopted Jan. 20, 2012) [hereinafter Philippines–Taxes on Distilled Spirits], para. 7.31.

75 EC–Asbestos (Panel Report), supra note 73, para. 3.450.
consumers might consider to be product-differentiating information (such as whether tuna was caught with fishing methods harmful to dolphins) and what WTO rules recognize as appropriate criteria upon which to treat similar products differently. While the role of consumer preferences in product likeness analysis does not go to the issue of consumer protection directly, it does inform the broader point of the WTO as a producer-centric trade liberalization system that insufficiently takes into account consumers as key actors in the trade transaction.

The case law on consumer protection from health risks, product information for consumers, and the prevention of deceptive commercial practices against consumers, is still embryonic and leaves many questions unsettled. Emerging trends suggest that WTO law largely displaces enquiries into consumer protection objectives by focusing on objective risk assessment and whether the measure was trade restrictive or otherwise incompatible with affirmative GATT or WTO disciplines. In other words, the WTO agreements include some measure of permissiveness for consumer protection, but that always recedes in the face of mandatory WTO disciplines.

3. Consumer Interest in Pricing

Consumers have an interest in obtaining goods and services at the best available price (keeping in mind that this does not necessarily mean the lowest price in absolute terms, but rather the lowest price for whatever level of product differentiation, quality and guarantees and other ancillary services the consumer seeks). In the trade context, that translates into a myriad elements additional to the production costs: transaction costs, transportation, insurance, duties and other export and import related fees, etc. WTO rules do no govern all of these elements, but they have a bearing on most. Past and current negotiations on trade facilitation would help to decrease transaction costs and other administrative costs related to import and export. Members’ tariff
schedules set the bound duties. Disciplines prohibiting less favorable domestic taxes on imported products also affect the pricing of the goods. Additionally, trade remedies (safeguard duties, antidumping duties and countervailing duties)\textsuperscript{76} may be imposed in certain circumstances, typically resulting in a price increase for consumers and in extreme cases, in making the foreign

\textsuperscript{76} Under WTO law, safeguards are an additional emergency duty that a state can impose on goods when the domestic industry of the like product is adversely affected by a sudden and unforeseen surge in imports of the competing products. See GATT, supra note 41, Art. XIX and Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 1869 U.N.T.S. 154 [hereinafter Agreement on Safeguards]. Antidumping duties may be imposed when the investigative authorities of a country find that a foreign product is sold on the domestic market at less than normal value (typically meaning at less than the price at which that product is sold on the foreign market of production, but there are additional ways of determining the “normal value”) and that causes an injury to the competing domestic industry. See GATT, supra note 41, art. VI and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement], 1868 U.N.T.S. 201. Countervailing duties may be imposed by a country to offset the effect of a foreign subsidy when it causes certain damages to the domestic industry. See GATT, supra note 41, Art. XVI and Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement] See generally MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION – LAW, PRACTICE, AND POLICY, chapters 11, 14, 15 (2d ed. 2006).
good so uncompetitive that it will no longer be offered to domestic consumers. Such trade remedies are typically imposed to protect domestic producer of competing goods from foreign trade practices or general circumstances that WTO members have deemed to be “unfair” to their domestic producers. This section first focuses on trade remedies, which are a unique area where the interests of domestic producers may be pitted against those of domestic consumers, while domestic consumers’ interests may be aligned with those of foreign producers. The issue, then, is how the WTO procedures for allowing domestic authorities to impose trade remedies accounts for these potentially diverging interests. It then discusses other cases where disputed measure affect the price of the goods to consumers.

Intersection between Price and Trade Remedies

Certain aspects of anti-dumping investigations call for information to be submitted both by the producers and the users of the product, including industrial users and consumers if the product is sold at retail level. Information from consumers is understood to be conveyed through “representative consumer organizations.”77 Similarly, the Subsidies and Countervailing Duties Agreement (SCM Agreement) requires the investigative authorities to give “representative consumer organizations” an opportunity to comment on the subsidization, injury and causality

77 Anti-Dumping Agreement, supranote 76, art. 6.12 (“The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.”).
elements. The SCM Agreement also calls for the domestic authority determining whether and at what level countervailing duty should be imposed to take into account “representations made by domestic interested parties”, defined to include “consumers … of the imported product subject to investigation.” This clause, however, is purely permissive – some would even say hortatory – as it does not use the language of legal obligation and does not prescribe a mandatory conduct. In all these cases, the interests of consumers may be adverse to those of the domestic industry petitioning for antidumping or countervailing duties. Indeed, domestic consumers may be paying less for a good because the good is subsidized by foreign taxpayers. Not only are consumers getting a better price, they do not have to pay indirectly through taxes used to fund the subsidy. In this case, the foreign subsidy is largely a transfer of wealth from the foreign taxpayer to the domestic consumer.80 With respect to antidumping, domestic consumers may also wish to continue to purchase the cheaper imported product, even if it is sold at “less than fair value” and injures the competing domestic producers. In the safeguards context, the domestic

78 SCM Agreement, supra note 76, art. 12.10 (“The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.”).

79 SCM Agreement, supra note 76, art. 19 and footnote 50.

80 Economists hotly debate the economic and social effects of subsidies and countervailing duties and the long term impact of subsidized good (and to some extent dumped goods) can be complex. Some analogies have been drawn from the anti-trust context, where a good is sold at a predatory price benefits consumers in the short term but by driving out the competition, poses the risk of later monopoly pricing or decreased availability of alternate suppliers, etc.
industry wishing to be protected by a safeguard measure must show that the damage or threat thereof that they sustain is caused by the increased quantity in imports of the competing foreign product, and not by other factors such as changes in consumer preferences.\textsuperscript{81}

However, the WTO agreements are largely silent regarding how the domestic authorities might balance the information and interests originating from consumers and that originating from producers. In the case of the Agreement on Safeguards, the state must apportion the injury to the various causes and may only impose the safeguard if the surge in imports causes the injury. The role and legal effect, if any, of representations from consumer in antidumping and countervailing investigations is less clear and likely minimal. Very little attention has been paid to the interests of consumers in countervailing duty and antidumping cases at the WTO level.\textsuperscript{82} Somewhat more

\textsuperscript{81} Agreement on Safeguards, \textit{supra} note 76, art. 6.2 (“Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference.”).

\textsuperscript{82} In Panel Report, \textit{European Communities—Measures Affecting Trade in Large Civil Aircraft}, WT/DS316/R, as modified by Appellate Body Report WT/DS316/AB/R (June 30, 2010) (adopted June 1, 2011) [hereinafter EC–Aircrafts], the panel understood the EC to essentially argue that subsidies to Airbus enabled it to compete with Boeing, “which competition was good for the consumers… the airlines nad leasing companies, and the travelling public, and that this militates against a finding that those subsidies cause adverse effects to the United States’
weight has been given to consumer perception and representations in the product likeness and market analyses.\textsuperscript{83}

Members have not challenged in WTO disputes how other members seeking to impose trade remedies have weighted consumer interests in their domestic proceedings. WTO adjudicators have been similarly reluctant to give serious thought to the legal effect of consumer interests in trade remedy cases.

The \textit{EC–Aircrafts} case offers perhaps the most explicit reluctance to give weight to consumer interests under the SCM Agreement. There, the Panel stated:

Moreover, we see no basis in the SCM Agreement for the notion that an increase in "consumer welfare" constitutes a defence to a claim of adverse effects caused

\textsuperscript{83} See e.g., EC–Aircrafts, supra note 82, paras. 5.30, 7.1629; Panel Report, \textit{Indonesia — Certain Measures Affecting the Automobile Industry}, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) (\textit{adopted} July 23, 1998), paras. 5.6, 5.8, 5.22. As part of trade remedies investigation, the domestic authorities must identify the comparable products (in some instances called “like products” or directly competing products) and the relevant scope of the affected industry.
by subsidies. Nothing in the text of the Agreement, or in its object and purpose, supports the proposition that the panel can or should take into account possible "positive" effects on competition of subsidies in evaluating claims of serious prejudice. It may often be the case that subsidies in fact contribute positively to consumer welfare – for instance, in *US – Upland Cotton*, the panel found price suppression caused by subsidies, and concluded that the United States' use of subsidies caused adverse effects to Brazil's interests. However, that price suppression presumably also resulted in prices for textiles and clothing that were lower than they otherwise would have been, which is a "positive", while it also reduced revenues to cotton farmers, which is a negative. There is no mention of this in either the panel's or the Appellate Body's decision, and absolutely no basis to think that panels should somehow engage in a consideration that might "balance" these competing effects.84

**Price and Consumer Market Segmentation**

In some cases, the state used a trade measure to correct a market segmentation that penalized certain consumers in terms of pricing. In other cases, the state might want to impose different import duties to goods that are physically the same, but have other characteristics that consumers identify as differentiating features. For instance, is “fair trade” arabica coffee the same as arabica coffee that has not earned the “fair trade” label such that the two coffees might be subject to different import duties? Do consumers perceive domestic and foreign liquor products and brands to be so different that the state could tax these products (and hence their consumption by consumers) at different rates?

The Japan–Alcohol case\textsuperscript{85} was the first to address consumer perception in the likeness analysis at the WTO. A Japanese tax measure categorized liquors as sake, sake compound, shochu (two categories), mirin, beer, wine, whisky/brandy, spirits, liqueurs, and miscellaneous other alcoholic beverages and taxed them differently depending what category a particular product fell into. The result was that shochu was taxed at a lower rate than vodka, gin, rum, whisky and brandy, many of which were imported products. Japan argued that “the primary objective of the policy …is to achieve neutrality and horizontal equity to consumers’ choice or minimization of distortions in competitive conditions among products. …[the] Liquor Tax Law succeeded in doing so in ensuring that the ratio of the tax over the retail price stays roughly constant between categories of distilled liquors.”\textsuperscript{86} The objective was, according to Japan, to create equity between consumers of different tax-bearing ability. In a way, then, the measure may be seen as a consumer protection measure inasmuch as it ensures that low-income consumers who tend to buy particular types of spirits do not bear a disproportionate tax burden for their alcohol consumption (presumably domestic shochu), and that conversely, high-income consumers (including foreigners) who might be less price sensitive bear a more heavy tax burden on the type of spirits that they consume (presumably imported gin, vodka, brandy, etc.). The EC, Canada and the United States (complainants in this case) produced surveys and studies purporting to show that consumers were more sensitive to price difference than to the specific nature of the product when


\textsuperscript{86} \textit{Id.} para. 4.133.
it came to hard liquors, so that gin, rum, brandy, vodka and whisky were really like products to shochu and should therefore be subject to the same tax rate. The Panel and AB found that with respect to the first sentence of GATT Article III:2 (prohibiting internal taxes on imported products in excess of taxes on like domestic products), vodka was taxed in excess of shochu in violation of the provision. Additionally, internal taxes could not be applied to imported or domestic products so as to afford protection to domestic production (Article III.2, second sentence), and here, the tax differential between shochu and whisky, brandy, rum, gin, genever, and liqueurs ran afoul of the prohibition. Japan’s objective of tax equity and consumer segmentation was of no import.

Segmenting markets based on different groups of consumers’ ability to pay is a policy used in many areas and many countries. Consumer segmentation for purposes of sharing the tax burden was also at issue in Korea–Alcoholic Beverages and Chile–Alcoholic Beverages, where Chile

87 Id. para. 4.172. The other reasons for the Panel’s decision were summarized as “(1) the structure of the New Chilean System (with its lowest rate at the level of alcohol content of the large majority of domestic production and its highest rate at the level of the overwhelming majority of imports); (2) the large magnitude of the differentials over a short range of physical difference (35° versus 39° of alcohol content); (3) the interaction of the New Chilean System with the Chilean regulation which requires most of the imports to remain at the highest taxlevel without losing their generic name and changing their physical characteristics; … and, (5) the way this new measure fits in a logical connection with existing and previous systems of de jure discrimination against import.”

argued “it is likewise inconceivable that members of the WTO, particularly developing country members, thought or think that, in joining the WTO and accepting thereby the obligations of Article II:2, they were foregoing the right to use fiscal policy tools such as luxury taxes or exemptions or reduced taxes for goods purchased primarily by poor consumers, even if such policies result in higher taxes on many imports than on many like or directly competitive products.”89 The panel struck the measure down, noting amongst other factors “the lack of any connection between the stated objectives and the results of such measures (recognizing that "good" objectives cannot rescue an otherwise inconsistent measure).”90 It concluded that “dissimilar taxation assessed on directly competitive or substitutable imports and domestic products is applied in a way that affords protection to domestic production.”91 Most recently, the Philippines made an equally unsuccessful argument in Philippines–Taxes on Distilled Spirits, with the Panel ultimately finding “no evidence of the existence of two separate distilled spirit markets in the Philippines that reflect different levels of purchasing power, i.e. one that would consume distilled spirits made from designated raw materials, and another that would consume distilled spirits made from other raw materials.”92 While the Philippines’ and others’ measures were struck down, the Panel’s statement in this case implicitly suggests that such tax measures could be permissible should the market segmentation that the tax was supposed to correct had been found to exist.

89 Chile–Alcoholic Beverages (Panel Report), supra note 71, para. 4.258.

90 Id. para. 7.159.

91 Id.

92 Philippines–Taxes on Distilled Spirits, supra note 74, para. 7.60.
A number of developing countries also implement consumer market segmentation measures in the service sector. For instance, foreigners are typically charged significantly more than Indians in museums, parks and archeological sites in India. This could be read as a discriminatory measure that gives less favorable treatment to foreigners than it does to domestic consumers. The issue is different from those explored here regarding the respective treatment of consumers and producers but warrants mention. The WTO agreements do not appear to include any broad discipline prohibiting such discrimination amongst consumers, whereas the EU has strict disciplines in that respect.

4. Reaching Consumers: Market Access

One of the WTO regime’s main objectives is to open markets for foreign producers. As explained in the first part of the paper, this is also generally considered to be a benefit for consumers in terms of the variety and lower price of the goods and services made available to them, compared to a closed economy scenario. The GATT prohibition on quotas, the objective of tariff reduction, and the market access commitments of the GATS are the most obvious ways in which the WTO system works to ensure availability of goods and services on a competitive basis for consumers. These disciplines, however, mostly focus on protecting foreign producers from protectionist domestic measures, with the benefits to consumers assumed through a “trickle down” effect. However, the benefits of trade liberalization will only be harvested by consumers if the savings in prices are passed on to them. Producers, in contrast, are primarily concerned with maximizing their profits, not necessarily with serving the highest number of consumers. The debate regarding access to medicines and patents has generated a lot of data to show that from an economic point of view, it is not always in the interest of the producers to serve the greatest number of consumers by cutting prices. It may therefore be that market access would
translate into different rules depending whether the objective is to ensure the kind of market access that producers want or the type that consumers want. More empirical and economic studies are needed to develop a more sophisticated analysis but at this preliminary stage, we can at least raise the question at the theoretical level and examine whether and how it has been dealt with at the WTO to date.

In Canada–Milk/Dairy, Canada (the respondent) enacted a “supply management system” designed to “provide the Canadian dairy industry with the means by which they could effectively govern their own affairs, so as to yield a fair return to producers while balancing the interests of processors and consumers.”93 In effect, Canadian dairy producers would benefit from prices for dairy that would not have been as high absent the measure, at the expense of consumers (the measure equally affected Canadian consumers and foreign consumers consuming dairy in Canada). The United States (complaining party) argued that “Canadian consumers would use more milk if domestic prices were lower.”94 Clearly, the United States was concerned about Canadian market opportunities for US dairy producers, rather than simply trying to protect Canadian consumers. However, the United States framed its argument in respect of those foreign consumer interests in order to protect its domestic producers’s interests.

The arguments between Canada and the United States (the complaining party) largely centered on the definition of the word “consumer.” Canada argued for a narrow definition of the term,

---


94 Id. para. 4.177.
supported by its Uniform Commercial Code, while the United States claimed that such a unilateral, domestic reference was not proper in the WTO context and unduly restricted “consumers” to consumers of retail goods. The United States referred to the New Shorter Oxford English Dictionary defining “consumer” as “a person who or thing which squanders, destroys, or uses up; a user of an article or commodity, a buyer of goods or services.” The Panel adopted the broader definition of the term. However, that seemed of limited import to its decision as the Panel immediately shifted the focus back to the WTO members’ expectations resulting from the balance of negotiated concessions (which in this case means the expectations of US dairy producers) in finding that the measure was in breach of Canada’s binding schedule of concessions.

Several trends emerge from the mention or discussion of consumers in WTO agreements and cases. On the one hand, WTO law offers a number of opportunities for states to protect consumers. The covered agreements and cases support measures that are, or can be aimed at consumer protection. One could say, then, that the WTO sets a permissive framework for consumer protection. Consumer protection is enabled within certain parameters rather than substantively regulated under the agreements. Like many areas of WTO law, the disciplines are more procedural, aiming to level the playing field between domestic and imported goods and services. For instance, the WTO agreements allow members to take health protection measures,

95 Id. paras. 4.503, 4.472, 4.489, 4.497, 4.500-4.507.
96 Id. para. 4.503.
97 Id. para. 7.152.
98 Id. paras. 7.154-7.155.
and impose a framework for how members might do so, but the agreements do not require members to take such measures. Similarly, nothing prevents members from prohibiting false advertising, for instance, but the TBT Agreement regulates measures applied in relation to the sale and distribution of goods and its Article 10 requires that an enquiry point exist that is able to answer questions from other members about the measure. On the other hand, when it comes to considering consumer and producers’ interests, the interpretative approach almost always focuses on the latter. The number of cases that raise consumer interests issues is quite large, testifying to member states’ interest and need to raise such issues as part of the trade liberalization regime. Yet, panels and the Appellate Body have been generally unwilling to really engage with consumer protection measures as such and rather have reframed and reduced the measures to producer discrimination devices. In many cases, the measure was struck down because it resulted in a barrier to trade that limited imports of foreign products or services. The next section further discusses this disconnect. Overall, it appears that panels have been loath to depart from tests and analytical frameworks that largely ignore the place of consumers in the trade transaction, and have declined to consider a balancing of consumer and producer interests where the two appear to conflict, even when there may have been some textual opportunity for doing so. In that respect, both the older EC treaties and the WTO agreements have a narrow textual basis for taking into account consumer interests in the trade liberalization process. Yet, we saw that this textual limitation did not limit the EC’s governing bodies from drawing from the core liberalization and market integration mandate to regulate in the relative silence of the treaties. This story has not been replicated at the WTO, at least with respect to the interpretation of the treaties by the panels and Appellate Body.
B. A Square Peg in a Round Hole? The Lack of a Normative Basis for Consumer Measures at the WTO

More fundamentally, consumers as a legal category have little weight in the interpretation of WTO disciplines. Institutions and persons that fall directly within the purview of the agreements include the various branches of governments involved in making and enforcing laws domestically (including local governments), producers, importers, exporters, industries, the public, and to some extent non-governmental bodies (standard-setting institutions for example). Consumers are recognized only to a very limited extent as objects and even less so as subjects in the covered agreements. Yet, regardless of the macro-economic creed that one subscribes to, from Chicago school neo-liberals to Marxists, it is difficult to describe the economic transaction of international trade without reference to consumers. While the WTO’s trade liberalization ethos is strongly embedded in a classical economics model, it simply subordinates their interest to those of producers, without much examination of the legal and economic implications. As suggested in the first part of this article, the choice is a political one, rather than one dictated by economic theory.

As a consequence, domestic consumer protection measures cannot be evaluated as such under the covered agreements. Rather, the measure has to be recast as a measure to protect public health, or a measure to protect the environment, or a measure affecting the sale or distribution of goods, etc. The practical implication is that domestic consumer-oriented measures must be redefined to fit within recognized WTO categories if they are to pass muster under the agreements. In some cases, the overlap between the consumer protection objective and the objective that would be recognized under WTO law is such that the measure can be upheld. For
example, a measure requiring a food product offered for sale to consumers to meet certain hygiene standards can be devised as a consumer protection measure domestically. As far as WTO obligations and adjudication are concerned, though, the measure might be allowed if it meets the requirements of GATT Article XX(b) or the SPS Agreement. Ultimately, the stated objective of the measure may be different in both legal systems (domestic and WTO) but both systems might allow the measure. In other cases, the overlap might not cover the measure. In other words, there is a disconnect between the normative underpinnings for consumer protection measures under domestic law and the assessment of those measures against the producer-centric trade liberalization disciplines of the WTO.

Consider a few examples. A state might recognize that a description of a product as “sustainably produced” allows producers to charge more because consumers perceive a social value in the good (it internalizes certain costs to the environment). Consumers, however, would be deceived if the product was in fact not sustainably produced and the producer simply pocketed the excess profit. A state might therefore wish to regulate the manner in which the “sustainability” description might be used; it might even ban the import of products that do not meet the requisite standard. For instance, the state might ban imports of fish alleged to have been “sustainably produced” when the producer cannot provide the requisite proof that it was, in fact produced in a sustainable fashion. Under the WTO agreements, though, the products are now being differentiated on the basis of process and production methods and in a number of areas of WTO law, that is not a legitimate differentiation. With respect to the sustainably produced fish, the member state will have to argue that the measure “relates to the conservation of exhaustible natural resources” and hence qualifies under Article XX(g) of the GATT. Panels and the Appellate Body might, however, find that there are other less trade restrictive ways to achieve
the desired objective, or that the measure was not really relating to the conservation of an exhaustible natural resource (which would be true since the measure really related to consumer protection). In that case, the disconnect between the legitimate normative grounds for enacting a measure under the WTO and under domestic law would not be bridged.

With respect to “fairly traded” products, the disconnect is even more obvious. “Fair trade” labels typically are meant to indicate that the original producer received living wages, but there would not be any physical difference in the product itself, compared to the non fair-trade equivalent product. A state might be passing a measure regulating the use of fair trade labels solely because it wishes to protect consumers against deceptive practices, not because it wishes to protect the working conditions of foreign workers. If the measure resulted in a decreased market access for non-fairly traded products, it is unclear whether the GATT, the SPS, or any other agreement would provide a cover for this consumer protection measure. A fairly traded and non-fairly traded banana would probably be considered like products, which would prohibit treatment of the product that would result in an impairment of a benefit under the agreements for the non-fairly traded bananas. The state would not even have the fall-back of another legitimate objective for the measure under general GATT provisions as it did with the sustainably produced fish, since Article XX does not provide an exception for measures protecting the labor conditions of workers.

In sum, then, consumer protection in itself is generally not a recognized legitimate regulatory basis for imposing a trade-restrictive measure under the WTO. Rather, states may take consumer protection measures that adversely affect trade only if the measure passes muster as a type of regulation that fits within a WTO-recognized category, such as health protection, environmental
protection, certain types of standard-setting, etc.\textsuperscript{99} Additionally, it is likely that the measure will need to pass the “least trade-restrictive alternative” test. In some cases, that framework will be good enough, but in other instances, the consumer protection objective of a measure might not be fully pursued because it has no legal counterpart at the WTO. Moreover, while WTO members are free, in theory, to determine the level of risk to public health acceptable to them, there seems to be no such presumption with respect to the level of protection for consumer interests.

Three types of solutions could be envisioned to bridge this disconnect. First the WTO agreements could be revised. At minimum, they could provide a stronger enabling framework for consumer protection (since states repeatedly demonstrated that need in disputes) and beyond that, member states might engage in a more careful examination of which trade-related tools might be most effectively deployed to help address the shortcomings of domestic, unilateral consumer protection. It should certainly not be presumed that the WTO is the appropriate forum to tackle these questions, but inasmuch as the WTO’s trade liberalization disciplines have proved to have spill-over effects on consumer protection, a consideration of these effects is warranted.

While treaty revision may seem to be the most obvious avenue, it is the least likely one at present, due to the stalled multilateral negotiations and to the impractical amendment process.\textsuperscript{100}

\textsuperscript{99} Some have even argued that the WTO has essentially prevented member states from “considering social, environmental, and justice issues” when deciding what and from whom to buy. Richard O. Cunningham, \textit{Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures}, 31 L. & POL’Y INT’L BUS. 897, 911 (2000).

\textsuperscript{100} There are also more tangential ways to modify the agreements without recourse to the formal amendment procedure, such as through interpretative decisions by the General Council. \textit{See, e.g.,}
Second, the WTO organs could leverage provisions to address consumer interests already built into the system. Since the WTO agreements textually do provide some opportunities for considering consumer interests (particularly the more regulatory agreements such as the TBT, SPS and TRIPS), deploying interpretative tools in a way that is more cognizant of this objective would be possible. This would require states, adjudicators and the WTO Secretariat (which supports the panels’ work in the report drafting) to think more holistically about the impact of canons such as the “least trade restrictive alternative.” Third, WTO rules that are not explicitly aimed at consumer interests could be construed in a way that affords states more discretion and policy space to address consumer issues.

Equally importantly though, is a preliminary question regarding whether the protection of consumer interests should be multilateralized and if so, what the optimal forum might be. Indeed, even if we are willing to agree that both producers and consumers play crucial roles in the trade liberalization process and hence that one should not necessarily be suborned to the other in the regulatory framework, that still does not establish that should take up the issue of consumers at the supra-national level. The next section seeks to map some of the issues rather than fully answer the question. Certainly, it does not answer the second question as a matter of principle, but instead brings to light more empirical evidence regarding various regulatory experiments that states have undertaken in the trade context for addressing consumer interests.

---

Statement by the Chairman, Decision-Making Procedures under Articles IX and XII of the WTO Agreement—As Agreed by the General Council, Decision of 15 Nov. 1995, WT/L/93 (24 Nov. 1995).
The exploration into the rationales and experiments for multilateralizing the protection of consumer interests does not in any way suggest that multilateralism should or could be a substitute for domestic state action. Rather, the issue is whether there could be supra-national tools for helping states to complement their domestic frameworks and reduce the regulatory failures they are currently facing.

III. Why Multilateralize Consumer Protection, and Where?

The EU example demonstrated that trade liberalization may be pursued through a consideration of both consumer and producer interests while the WTO has focused on a producer-centric model. In practice, however, WTO member states have had to defend consumer protection measures in the WTO context. While that calls into question many of the assumptions behind the WTO model of producer-led liberalization, it does not answer the issue of the appropriate, or even the optimal locus of consumer protection regulation. It could be argued that even if trade barriers can be further decreased by protecting both producer and consumer interests, the WTO should be concerned mostly with facilitating trade for producers and states can protect consumers domestically. Policy rationales in support of this perspective include the different preferences, expectations and risk tolerance of consumers in different parts of the world, and the different polity models for states’ control over individual choices such as consumption choices. At a theoretical level, some may argue that trade agreements are only entered into by states in order to reduce externalities, and they may doubt that consumer interests generate such externalities.

Yet, the past decades have been replete with major debates involving states’ inability to protect domestic consumers, and their incapacity to enforce policy preferences on risk in relation to
international trade. Lead paint toys, tainted baby formula milk, vitamin supplements, and dog food from China, and unsafe generic drugs from India have captured the popular attention. High-profile trade disputes between Europe, the United States and Canada, such as the controversy regarding genetically-modified organisms in corn and other foods, beef produced with growth hormones, and asbestos imports are equally proof that the demand for protection of consumers has overtaken the national state’s regulatory capacity. Even the dispute on gambling services that pitted Antigua against the United States reflects different policy choices about the morality of certain services, and the United States was unable – legally at least – to maintain its policy preference when challenged by a small developing state.

Indeed, domestic instruments available to protect consumers against unsafe or undesirable foreign goods and services are limited and blunt. Prevention tools, such as border inspection are impractical, given the enormous volume of trade and the difficulty to trace the chain of production back to the problem. Mitigation tools, such as import bans and labeling of products sold domestically are only effective once the threat is known. Remedial tools, such as trade sanctions or torts claims for product liability, lack deterrent effect, often provide insufficient compensation and place a huge financial burden on consumers.

101 Elizabeth Trujillo and Jacques de Lisle, Consumer Protection in Transnational Contexts, 58 AM. J. COMP. L. 135 (2010) (surveing US domestic remedies, concluding that consumers face many hurdles when seeking redress for harm caused by foreign products and noting that intergovernmental cooperation on consumer protection has been limited).
The literature is also increasingly identifying the need to address consumer interests both within and beyond the domestic state as a consequence of trade liberalization\textsuperscript{102} though little attention has been paid to how that effort might translate in relation to the WTO’s law and institutions. Consumer protection theorists typically have not framed their enquiries as a debate between producer and consumer interests. Rather, they root consumer protection in the need to remedy a market failure, widely acknowledged and theorized in the domestic realm most recently in relation to consumer finance.\textsuperscript{103} There is no reason to believe that those market failures do not also happen at the international level, particularly when those failures are not addressed – or addressed imperfectly – by domestic regulation. Put another way, regulatory failures that result


in dangers to consumers, such as lead paint in toys, can be seen as negative externalities that producers in the global supply chain have not internalized.

Perhaps even most importantly, states themselves are increasingly looking to international and transnational frameworks to address the challenges of consumer protection in a free trade environment. Renewed interest in the Codex Alimentarius Commission,\textsuperscript{104} the activities of the International Standards Organization and their popularization through information campaigns aimed at individual consumers and businesses, bilateral and multilateral regulatory cooperation processes\textsuperscript{105} are all examples of voluntary undertakings by states at the supra-national level that can only be explained by the recognition that purely domestic frameworks are insufficient. The fact that the EC took up consumer protection at the supranational level is further indication that in an integrated trade system, consumer interests do not stop at the border.

Even while there is no mandate in the WTO agreement dealing specifically with consumer discrimination and consumer protection, such issues have emerged in many instances in dispute


\textsuperscript{105} See, e.g., the International Organization for Standardizations (ISO) comprises 163 countries and develops voluntary standards for products and services; International Consumer Product Safety Caucus bringing together regulators from Australia, Brazil, Canada, China, the EU, Japan, Korea and the United States.
settlement. Much of the current case law focuses on regulatory issues, rather than on tariffs and quantitative trade restrictions. Clearly, then, trade concerns have migrated to a realm which makes it all the more pressing to examine how the current WTO rules respond or fail to respond to market failures other than price and quantity. Far from being the result of pressure by domestic consumer groups and lobbies, most of the consumer interest arguments presented by member states reflect the tension between trade liberalization and its impact on domestic policies regarding product safety, the morality of certain goods and services, and social equity issues in relation to consumption taxes.

This trend raises two broad types of issues in relation to the WTO. First, does the WTO legal regime offer adequate tools to deal with these claims and arguments? The research presented here shows that the traditional producer focus of WTO regulation and adjudication ethos makes it more difficult, if not impossible, to respond to these arguments, largely due to the near absence of consumers as a legal category in WTO law. Second, it shows that consumer protection issues are not limited to the domestic sphere. Indeed, states at the domestic level commonly recognize that consumer interests are not just about price, but about many qualitative and regulatory issues as well. So why would these concerns suddenly disappear if we take commercial policy to the international level?

An exhaustive survey of international and transnational processes regarding consumer protection is beyond the scope of this study. More narrowly, this part first asks whether there are any theoretical reasons why we might expect trade agreements, WTO legal system included, not to address consumer interests. It relies on trade relations theories of why states enter into trade agreements. This part then considers whether other trade agreements that do not feature the
market integration objective of the EU might provide further empirical evidence and models for rethinking the trade liberalization and consumer protection relationship.

A. Trade Relations Theory and Consumer Interests in Trade Agreements

Most economists recognize more or less vocally that trade agreements are hardly fully reflective of classical liberal economics predicates, and that, in fact, the reason why countries enter into trade agreements may be found elsewhere than in the desire to achieve economically optimal trade policy. Perhaps these alternative theories of trade agreements can shed light on the design of the WTO agreements and particularly their emphasis on producers. This section turns public choice theory and its progeny and other political economy theories to enquire whether trade agreements should be concerned with consumer protection issues, or whether their producer-focus reflects a political economy and negotiation optimum.

A seminal attempt at explaining why countries enter into trade agreements is public choice theory. The original insight is that public officials pursue their self-interest, including maximizing their chances of reelection. For that purpose, they are more likely to cater to groups that are well organized and hence can leverage votes or campaign contributions. In the United States, where the theory originated, and in most of the world, industries tend to be more organized than consumers. Import-competing industries will favor protectionist policies while domestic industries that use imported goods for their production will want free trade at least on these imported intermediate goods. The result, then, is a battle between pro-protectionism and pro-free trade industries, which largely leaves out disorganized consumer interests. However,

---

original public choice texts have not explained whether it is economically optimal to disregard consumers from that policy equation.

As a modern variance on public choice, terms of trade theory has been very influential in its account of why states engage in multilateral trade liberalization. Terms of trade theory ascribes multilateral trade agreements to the need to reduce the collective action problem that would otherwise lead to an inefficient tariff equilibrium. Each state unilaterally wishes to set the optimal tariff level for its economy, but other states will respond by raising their own tariff level, in turn offsetting the trade advantage that the first state was seeking.\textsuperscript{107} Trade agreements can reduce this tendency to engage in a trade war. Does this theory explain why trade agreements are primarily concerned with reducing discrimination between producers, and not between consumers?

According to terms of trade theory, large countries, which have the ability to choose their optimal tariff independently, will set their tariffs to maximize national welfare. On its face, this assumes that the interests of consumers in cheap goods and of import-competing domestic industries in keeping out cheap competing products are reflected in the national welfare and are therefore accounted for in computing this optimal tariff. In other words, competing interests of consumers and domestic industries are already reflected as a result of the domestic bargaining process leading to the determination of the optimal tariff. If that is true, then trade agreements would already reflect the most efficient balance of protection and free trade for consumers and producers alike. Terms of trade theory, then, suggests that consumer protection should not be included in international trade agreements because it was already taken into account domestically for the determination of the national welfare.

\textsuperscript{107} Harry G. Johnson, \emph{Optimum Tariffs and Retaliation}, 21 REV. ECON. STUD. 142 (1953-54).
Several problems arise at the theoretical and empirical levels. First, the theory assumes that national welfare is a given that can be determined. It does not differentiate between different distributions of the overall national welfare that may favor certain categories of the population or economic actors, such as consumers and producers. Second, it assumes that the national welfare is indeed an accurate reflection of producers and consumers interests. This is only true if there is no domestic failure of what we could call a political market: all constituents (consumers and producers alike) had full and free information and were atomized such that no group had any preponderant voice. This, of course, is not true in practice. As noted above, industry groups are well organized to capture as much of the political process as possible while consumers tend to be disorganized and uncoordinated, with a much lower and more diffuse impact on policy-making. As Grossman and Helpman note, terms of trade theory is most applicable “when the government cares overwhelmingly about voters’ welfare” or when all voters belong to a lobby group and all industries are organized,\textsuperscript{108} conditions that are typically not verified empirically. Third, the theory assumes that consumers and producers’ interests as they were expressed in the national welfare allocation will be reflected in the balance of the trade agreement. This fails to reflect the fact that even more complex aggregations of interests between the member states take place at the international bargaining level. It may very well be, then, that the trade agreement reflects something quite different from a particular country’s national welfare preference as it was expressed domestically in the first round of the game. For instance, the ultimate set of commitments may end up being biased in favor of producers if the strongest negotiating members had a domestic welfare allocation that favored producers. The aggregation of domestic

positions may have a multiplying effect that leaves domestic consumers in a very different position than what they thought they were getting with the national welfare position.

Grossman and Helpman’s model considers terms of trade theory and public choice preferences of political officials in a small country (which cannot freely set its optimal tariff). The theory uses Putman’s two-level game to describe the interaction between domestic processes and international positions. It also highlights the role of trade to effectuate domestic income redistribution and acknowledges that some individuals are both consumers and hold assets in particular industries, such that they have multiple interests. The authors assume that politically unorganized individual asset owners have no means to influence policy with their campaign contribution such that they are only relevant as individual voters. Unfortunately, the model focuses solely on the industry asset ownership role of individuals, ignoring the consumer-motivated interests, but it is plausible to hypothesize that consumers are largely politically unorganized and therefore have the same type of influence (or lack thereof) as unorganized individual asset owners. In a trade war, “the politicians may value contributions as a source of funding for campaign advertisements and possibly for other reasons. A concern for average welfare will arise if the prospects for reelection depend on the average voter's prosperity.” Rather, they show that “the politically motivated governments tilt trade policies in favor of their organized special interests” compared to what would be predicted by the traditional terms of trade theory optimal equilibrium. Trade agreements, then, are not so much a device to reduce tariff inefficiencies, as they area way to reduce the political costs that politicians impose on each

---

109 Id., at 680.

110 Id., at 682.

111 Id., at 692.
other by choosing their national policies non-cooperatively (independently of other governments). The authors caution that the story is likely even more complex, such that “rates of protection should reflect not only the political strength of the special-interest group at home – as indicated by the extent of its political activism, by the ratio of domestic output to net trade, and by the size of the home import demand or export supply – but also the political strength of the interest group in the same industry abroad.”

Perhaps an even more fundamental limitation to terms of trade theory is that it is mostly relevant with respect to quantitative reduction of trade barriers (quotas and tariffs), which made it pertinent at the time it was formulated. Since the Uruguay Round, however, the largest part of the WTO’s activity and some of the most resilient barriers to trade have been regulatory. It is also unclear how the theory applies to GATS-style market access commitments.

Purely political theories of trade agreements claim that the real motivation for trade agreements is largely divorced from economics welfare theory. For instance, Krugman argues that “optimal tariff argument plays almost no role in real-world trade disputes.” Baldwin also believes that the GATT and others agreements are not about maximizing welfare but rather serve to “maintain international political stability by establishing rules of ‘good behavior’ as well as mechanics for..."
settling disputes.” If that is true, then the decision to ignore barriers to trade created by discrimination between domestic and foreign consumers is a political one, not an economic one.

With its focus on political processes, domestic political commitment theory posits that governments enter into trade agreements as a hand-tying device that improves their bargaining position vis-à-vis domestic pressure groups. Here, governments want to maximize national welfare but import competing producers resist it and impose a high political cost domestically to doing so. Trade agreements remove trade policy making from policy-makers captured by those interests, increases the power of exporting interest groups and raises the cost of yielding to a high tariff policy. In this framework, one might imagine that governments believing that non-discrimination amongst consumers could enhance their trade position would want to include such a feature in trade agreements in order to resist the pressure from better-organized and more vocal import-competing industries. Governments could also thwart international anti-competitive behavior of firms wishing to segment the market in order to extract the highest profits. The EU understood that local discriminatory treatment of foreign consumers reduced the mobility of persons and hence was an impediment to the most effective allocation of labor across member states. Prohibiting less favorable treatment of foreign consumers compared to domestic consumers at the EU level could therefore improve the overall trade equilibrium.

Political commitment models seem to show a correlation between three elements: trade policy outcomes (unilateral domestic or bargained internationally), how strongly organized pressure groups are domestically, and how powerful they are relative to their foreign counterparts. This suggests that as a matter of economics, there is no reason why the interests of producers should

---

trump those of consumers when they are not aligned. Rather, it only suggests that trade policies results from the fact that industries are generally better organized than consumers.

Is that to say that trade agreements focus on producer-oriented trade liberalization because consumers are unable or unwilling to express their trade policy preferences? For instance, it could be that individuals that are both producers (through ownership in capital assets or as workers) and consumers express their trade preference wearing their producers’ hat. They might do so because of path dependency: Since so much of our trade policy has been historically focused on producers’ interests, individuals have come to see it as the only way to influence that policy. Or it could be that individuals who are both consumers and producers chose to express their trade policy preferences as producers for some other reasons.

Baker explores the latter issue. His work focuses on mass public preferences about trade policy, starting with the apparent paradox that “while citizens as producers and nation-state residents may complain about globalization, citizens as consumers often find it hard to resist.”

His theory incorporates a traditional perspective on the welfare effects of high-skilled and low-skilled labor markets derived from the Heckscher-Ohlin model, and empirical analysis from consumption behavior. He finds that public attitudes regarding the desirability of trade liberalization correlates well with the predictions of the Hecksher-Ohlin model with respect to highly-skilled labor market countries. However, he points out that traditional analyses fail to tease out the expected negative correlation with pro-trade attitudes in low-skilled markets (for instance in many developing countries). He also argues that dynamic consumption patterns have


117 Id., at 924.
been overlooked and that there are economic, cognitive and psychological reasons why consumption habits might inform trade policy preferences.\textsuperscript{118} A key element of his analysis is the recognition that consumer tastes vary with income, such that consumers with a higher income will not simply consume more of the goods in the same proportion than a lower income person (nonhomothetic tastes).\textsuperscript{119} By contrast, most international trade theories assume that consumer tastes do not vary when their income increases (homothetic tastes). His four models show that interests of consumers matter in stated trade policy preference, in addition to traditional findings from trade theory regarding the free trade interests of production assets (labor, capital and land). He finds that while “in nearly every country, the poor and the unskilled tend to be more protectionist than the wealthy and the skilled” it is also true that “citizens in less developed countries are actually more enthusiastic about free trade than those in the North.”\textsuperscript{120} Although individual trade policy preferences result from both consumer and producer perspectives, whether they translate into actual policies at the political level is another question. Here, Baker turns to collective action problems and public choice to explain the discrepancy between the role

\textsuperscript{118} Id., at 926.


\textsuperscript{120} Baker, \textit{supra} note 116, at 936.
of consumer attitudes in determining trade policy preferences and the positions taken by governments. ¹²¹

When it comes to explaining why the WTO is a producer-centric trade liberalization system that subordinates, or at times even impedes consumer protection, the literature on states’ motivation for entering into trade agreements provides only partial answers. At best, simple public choice theory stands for the empirically verified proposition that consumers are less able to influence negotiations because they are less organized than producers. Terms of trade theory displaces the question to consider solely an aggregate national welfare that supposedly inherently reflects the distribution of the benefits from trade between domestic producers and consumers. At the very least, public choice theories would need to be combined with two-level game approaches to begin to account for the fact that the domestic balance between consumer and producers might be considerably thrown off when all the member states’ interests are negotiated at the international level. Theories that posit trade agreements as primarily for the purpose of reducing externalities fail to reflect the empirical evidence that purely domestically-based consumer protection is ineffectual in a globalized supply chain and that states have no effective way to unilaterally reduce the resulting costs to consumers. Overall then, political economy and to some extent international relations suggest that the producer-centric model of trade liberalization espoused by the WTO can be explained by domestic and multi-level power plays rather than economic efficiency. As such, it does not provide a convincing argument against multilateralizing consumer protection. State practice, on the other hand, provides ample empirical evidence for the failure of purely domestic regulation, and to some extent, for the

¹²¹ Id., at 934.
desirability of a multi-level framework for consumer protection. The next section examines current experiments with consumer protection in trade agreements other than the EU.

B. The Practice of Trade Agreements Involving Consumer Protection

Based on the theoretical discussion above and the empirical evidence from the EU and the WTO, we might posit that protecting consumers is indeed beneficial to achieve trade liberalization, but we might be unsure whether it is possible to do so absent the type of political project and processes that the EU offers. Global trends in regional trade agreements suggest that it is possible to give consumer interests a normative importance jointly with that of producers in the absence of a full market integration project. The Mercado Commún del Sur (MERCOSUR), the Association of South East Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation Organization (APEC) are discussed in this section.

1. MERCOSUR

The MERCOSUR offers a pertinent narrative for the WTO because the founding treaty includes a number of trade disciplines similar to those enshrined in the WTO treaties. It also brings together state parties that had very different consumer protection regimes.

Similarly to the WTO, the Treaty of Asuncion creating the MERCOSUR generally prohibits discriminatory restrictions to trade (in violation of national treatment obligation of Article 7 or most favored nation of Article 8) and is silent regarding consumer protection. The Montevideo Protocol on trade in services includes a general exception for measures to protect public morals, public health and the environment.122 However, the Montevideo Protocol also provides

---

exceptions to the general disciplines for measures to protect the privacy of persons in relation to personal data, and to prevent fraudulent practices. Some interpret this instrument as creating an opportunity for some level of consumer protection. 123 We have seen that the absent of such exceptions at the WTO limits the ability of states to impose some consumer protection measures that have a trade-restrictive impact.

While the MERCOSUR envisages developing a common consumer protection policy, efforts have focused on harmonizing domestic regulation amongst MERCOSUR member states. Argentina and Brazil developed divergent consumer protection laws in the 1990s, and Paraguay, for instance, did not have any consumer protection laws at the time. 124 Albeit at a much more limited scale, this is similar to the wide variety of regulatory choices by WTO members. In response, some commentators have touted the EU approach as a possible model for harmonizing consumer protection in the MERCOSUR region. 125 A 1994 resolution stated that pending


approval of common regulations, member states’ legislation on consumer protection will continue to apply.\textsuperscript{126} A 1998 resolution began to provide substantive rules on the form of consumer contracts.\textsuperscript{127}

At the institutional level, a Technical Committee (CT No. 7 Defense del Consumidor) specializes in consumer protection. It is an organ of the Trade Commission (Comisión de Comercio del MERCOSUR), which is in charge of applying the instruments devised for common policies. The Technical Committee currently works on a project regarding harmonization of the law applicable to international consumer contracts and also endeavors to establish some “basic principles” on consumer protection.\textsuperscript{128} In 1996, MERCOSUR parties also agreed on a Protocol on jurisdiction regarding disputes involving consumers.\textsuperscript{129}

\begin{quote}
\end{quote}

\textsuperscript{126} Grupo Mercado Común, Defensa del Consumidor, Resolución 126/1994 (June 24, 1994). “Esta norma establece que hasta que sea aprobado el reglamento de defensa del consumidor del MERCOSUR, cada Estado Parte aplica su legislación y reglamentos técnicos en materia de derechos del consumidor a los productos y servicios comercializados en su territorio. En ningún caso, esas legislaciones y reglamentos técnicos podrán resultar una imposición de exigencias a los productos y servicios originarios de los demás Estados Partes superiores a aquellas vigentes para los productos y servicios nacionales u originarios de terceros países.” \textit{Id.}


\textsuperscript{128} MERCOSUR/CXXII CCM/DT Nº 29/11 and \textit{see generally} Report to the Trade Commission MERCOSUR/CCM/ACTA Nº 05/11, Sept. 20-22, 2011, para. 1.4.
2. ASEAN and APEC

Harmonization efforts have also been advocated in Asia, but the variance of consumer protection across the region is great, with many countries operating on a very embryonic regulatory framework in that field.\textsuperscript{130} However, a different path was followed. Consumer protection became a more visible issue in the 1980s in response to efforts by the Regional Office for Asia and the Pacific of the International Organization of Consumers Unions, to the 1985 United Nations Guidelines on Consumer Protection, and to the 1988/61 Resolution of the UN Economic and Social Council.\textsuperscript{131}

The Association of South East Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation organization (APEC) have undertaken some initiatives in favor of consumer protection. For instance, the ASEAN Economic Community Blueprint specifically includes a Consumer protection heading:

The building of an integrated economic region with a people-centred approach in this region has made ASEAN mindful that consumers cannot be precluded in all


measures taken to achieve this integration. Consumer protection measures are already being developed in tandem with the proposed economic measures to address the already emerging consumer protection.

Actions:

i. Strengthen consumer protection in ASEAN through the establishment of the ASEAN Coordinating Committee on Consumer Protection (ACCCP);

ii. Establish a network of consumer protection agencies to facilitate information sharing and exchange; and

iii. Organise regional training courses for consumer protection officials and consumer leaders in preparation for an integrated ASEAN market.132

Building on that framework, an inter-governmental ASEAN Coordinating Committee on Consumer Protection, later renamed as the ASEAN Committee on Consumer Protection (ACCP), was established in August 2007. Consumer protection is explicitly linked to the promotion of a regional trade bloc: “ASEAN has been more mindful that consumer interests and welfare have to be taken into account in all measures implemented to achieve an integrated economic region.”133 The Committee’s strategic approach to fostering consumer protection within the region is three-fold: “(i) notification and information exchange mechanism by 2010;


(ii) cross border consumer redress mechanism by 2015; and (iii) strategic roadmap for capacity building by 2010.”

With respect to the APEC, consumer protection activities have emerged in the Electronic Commerce Steering Group, which is a subgroup of the Committee on Trade and Investment.\textsuperscript{135} This work builds on the broader mandate laid out in the 1998 APEC Blueprint for Action on Electronic Commerce, where APEC ministers agreed that “Government and business should cooperate to develop and implement technologies and policies, which build trust and confidence in safe, secure and reliable communication, information and delivery systems, and which address issues including privacy, authentication and consumer protection.”\textsuperscript{136} In several reports, the Committee has researched and compiled the state of the law in member states on various consumer protection issues, including data protection and privacy. The objective is information sharing to facilitate business within the region rather than top-down EU-style harmonization.

While harmonization has been advocated by some as a needed element of trade in the East Asian region, the state of the law and ongoing institutional initiatives are still largely short of such an objective. Given the wide disparity regarding consumer protection in Asian and Pacific countries, current work in regional organization is dedicated instead to centralizing information.

\textsuperscript{134} Id.


In time, this data gathering and enhanced regulatory transparency may provide a platform for harmonization efforts under the aegis of the APEC or ASEAN, for instance.

3. TPP: Consumer Interests in the Limelight or in the Cross-Fire?

Consumer groups, anti-globalization groups and unions alike have vocally raised the alarm regarding what they see as an undermining of domestic consumer protection in trade treaties and in particular in the TPP project. Conversely, the United States Trade Representative (USTR) released an outline of the negotiations that is careful to emphasize benefits to and protection of consumers alongside the promotion of business interests. At least at the rhetorical level, the recurrent juxtaposition of producer and consumer interests is noteworthy.


138 Touting market access opportunities (generally and in the financial and telecommunications sectors specifically) that “create new opportunities for our workers and businesses and
While the current drafts under discussions are not publicly available, earlier leaked versions of some chapters, in particular the intellectual property chapters make no mention of consumers directly, and focus mostly on the IP rights owners. A few instances of the complex relationship between IP rights and consumer interests are illustrated below, but a full analysis will only be possible with the full text.

Article 2 of the Intellectual Property Rights Chapter\(^{139}\) would require states to allow trademark status to certification marks and geographical indications. As discussed in the second part of this article, certifications and geographic indications are important to conveying truthful information to consumers about the quality, origin, nature or other characteristics of products or services. The move to allow private parties to trademark certifications and geographic indications is interesting in the face of the proliferation of private standard-setting and other quasi-administrative law-

---

making. The implications for consumers should be examined carefully by negotiators and in future research.

Article 3 on internet domain names provides a clearer example of a pro-consumer provision as it requires states to provide appropriate avenues for dispute settlement and public access to databases of contact information for registrants. Enhancing recourses and transparency regarding providers of services is a standard feature of consumer protection measures. Likewise, Article 7 on the protection of cable and satellite programs, which it is primarily aimed at the protection of program producers, also includes a broad provision for civil remedies for “any person injured” by the activities sanctioned in this article. Consumers who pay for program content but are not getting the service they are entitled to for a reason covered by the article may therefore have improved judicial recourses.

Perhaps most controversially, the proposed text unequivocally enshrines a requirement for states to allow patenting of plants, animals and treatment methods for humans or animals (presumably meant to include patenting of human bio materials) (Article 8.2). While patent advocates typically will defend such a measure as one that promotes research and innovation, consumers of remedies from “traditional knowledge” may fear restricted access and higher prices.

As the limelight has shifted from the WTO to the TPP and other RTA negotiations, states find themselves at a crossroads regarding the consideration of consumer and producer interests in trade liberalization. While force of habit might shape the negotiations in favor of a producer-centric regime, there is a growing amount of empirical and theoretical data available for states to reconsider the wisdom of such a position. The WTO’s historic and present focus on reducing barriers to trade for producers is not fully explained by economic theory or trade relations
theories. This theoretical analysis is further confirmed by the practice of states in regional trade negotiations. Both combined suggest that taking into account consumer interests is an increasingly necessary ingredient of trade liberalization and cannot be achieved exclusively domestically. Moreover, as the WTO system moves away from a mercantilist tariff reduction focus, it increasingly denotes a regulatory regime aimed at trade integration. That emerging stage of maturity in the global trading order is more than just about reducing trade externalities, as recognized by theories of trade emphasizing the political dimension of trade agreements.

**CONCLUDING THOUGHTS: TRADE LIBERALIZATION FOR WHOM?**

As the EU legal framework has demonstrated and as a number of regional trade agreements are also exploring, trade liberalization and consumer protection can be complementary. Why then is the latter so marginal in the WTO system? While the political differences between the EU and the WTO regimes are obvious, it is doubtful that they fully account for this divergence. Other regional trade agreements in Latin America and Asia, which do not have the political project of the EU also militate against a simple dismissal of the EU as an irrelevant model for trade liberalization regimes that focus on the reduction of trade barriers, such as WTO, rather than on market integration. Moreover, it may be that the WTO system has reached a level of maturity where it is moving beyond the GATT’s original anti-protectionist mission, and now serves a broader trade integration role. The increased focus in WTO negotiations and adjudication on harmonization of trade rules, rather than the simple enforcement of non-discrimination disciplines may be indicative of this shift. The WTO’s mandate should be the starting point for considering whether there is room for consumer-oriented provisions in the organization’s legal framework.
The Marrakesh Agreement Establishing the WTO states in its preamble that WTO members endeavor to “enter[] into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.” The issue is for whom exactly is the scheme “mutually advantageous”? As the law currently stands, it seems to be for producers as a first order of priority, with the assumption that consumers will necessarily be secondary beneficiaries. The reality, however, at times disproves this assumed trickle down effect, or at least suggests that it is an insufficient vector to protect consumers’ interests. While consumer and producers’ interests are in many cases aligned and complementary, the relationship is more complex than reflected in the current understanding of the WTO agreements.

The question whether consumer protection works for or against trade liberalization is important but is also a red herring. In the EU, it is clearly seen as pro trade because it facilitates the transit of goods, services and consumers throughout the zone. In the WTO legal regime, in many cases, it is considered merely as an unlawful restriction to trade. Some take the view that the WTO is a contractual system grounded in a liberal economics understanding of trade according to which free trade maximizes welfare.140 Consumer interests would therefore be addressed through such gains from trade (both for the producers and the consumers). In this perspective, barriers to trade, such as protectionist measures, no matter their purpose, only work to destroy welfare

maximization. Macroeconomic trade theories, however, have much more to say about the overall
gains from trade, compared to protectionism, than they say about the allocation of the gains from
trade amongst various constituencies. Mavroidis admits that in a static system, there are little
opportunities for fostering consumer welfare at the WTO, with the emphasis instead on
maximizing producer welfare. In particular, he finds that the interpretation of non-discrimination
in trade promoted by panels and the AB regarding trade in goods and services “has very little to
do with consumer welfare concerns,”¹⁴¹ and the same can be said of contingent protection
instruments (antidumping, safeguards, and countervailing duties). Nonetheless, he argues that
over time, the trade liberalization process will enhance consumer welfare.¹⁴² Overall, the
contractual view of the WTO agreements probably does not allow for any significant evolution
of the status quo.

However, measures protecting consumer interests may also have longer term and more diffuse
positive impacts on market access. In some cases, they might hinder sales of one product but
foster that of another. The net effect on free trade may therefore not be identifiable in the narrow
confines of a complaint by one member producing the adversely affected product. More
fundamentally, consumer protection measures may also reflect the very real variations in
national risk sensitivity, requirements for product information, etc. Free trade might be facilitated
by a reduction of these discrepancies and cross-border harmonization, but that in itself does not
require a lowest common baseline. The better question, then, might be an enquiry into the
allocation of the welfare costs and benefits from trade liberalization to producers and consumers.
Here, we recognize that the trade liberalization objective in itself is not determinative of what

¹⁴¹ Id., at 286.
¹⁴² Id., at 279.
that allocation should be. Accounting more fully for the broad range of consumer interests in the
global trading regime would therefore have more to do with the manner in which to achieve trade
liberalization than with whether to pursue it.

The next question then focuses on what legal framework can be leveraged and what legal
instruments may be deployed to address the diversity of these interests and to experiment with
different allocations at the WTO and elsewhere.

At a narrow technical level, one possibility could be to adopt multi-level standards at the WTO
level, so that different countries or regions can choose whatever level of protection they see fit,
but producers can have access to markets that are broader than strictly national markets. For
example, in the realm of product safety, the third-party approval UL certification (required for a
number of electronics offered for sale in the United States) is more stringent than the self-declared CE mark (required for the marketing of products in the EU), but a growing number of
mechanisms exists to bridge those discrepancies. The UL itself offers an EU-UL mark that meets
the requisite standard for marketing certain products both in the EU and US markets. Additionally, agreements on mutual recognition of conformity assessment\(^\text{143}\) streamline the
process for producers, while assuring consumers that the products meet local safety standards.\(^\text{144}\)

\(^{143}\) See, e.g., Agreement on Mutual Recognition between the United States of America and the
Cooperation (APEC) Mutual Recognition Arrangement, Inter-American Commission on
Telecommunications’s mutual recognition agreement (1998), Publication No. APEC#202-TC-

\(^{144}\) On the mixed effects of product standards and regulations on free trade, see generally Alan
Such initiatives are in line with the WTO preference for internationally recognized standards and procedures, which offers some measure of harmonization. Standards can emerge from private, supra-national or domestic bodies.

At a broader normative level, the tension between the deregulation ethos of the WTO agreements and consumer protection is an enduring one. To be sure, the panels and the AB have at times been more restrictive than the text of the agreements suggests (in the SCM and antidumping fields, for instance), and a more consumer-oriented reading could certainly be supported textually. Nonetheless, while the WTO system offers some limited avenues for reconciling the two, the lack of an explicit recognition of consumer protection as a legitimate ground for maintaining measures even if they are trade-restrictive is a very real limitation.

A perspective that sees the WTO agreements as a legal and institutional vehicle for implementing classical economics theory could potentially find space for balancing consumer and producer welfare if it is capable of quantifying the more intangible costs of not having consumer protection, for instance in terms of public health, of the economic effects of defective products, and of the short and long term effects of deceptive commercial practices. If, however, the economics root of the WTO system is restricted to a static Ricardian comparative advantage framework, then the aspects of consumer welfare that depend on consumer protection will likely be ignored.

Overall, then, there is no clearly articulated reason from trade theory why we should not consider consumer interests at the WTO in addition to producer-oriented trade liberalization. There is also no comprehensive study proving that consumers’ welfare is maximized by simply putting in place the best market conditions for producers. We must therefore look elsewhere for
explanations as to why the WTO-style of trade liberalization focuses on non-discrimination amongst producers, where as the EU-style of trade liberalization accounts both for the reduction of discriminatory practices amongst producers and consumers. Further research on these issues would help to gain a better understanding of the value of different trade liberalization regimes and how they could be best optimized for producers and consumers.

Ultimately, though, the WTO system is more than the legal embodiment of an economic theory. In a number of respects, it in fact ruefully subsumes economic theory to political realities and policy choices of member states, as commentators have extensively argued with respect to trade remedies. Even the general exceptions of the GATT and GATS for public health, the environment and a number of other grounds reflect policy preferences, rather than economic orthodoxy. Likewise, the choice to exclude labor regulation from the ambit of the WTO is a political position, rather than one dictated by the desire to conform to economic theory. Such is the case for consumer protection as well. The issue is not really whether consumer protection is a net cost or a benefit to trade liberalization, if that could even be determined. Rather the question is whose interests the trade liberalization project is meant to serve. That is for WTO members to determine as a matter of politics but the current status quo is not neutral. The relative silence of the WTO agreements regarding consumer interests as such (rather than as a secondary effect of producer-oriented rules) has been taken by adjudicators largely as an indication that members do not see it as an important normative constituent of the trade liberalization regime. By contrast, the European Court of Justice and other EU institutions took a similar silence in the original founding treaties of the EC as a license to balance producer and consumer interests within the overall non-discriminatory mandate.
Member states’ practice suggests more appetite for consumer protection than the narrow interpretative frame that WTO panels and the Appellate Body have recognized. The EU and regional trade agreements also question the presumption of consumer welfare gains and these systems have injected more attention to consumer interests other than price. The trend appears to be moving towards more rather than less recognition of these interests. The experience from the EU and from Latin American and ASIAN market integration processes leave WTO members with several models to frame the consumer/trade relationship at the WTO. Without modifying the agreements, they could reorient the interpretation of the agreements to include more of a balancing standard between producers’ interests and consumers’ interests. They can also continue to foster international harmonization efforts to promote a convergence on product safety and quality that is mindful of consumer interests. More radically, they could render more explicit a normative dimension of trade liberalization that would account for consumer welfare.

Could it be that the WTO has now reached a level of maturity such that it is appropriate to ask whether there are additional gains to be had from the global trade liberalization process by examining the interests of consumers and how they balance with the interests of producers? This question is almost entirely unanswered in the current economic, legal and policy literature.