

Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?

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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 uses a comparative legal perspective to explore what shapes international trade regimes to be more or less consumer oriented, using primarily EU law as a counterpoint to the WTO, as well as NAFTA and MERCOSUR. Ultimately, the Article suggests that the WTO's producer-focused liberalization leaves consumers underserved. It also 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 within the WTO is warranted.

INTRODUCTION

The past decade has witnessed major debates about 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 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. A ban on imported products involved in safety scares, for instance, may be overbroad. But leaving consumers to litigate up complex supply chains is an equally inadequate remedy.

The World Trade Organization ("WTO")'s approach to trade liberalization is unapologetically, and perhaps unreflectively, producer-oriented. It prioritizes 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 services at a cheaper price. While such benefits have, indeed, materialized in a number of ways, they do

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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 privacy¹ are only marginally or imperfectly addressed by the trade regime. While producers' interest in accessing global markets are reflected 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 literature also fails to provide a systematic analytical framework. Theorizing the relationship between trade liberalization and consumer interests could proceed 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. Finally, it may be that other institutions, including regional and domestic bodies, should be the foremost forums for dealing with consumer issues, while the role of the WTO should be to allow the necessary policy space for these endeavors to fully unfold. Rather than proposing a framework for addressing consumer interests at the WTO, this Article explores how to articulate a more holistic understanding of the trade liberalization project that accounts both for producer and consumer interests. Ultimately, it calls for experimentation and reflection on the relationship between trade liberalization and consumer interests.

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. To be sure, the benefits of producer-driven liberalization trickle down to consumers in many ways. Classical economic theory and 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

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 (Apr. 16, 1985), as amended by United Nations Guidelines for Consumer Protection, G.A. Decision 54/449, U.N. GAOR, 54th Sess., ¶ 1 (Dec. 22, 1999).

sources, and lower risk of shortages. 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, preservation of consumers' legal interests (e.g., bans or restrictions on unfair credit or contract terms), and regulation of deceptive commercial practices. States have recognized similar concerns in regimes designed to protect consumers of intermediate goods in business-to-business transactions. By contrast, the WTO system, which finds its conceptual roots in classical liberal economics, does little to address these concerns. In other words, the WTO regime seems to assume that the benefits of cheaper and more varied goods and services will more than offset any cost to or needs of consumers not addressed by simply decreasing barriers to trade for producers.

The European Union's trade liberalization and integration model since the 1970s shows that there are alternative approaches to allocating the burdens and benefits of trade liberalization between producers, consumers, and workers. Moreover, the EU model does so with an explicit theoretical grounding in classical economics. Free movement of persons within the EU is a key component of liberalization and is meant to result in a more efficient allocation of labor and capital. Less favorable treatment of consumers from other EU countries has been seen as a hindrance to the free movement of persons. For instance, universities cannot charge higher tuition to other EU nationals than they charge to domestic students, and museums cannot charge a higher entrance fee to other EU tourists than to locals.² In another example of regulation that relates consumer interest to trade liberalization, the EU directive on distributorships allows a geographic allocation of markets among distributors, provided distributors allow consumers to buy potentially cheaper goods in other EU markets.³ Here, the EU explicitly sought to weight the producers' interest in providing exclusivity to their distributors in certain markets against consumers' interests 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. Clearly, then, the WTO is not the only available model for the normative place of consumers and producers in a trade liberalization system; the EU, at least, offers one alternative narrative.

Undoubtedly, the European Community ("EC") and later the European Union have a deep political dimension that the WTO lacks. Some may claim that the differences in the place of consumers in the European and WTO systems stem from the original political objective of the EC as a

2. Case C-45/93, *Comm'n v. Kingdom of Spain*, 1994 E.C.R. I-00911.

3. Commission Regulation 330/2010, *On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices*, 2010 O.J. (L 102) 1-7.

peace-building and stabilizing bloc for the region, rather than from diverging perspectives on trade liberalization between the two systems. In any event, the notion that the European Union and the WTO have common traits as trade law regimes is not a new one.⁴ While it is 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, instead supporting the theory that consumer protection in the EC and EU reflects differing perspectives on the role of market regulation in achieving trade liberalization. The EC was highly successful at trade integration, but consumer interests were not a part of the political genesis of the common market project; rather, such interests emerged as an unaddressed issue several decades after the creation of the EC.

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 the success of the European model suggests, the WTO's failure to engage these interests cannot be justified purely on the basis of economic theory.

The second part of the Article presents evidence that member states have raised the consumer dimension of trade liberalization at the WTO as an issue distinct from the trickle-down, producer-centric approach. This in turn suggests that states find domestic instruments insufficient 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. It shows that domestic regulatory efforts have international trade effects and that trade disciplines similarly have spill-over effects for the protection of consumer interests in the domestic framework. 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 some regional trade liberalization frameworks have incorporated consumer interests. Considering examples from Asia and the Pacific, as well as Latin America, it discusses alternative models for balancing consumer and producer interests in a trade liberalization project that could hold valuable lessons for the WTO. Ultimately, this Article also calls for more research, theoretical and empirical, and for a reasoned debate about the extent to which the WTO should more explicitly address consumer interests.

4. See, e.g., *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 125 (Joseph H.H. Weiler ed., 2001).

I. A TALE OF TWO CITIES: FRAMING PRODUCER AND CONSUMER INTERESTS IN THE EUROPEAN AND WTO MODELS FOR LIBERALIZATION

This section explores the status of consumers and producers in the EU and WTO trade liberalization projects. It shows that, although the two systems share common grounding in classical liberal economics, they diverge greatly in the weight they give to producer and consumer interests. Whereas the WTO uses producer interests as a primary vector for decreasing barriers to trade, the EU views both consumer and producer interests as avenues for furthering trade liberalization. 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.

The WTO agreements' fundamental disciplines demonstrate the producer-centric quality of the WTO system. 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.⁵ In contrast, producers or sellers are not restricted from discriminating between domestic and foreign consumers in order to extract higher profits. In India, for example, most foreign nationals pay higher entrance fees in museums than domestic consumers and consumers from certain preferred countries,⁶ while in Japan, foreign tourists can purchase cheaper railway passes than residents.⁷ Although these consumer issues are typically not articulated as trade concerns, they are, in fact, consumer-oriented trade barriers that the producer-oriented regime does not capture. Additionally, the state may have other policy reasons for allowing or implementing the differential pricing, which trump trade liberalization concerns. In this instance, India seeks to preserve access to historical sites by the local population. The producer-centric orientation 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, made more expensive by the imposition of such producer-oriented protections.

5. *See, e.g.*, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 (1994) [hereinafter GATT] art. I; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183; 33 I.L.M. 1167 (1994) [hereinafter GATS] art. II.

6. *See, e.g.*, World Heritage Sites - Agra - Taj Mahal, ARCHAEOLOGICAL SURVEY OF INDIA, http://asi.nic.in/asi_monu_whs_agratajmahal.asp (last visited Mar. 1, 2014).

7. *See, e.g.*, Japan Rail Passes, JAPAN-GUIDE.COM, <http://www.japan-guide.com/e/e2361.html> (stating that Japan rail passes may be purchased by foreign visitors only) (last visited Mar. 1, 2014).

At first blush, we might think that classical economic theory requires a producer-centric model of trade liberalization. There are at least two problems with this claim. First, little in trade theory supports this position. Free trade theories hold that opening trade benefits producers and consumers. These theories provide extensive models and data as to the inefficiency of certain trade restriction instruments. They also recognize that instruments such as tariffs and subsidies have different impacts on producers and consumers domestically and abroad. However, they generally make no normative claim as to the superiority of reducing distortions to trade for producers over the reduction of distortions to consumers.⁸

Second, the EU trade integration and other regional trade liberalization processes provide empirical evidence for the possibility of joint consideration of producer and consumer interests to shape trade liberalization policies. 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 undeniably a successful trade liberalization process.

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 lower prices and wider availability of goods adequately served consumers. 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 the original producer-oriented position.

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 remain mostly silent on the movement of persons. In the WTO legal system, "persons" are seen almost exclusively as factors of production. However, the EU legal system also treats "persons" as consumers, and their ability to obtain goods and services abroad or consume foreign production domestically forms a critical part of the market integration process.⁹ 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 treat-

8. As Robert Baldwin summarizes, "The 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." ROBERT E. BALDWIN, *THE POLITICAL ECONOMY OF U.S. IMPORT POLICY* 1 (1986).

9. See *infra* Section I.A.

ment generally apply to the production, import, and offer for sale, as well as to the consumption of goods and services.

Section A discusses how the EU first came to view consumer protection as a core pillar of trade liberalization. Section B explores how European trade integration has blended producer and consumer interests and how EU institutions have managed the tensions between producer-oriented laissez-faire and regulatory remedies to market failures in the consumer protection arena.

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 policy¹⁰ and competition policy,¹¹ but it was not until the 1992 Treaty on European Union (Maastricht Treaty) creating the EU that consumer protection became a part of the founding treaties.¹² The provision was later reiterated in amendments to the founding treaties by the 1997 Treaty of Amsterdam,¹³ the aborted EU Constitution,¹⁴ and the 2007 Lisbon Treaty.¹⁵ 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.¹⁶ The European Parliament noted the need for a coherent and effective consumer policy in 1972,¹⁷ and the Commission responded with a compre-

10. Treaty Establishing the European Economic Community art. 39, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome].

11. *Id.* arts. 85(3), 86.

12. Treaty on European Union art. 129a, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 [hereinafter Maastricht Treaty].

13. Treaty of Amsterdam art. 153(2), Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56 (renumbering the Treaty on European Union former art. 129a).

14. Treaty establishing a Constitution for Europe art. III-120, Dec. 16, 2004, 2004 O.J. (C310) 1.

15. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 2(20), Dec. 17, 2007, 2007 O.J. (C 306) 1 (renumbering art. 153(2) of the Treaty on European Union as art. 12 of the Treaty on the Functioning of the European Union).

16. See STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* (2005); ASTRID EPINEY AND FLORENCE RIVIERE, *LA PROTECTION DU CONSOMMATEUR* (2003) (Part III.A); see generally Hans-W. Micklitz and Stephen Weatherill, *Consumer policy in the European Community: Before and after Maastricht*, 16 J. CONSUMER POLICY 285 (1993) (providing a history of consumer protection in the EU).

17. See the European Parliament debate on September 20, 1972 referenced in 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, para. 1 n.1 (21 May 1974) [hereinafter 1974 Commission Report for Consumer Information and Protection].

hensive report in 1974.¹⁸ The report presented consumers not only as purchasers of goods, but also as citizens entitled to four rights that should inform sector-specific Community policies: the rights to protection of health, safety, and economic interests;¹⁹ the right to redress; the right to information and education; and the right of representation.²⁰

The Commission explicitly framed the report in reference to classical free trade economics, rather than in political or normative terms. It found support for its project to rebalance consumer and producer interests 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."²¹ The report noted that the place of consumers has since decreased "despite [the consumer's] importance as a basic factor in the market place"²² and that the lack of consumer protection prevents the consumer from "play[ing] his proper role as a balancing factor prescribed by economic theory."²³ The Commission further described the microeconomic 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."²⁴ It concluded, "[t]oday, the producer has a greater opportunity to select his market than the consumer has to select his supplier."²⁵ The Commission went on to identify a number of areas fostering the imbalance in weight accorded to the interests of producers versus those of consumers.²⁶ This report showed that a joint

18. *Id.*

19. These rights are meant to "protect 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).

20. 1974 Commission Report for Consumer Information and Protection, *supra* note 17, para. 4.

21. *Id.* para. 6.

22. *Id.*

23. *Id.* para. 7.

24. *Id.* Whether they are based on the classical Ricardian comparative advantage model and its contemporary variances including the Heckscher-Ohlin model, or on "new trade theories" stressing increasing economies of scale, economic theories of international trade typically begin with conditions of production. The results imply that free trade is welfare-enhancing for consumers because free trade 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) is conceptualized as interchangeable with trade for analytical purposes. Mundell first showed that under the Heckscher-Ohlin model, trade and factor mobility were substitutes. See Robert Mundell, *International Trade and Factor Mobility*, 47 *AMERICAN ECON. REV.* 321 (1957); see also Krugman, *supra*, at 478.

25. 1974 Commission Report for Consumer Information and Protection, *supra* note 17, para. 7.

26. *Id.* para. 8 (areas of imbalance include "trade practices, contractual terms, the whole field of credit trading. . . and the very concept of competition").

consideration of producer and consumer interests in trade liberalization is not incompatible with classical economics. Indeed, classical economics-based trade theory since then has attempted to describe the impact of trade liberalization on consumers and producers alike.²⁷

The second report of the Commission, in 1978, again emphasized the need to give greater weight to “the rightful interests of consumers . . . as a balance to policies safeguarding the producer.”²⁸ The report concluded that “[t]he key to that ultimate accomplishment lies in the recognition by all

27. Over the past two decades, some economists have attempted to consider the responses of producers and consumers in relation to trade policy. Robert Staiger and Guido Tabellini propose a model with three types of actors: producers, consumers, and the government. Robert Staiger and Guido Tabellini, *Rules and Discretion in Trade Policy*, 33 *EUR. ECON. REV.* 1265, 1267 (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. *Id.* 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. *Id.* Consumers make their decision last. *Id.* 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). *Id.* In line with Bhagwati's *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, *supra* at 1268–70; *see also* Jagdish Bhagwati, *The Generalized Theory of Distortions and Welfare*, in *TRADE, BALANCE OF PAYMENTS, AND GROWTH: PAPERS IN INTERNATIONAL ECONOMICS IN HONOR OF CHARLES P. KINDLEBERGER* 69 (Jagdish Bhagwati, Ronald Jones, Robert Mundell and Jaroslav Vanek, eds., 1971). 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 (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, etc.), which in turn translates into higher prices for the products, and consumers who want a higher purchasing power. That increased purchasing power can be achieved by a higher income (if the price of goods does not increase) or cheaper goods (if the income does not decrease) or a combination of both. As shown by Staiger and Tabellini, tariffs, one of the main trade instruments regulated by the WTO, do not help to resolve that tension or to address individual trade distortions to producers and to consumers.

28. Commission of the European Communities, *Consumer protection and information policy: Second report*, at 3, para. 2 (1979) [hereinafter *Second Commission Report on Consumer Protection*].

interests of the consumer dimension as a natural and indispensable one in the achievement of balanced development of the Common Market.”²⁹

The GATT is largely premised on the same classical economics bedrock as the EC; therefore, it is 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 simply putting in place the best market conditions for producers. 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 adapt the trade liberalization process to better address both 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 founding treaty.³⁰ In addition to the treaty articles mentioned earlier,³¹ Article 100 of

29. *Id.* at 3, para. 4. As noted earlier, the “Common Market” admittedly has a broader trade integration ambition than the GATT and the WTO. Imperfect competition analysis has attempted to disaggregate producer and consumer dynamics, particularly with respect to the relationship between the interests of foreign producers and domestic consumers in setting trade policy. For instance, Helpman and Krugman examine tariffs in a model of monopolistic competition where consumers value variety but firms benefit from economies of scale and do not want to produce the variety. See ELHANAN HELPMAN & PAUL R. KRUGMAN, *TRADE POLICY AND MARKET STRUCTURE* (1989). Bagwell and Staiger considered the role of export subsidies when the consumers have imperfect information about the imported product, building on the work of earlier theoretical contributions. See Kyle Bagwell & 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 & 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 & Staiger, *supra* at 70. They stress 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.

30. 1974 Commission Report for Consumer Information and Protection, *supra* note 17, at 4, 12.

31. See Treaty of Rome, *supra* note 10, at 13; Treaty on European Union, *supra* note 12, at 13; Treaty of Amsterdam, *supra* note 13, at 13; Treaty Establishing a Constitution for Europe, *supra* note 14, at 13.

the Treaty of Rome (and subsequent amendments after the entry into force of the Single Act in 1987) on harmonization (“approximation”) of member states’ laws and regulations that “directly affect the establishment or functioning of the common market” have also been used as a basis for EC Council and Commission directives in the area of consumer protection.³² 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-centric focus.

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).”³³ 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 policy, and energy policies.³⁴ The Report also highlights the shift in perspective from commercial practices that were previously treated mostly as a business practice, to a consideration of these business practices as a producer-consumer issue.³⁵ For instance, contractual terms for credit trading (including hire-purchase and credit cards), which, to that point, 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.”³⁶ As a result, the Report outlines the principles for a Community policy on consumer protection substantiating the four basic rights.

The first right 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 proven to pose a danger to consumer health and safety, and creating procedures for product approval for new products that may pose a risk.³⁷

32. Treaty of Rome, *supra* note 10, at 13.

33. 1974 Commission Report for Consumer Information and Protection, *supra* note 17, at 2.

34. *Id.*

35. *Id.* at 3–4.

36. *Id.* at 3.

37. *Id.* at 6–8.

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.”³⁸

With respect to the right of redress and assistance, the Report is more tentative, mostly proposing consultations with domestic consumer bodies and building on work done by international organizations to enhance the remedies available to consumers.³⁹ 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.⁴⁰

The second report, in 1978, moves away from this rights-based approach, emphasizing instead consumer choice as a vector of market integration.⁴¹ In the year leading up to the second report, the EC Commissioner in charge of the report had advocated the shift from a policy of *protecting* consumers to one of “*promoting* consumer interests.”⁴² 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.”⁴³ This shift also announced a balancing approach between protecting consumer choices and other possibly conflicting policies that might have favored producers.

In addition, Article 18 of the 1986 Single Act creating an amended Article 100a(4) to the Treaty of Rome allowed states to invoke “major needs” to uphold standards of consumer protection higher than those set by EC institutions under Article 100a(1).⁴⁴ The standard of protection of Article 100a(1) is reinforced by Article 100a(3), stating, “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.”⁴⁵

The European Court of Justice played a critical role in building consumer protection at the core of market integration. The Court focused in the 1980s on rolling back domestic rules that restricted consumer choices and thereby restricted full access by consumers to a larger free market. It scrutinized

38. *Id.* at 9.

39. *Id.* at 13.

40. *Id.* at 13.

41. Micklitz & Weatherill, *supra* note 16, at 294.

42. Second Commission Report on Consumer Protection, *supra* note 28, at 8 (emphasis added).

43. *Id.*

44. Single European Act, 17 February 1986, 1987 O.J. art. 18.

45. *Id.*

domestic tax regulations, rules on marketing contingent on particular process methods that favor domestic industries, and anti-competitive arrangements for the obstacles they created to consumer choices.⁴⁶

The Court took on consumer discrimination as a powerful tool to enhance market integration, stating that, “Free movement of goods concerns not only traders but also individuals.”⁴⁷ 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.⁴⁸ The Spanish museum case is a more recent illustration.⁴⁹ 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 21.⁵⁰ 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, and may, therefore, influence the decision of some persons to visit a country.”⁵¹ The Court found that the price discrimination violated Articles 7⁵² and 59⁵³ 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.

Additionally, domestic rules that were ostensibly crafted as consumer protection measures were struck down when the Court found that they did not actually serve consumer interests and, instead, merely acted as protectionist devices.⁵⁴

In several cases, then, the European Court of Justice recognized that allowing consumers to access various products could foster free trade, and the

46. Micklitz & Weatherill, *supra* note 16, at 286–88.

47. Case C-362/88, GB-INNO-BM v. Confederation du Commerce Luxembourgeois, 1990 E.C.R. 1–668.

48. See Cases 286/82 & 26/83, Luisi and Carbone v. Ministero del Tesoro, 1984 E.C.R. 377; Case 186/87 Cowan v. Trésor Publique, 1989 E.C.R. 195.

49. Case C-463/00, Comm’n v. Kingdom of Spain, 1994 E.C.R. I-00911.

50. *Id.* para. 1.

51. *Id.* at I-919.

52. See Treaty of Rome, *supra* note 10, at 5 (“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.”).

53. See *id.* at 24–25 (“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during 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 for whom the services are intended.”).

54. Case C-120/78, Rewe Zentrale v. Bundesmonopolverwaltung für 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 a 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. See Cases C-1/90 and C-176/90, Aragonosa de Publicidad Exterior SA (APESA) v. Departamento de Sanidad y Seguridad Social de la Generalitat de Catalunya (DSSC) 1991 E.C.R. I-04151. This suggests an overt balancing approach by the Court between consumer and producer interests.

Court has been skeptical of domestic measures that impeded such free-market oriented consumer choice. Equally, though, the Court has recognized the legitimacy of member states' regulatory choices to protect consumer interests, even at the cost of a trade restriction for producers.

One may also frame this tension between consumer freedom of choice and public law 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 they considered to be 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 and deceptive advertising practices, and sustaining public policies corresponding to the local social mores, such as social choices about exposure to health risks, to environmental risks, or to goods or services offending public morals. Because the EU market integration is not grounded in a neoliberal deregulating ethos, its institutions are perhaps more comfortable than other fora, such as the WTO, with balancing those concurrent objectives.

A separate title on consumer protection eventually became part of the founding treaty with the Maastricht Treaty of 1992.⁵⁵ This treaty established a tiered approach:

- Consumer protection measures may be adopted "in the context of completion of the internal market";⁵⁶
- EC institutions may "support and supplement" actions by member states with respect to the "health, safety and economic interests of consumers and [provision of] adequate information to consumers";⁵⁷ and
- Member states can still adopt more protective measures so long as they are compatible with the treaty.⁵⁸

Hence, the treaty preserved the original rationale of consumer protection as part of the market integration mission, while also establishing an independent ground for consumer protection for its own sake. This was particularly salient regarding the determination of the appropriate 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. In a system where produc-

55. Maastricht Treaty, *supra* note 12, Title XI.

56. *Id.* art. 129a(1)(a).

57. *Id.* art. 129a(1)(b).

58. *Id.* art. 129a(3).

ers are the primary vector for trade liberalization, one would expect not to see a regulatory intervention to protect the consumer. By contrast, in a system where both producers and consumers are vectors for trade liberalization, one may see a regulatory intervention to protect the threatened consumer interest. The EC's independent regulatory competence and the member 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 among producers, rather than consumers. Both EC policy-makers and adjudicators, however, soon recognized consumer protection as 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 and balance the producer and consumer interests for a freedom of movement objective.

Empirically, then, the EU history and the success of its trade integration mission⁵⁹ indicate that the assumption that consumers always receive full compensation 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 sometimes 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. Second, if we accept the plausibility of the hypothesis that addressing those consumer interests might promote increased welfare and deeper trade liberalization, the next step is to determine the

59. See Ivan Arribas, Francisco Perez & Emili Tortosa-Ausina, *The Dynamics of International Trade Integration: 1967-2004*, 181 *EMPIRICAL ECON.* 377 (2013) (using a set of indicators to measure the success of trade integration, noting the case of the European Union, between 1967 and 2004); see also Ivan Arribas, Francisco Perez & Emili Tortosa-Ausina, *A New Interpretation of the Distance Puzzle Based on Geographic Neutrality*, 87 *ECON. 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).

optimal regulatory forum (or fora) for doing so.⁶⁰ 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, 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 affect 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 primary actors of the trade transaction. Section A maps the WTO rules that have a direct impact on consumers by creating incentives and opportunities for consumer protection and discrimination. Beyond the letter of the law, thinking about the intersection of trade liberalization and consumer interests requires an assessment of the missed opportunities to incorporate 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 anti-dumping, subsidies, and safeguards. Last, Section C concludes that the law and practice of the WTO largely lack a deliberate allocation of consumer and producer interests because of an insufficient normative understanding of 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 mirrors domestic concerns, but it also presents additional challenges. This Section explores how consumer interests play out in WTO law. First, in its narrowest sense, consumer protection involves conveying truthful and

60. In the EC, 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 could be appropriately regulated at the domestic level, it should be handled at that level, and not at the EC level.

accurate information about the goods and services offered to consumers.⁶¹ Typical legal instruments in this vein, shaped in part by the WTO framework, include labeling requirements and other measures related to producer claims about the product or service. Second, consumer protection includes product safety. Here again, WTO rules on sanitary and phytosanitary measures and on the adoption of standards play a significant role to ensure product safety. Third, in a somewhat broader sense, consumers' interests include the price of goods and services. The trade regime affects pricing through regular duties and tariffs and other duties, such as safeguard measures, anti-dumping duties, and countervailing duties. Once the product is imported, internal taxes and other sales and distribution measures also affect the traded item's price for consumers. Such measures are often, but not always, addressed by the WTO agreements. Competition or antitrust rules also come into play here, although the ongoing debate whether to include such rules in the WTO mostly focuses on the firms' commercial interests, rather than the effect of practices such as monopolistic behavior or price-fixing on consumers.⁶² 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 represents the dominant way in which lawyers and economists have understood the trade regime and consumer interests to intersect; it will be addressed only briefly in this section.

This Section presents an overview of the WTO provisions that address the four aspects of consumer interests enumerated above. In a number of instances, the WTO agreements explicitly mention consumers in relation to these interests. 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 Appellate Body (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 AB, in large part because the covered agreements lack a legal basis for the specific claim.

61. See UN Guidelines for Consumer Protection, *supra* note 1 (defining the various elements of consumer protection).

62. See, e.g., Anu Bradford, *International Antitrust Cooperation and the Preference for Non-Binding Regimes*, in COOPERATION, COMITY AND COMPETITION POLICY (Andrew Guzman ed. 2011). See also PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO (2003) (arguing that the discussion of competition rules at the WTO should focus on whether competition authorities tolerate business practices that may exclude business competitors); Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 321, 355–56 (2004) (acknowledging "a common criticism that [the WTO] only caters to the interests of business and multinationals and not to 'plain people'"); Bill Butcher & Mary Ip, *Are Chinese Consumers Winners or Losers Under WTO Membership?*, 4 MACQUARIE J. BUS. L. 71, 72 (2007) (arguing that the primary focus of the WTO is not on the consumers of products and services but rather in trade itself). Cf. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216 (2012) (arguing that the link between antitrust and consumer protection has been clearly established in the literature regarding domestic law).

1. *Conveying Truthful Information to Consumers*

A number of WTO agreements include provisions that regulate what information is conveyed to consumers. The WTO texts do not directly mandate states to impart certain information to consumers. Rather, the agreements create a framework enabling states to regulate in this area and setting certain procedural baselines for such regulation. The agreements also reflect a preference for particular types of substantive information. In some cases, the framework is indicative rather than mandatory.

The Technical Barriers to Trade (“TBT”) and Sanitary and Phytosanitary (“SPS”) Agreements, to some degree, encourage the use of international technical standards, which help to convey uniform information about products.⁶³ The TBT Agreement 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.⁶⁴

Even more explicitly related to consumer protection, GATT Article IX, on marks of origin, expressly points to the prevention of misleading or fraudulent information to 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.⁶⁵

Similarly, rules on geographic indications, which feature in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and the GATT, have a bearing on information available to consumers and the prevention of deceptive advertising practices. However, the concern in the GATT, for instance, seems to be at least in equal measure to protect producers of products that are genuinely entitled to the indication from

63. Agreement on the Application of Sanitary and Phytosanitary Measures, Preamble, arts. 3–4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, 33 I.L.M. 1125, [hereinafter SPS Agreement] (underscoring the role of international standards by “{r}ecognizing the important contribution that international standards, guidelines and recommendations can make in this regard” and “{d}esiring 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.”); Agreement on Technical Barriers to Trade, Preamble, arts. 2.6–2.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 [hereinafter TBT Agreement] (similarly emphasizing the importance of international standards by “{d}esiring therefore to encourage the development of such international standards and conformity assessment systems.”).

64. TBT Agreement, *supra* note 63, art. 2.2.

65. GATT, *supra* note 5, art. IX, para. 2.

competing products that are unduly using it, as it is to prevent confusion amongst consumers.⁶⁶ By contrast, the TRIPS explicitly mentions preventing the use of geographic indications “which mislead[] the public as to the geographic origin of the good.”⁶⁷ The rest of the Section, though, mostly aims to prevent an illegitimate protectionist use of the geographic indications. An allowance under the TRIPS to provide limited exceptions to trademark rights has also been interpreted to include the “legitimate interests” of consumers alongside those of the trademark owner.⁶⁸

The TRIPS provision on geographic indications for wines and spirits also reflects a concern regarding possible consumer confusion between homonymous indications.⁶⁹ More tangentially, the Agreement on Rules of Origin, while not explicitly designed to protect consumers, may 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 measure of harmonization in the manner in which states can determine the official origin of a good. In sum, there are a number of WTO rules regarding product information conveyed to consumers. However, the disciplines are not designated solely or mainly for the benefit of consumers. Rather, they are largely concerned with preventing commercial practices that would hurt competing producers. Here, it appears that producer and consumer interests in policing statements about products are aligned, and the WTO agreements are mindful of such interests.

The Agreement on Agriculture also touches on the issue of information conveyed to consumers. While the Agreement generally aims to limit domestic support to agricultural producers, it exempts 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.”⁷⁰ This exemption recognizes the legitimacy of government actions to

66. *Id.* art. IX, para. 6 (“The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true 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.”).

67. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22.2(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

68. *Id.* art. 17 (“Third parties” are interpreted to include consumers in Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, para. 7.676, WT/DS174/R (Mar. 15, 2005) (adopted Apr. 20, 2005) [hereinafter *EC–Trademarks/GIs*]).

69. TRIPS Agreement, *supra* note 67, 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.”).

70. Agreement on Agriculture, Annex 2, para. 2(d), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture].

improve and facilitate the dissemination of information to consumers (and producers). For instance, a government grant to bovine producers to disseminate to the consuming public research on the health effects of growth hormones in cattle would not be a prohibited subsidy under the agreement.

In addition to the text of the WTO agreements, several cases have also addressed the issue of truthful information to consumers. Here, the tension lies between the objective of conveying truthful information to consumers and the perversion of such an objective to protect producers in breach of free trade disciplines. For instance, a requirement that only mustard actually made in Dijon may be called "Dijon mustard" would convey some truthful information to consumers about the product: it is made in Dijon, France. Consumers expect a product labeled as "Dijon mustard" to have a certain taste, consistency, color, etc. and would buy the product because of this label. However, non-Dijon producers might claim that this is just a thinly veiled attempt to disadvantage their product, even if their mustard is made according to a very similar recipe and it tastes and looks the same as the French product. The producers of the similar mustard who are not able to describe their good as "Dijon mustard" would lose customers. The case law suggests that panels and the AB have difficulties parsing out the legitimate objective of ensuring that consumers are not misled by producer claims on the one hand, and disguised protectionism on the other hand. The *Japan-Film*⁷¹ case, for example, involved a number of "administrative guidance" measures enacted by Japan to regulate retailing and promotional practices aimed at consumers (including discounts, rebates, lotteries and other prize offers)⁷², but resulted in decreased distribution of foreign photographic film. The measures, which were technically not all binding on retailers and industry, but which in practice heavily influenced distributors, were found to be in violation of the GATT.⁷³ The parties debated at length 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 U.S.-produced Kodak film out of the Japanese market, to the advantage of Fujii film and other Japanese-made products. The Panel simply bypassed this debate, devising instead a landmark three-part test: (1) Is there a measure by the state? (2) Is there a legitimate expectation of a trade benefit by the complaining part?, and (3) Did the measure cause that benefit to be nullified or impaired? That test left no room for an inquiry into the purpose and objective of the measure. If the foreign producer seeking to enter the Japa-

71. Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998).

72. *Id.* at 48–159.

73. *Id.* at 476.

nese market had a legitimate expectation of improved market access and the government measure adversely affected this expectation, then the measure could not be maintained. Only the trade restrictive effect of the measure was relevant, combined with the fact that this trade restrictive effect adversely affected legitimate expectations of foreign producers seeking to enter the Japanese market. The notion that the measure might be a consumer protection measure was not even balanced against its trade restrictive impact on producers. By contrast, had the test included a consideration of the legitimacy of the measure for consumer protection purposes, the government's interest in protecting consumers may have trumped the producers' interest in increasing their market share.

Several other cases involved measures allegedly designed to avoid misleading or deceiving consumers about a product. EC measures, in particular, were challenged in a number of instances. In *EC–Sardines*, for example, the EC described the following five objectives 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.⁷⁴

The Panel noted that, as both parties agreed on the legitimacy of the objectives under Article 2.4 of the TBT Agreement, it would simply proceed on that assumption without deciding the matter.⁷⁵ Instead, the Panel focused on whether the Codex Alimentarius was a relevant international standard that the EC should have used in crafting its measure. The Panel decided that the Codex Alimentarius was a relevant international standard, but found that the EC measure could not stand, as it had not taken into account the relevant Codex provision to fulfill the legitimate objective of consumer protection.⁷⁶ The Panel concluded:

By establishing a precise labelling requirement 'in a manner not to mislead the consumer,' the Codex Alimentarius Commission considered the issue of consumer protection in countries producing preserved sardines from *Sardina pilchardus* and those producing preserved sardines from species other than *Sardina pilchardus*

74. Panel Report, *European Communities–Trade Description of Sardines*, WT/DS231/R (May 29, 2002), para. 4.60.

75. *Id.* para. 7.122.

76. *Id.* para. 7.139.

. . . . Thus, Codex Stan 94 allows Members to provide precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition.⁷⁷

Unlike the *Japan–Film* case, then, this case suggests that there may be a basis under the WTO agreements to maintain consumer protection measures against deceptive commercial practices notwithstanding ancillary trade-restrictive effects. Technically, however, 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.

The recent *US–Tuna II*⁷⁸ case also relies on a reading of TBT Agreement Article 2.2 that makes the protection of consumers against deceptive practices a legitimate objective. In this case, the United States argued that the objective of the Dolphin Protection Consumer Information Act and related regulations was:

(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 provisions squarely fall within these two objectives.⁷⁹

The Panel found the measure to be a technical regulation within the meaning of the TBT Agreement and determined that it did not treat Mexican products less favorably than U.S. products. However, the Panel ultimately struck down the measures after finding 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.”⁸⁰ Unlike the *Japan–Film* case, then, the *U.S.–Tuna II* Panel engaged in a balancing exercise between the consumer protection element of the measure and its trade-restrictive impact, using the familiar standard of the “least trade restrictive alternative.”⁸¹ The

77. *Id.* para. 7.133. See also paras. 7.137, 7.139 and arguments of third parties Peru, Canada, and Venezuela at paras. 4.26–4.27, 5.78.

78. Panel Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011).

79. *Id.* para. 4.176.

80. *Id.* para. 7.620 (finding the measure to breach Article 2.2 of the TBT Agreement).

81. This standard requires that amongst several measures designed to achieve a legitimate objective, the state choose the measure that has the least negative impact on free trade. See, e.g., SPS Agreement arts. 5.3–5.6. For instance, if animals from a tropical country are at risk of bringing in and spreading a disease but quarantine at the border would allow to determine whether the animal is healthy, then the country

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).⁸² 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 product distinctions recognized by consumers, but such distinctions might not pass muster as a legal basis for a different treatment at the WTO after this case and another recent case.⁸³ Second, the Appellate Body reversed the Panel finding that the measure was more trade-restrictive than necessary. Here, the AB confirmed that three elements must be balanced for this determination: the trade-restrictiveness of the measure, the measure's contribution to a legitimate objective, and the risks of not fulfilling that objective.⁸⁴ Unlike the Panel in the *Japan–Film* case, then, the AB in the *US–Tuna II* case also interpreted the least trade restrictive standard to require balancing the interests of the producers in trade openness with the interests of the government in passing the measure to fulfill a legitimate objective such as consumer protection and the protection of animal life.

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 from being misled about the novel foods.⁸⁵ The Panel attempted to fit this objective within SPS Annex

should implement such a quarantine, rather than ban animals from that country altogether. The ban would achieve the objective, but it restricts trade more than a quarantine measure.

82. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) (adopted June 13, 2012) [hereinafter *US–Tuna II* (AB Report)], para. 225.

83. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2011) (adopted Apr. 24, 2012), paras. 19, 20, 181, 182, 187, 215, 217, 225 (according to the United States, the measure against flavored cigarettes was justified because it was aimed at protecting the public health of young smokers for whom this product is particularly appealing. The Appellate Body found that the differential treatment of menthol and clove cigarettes was not based on a "legitimate regulatory distinction," concluding that the ban on clove cigarettes amounted to a discrimination against "like products."). See also Report of the Panel, *Canada/Japan—Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, L/6470 (Apr. 26, 1989), GATT B.I.S.D. (36th Supp.) at 167 (1989) (generally considered to "overrule" Report of the Panel, *Spain—Tariff Treatment of Unroasted Coffee*, L/5135 (Apr. 27, 1981) GATT B.I.S.D. (28th Supp.) at 102 (1982) [hereinafter *Spain—Unroasted Coffee*], which gave way to use by consumers in determining that the various kinds of coffee were "like products").

84. *US–Tuna II* (AB Report), supra note 79, paras. 318, 322. For an overview of the AB Report, see Elizabeth Trujillo, *The WTO Appellate Body Knocks Down U.S. "Dolphin-Safe" Tuna Labels But Leaves a Crack for PPMs*, American Society of International Law Insight (July 26, 2012), <http://www.asil.org/insights/volume/16/issue/25/wto-appellate-body-knocks-down-us-dolphin-safe-tuna-labels-leaves>.

85. Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, as modified by Appellate Body Report, WT/

A(1) on “labelling requirements directly related to food safety.”⁸⁶ It read the term “food safety” to include the safety of such substances as food additives and 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. Accordingly, we consider that the second purpose of Regulation 258/97 falls outside the scope of Annex A(1).”⁸⁷ Hence, the Panel distinguished between the objectives of not misleading consumers on the one hand and preventing consumer exposure to an unsafe food on the other hand. Because the SPS Agreement deals with food safety, rather than misleading information, and the EC measure dealt with information to consumers, the Panel could not justify the EC measure under the SPS Agreement.

Geographic indications, such as Genoa salami, Dijon mustard, or Champagne wine, are another way to save consumers from being misled about the nature and quality of a product. Although the relevant TRIPS provisions are not primarily aimed at consumer protection, the *EC–Trademarks/GIs* case emphasized the role of trademarks and geographic indications in consumer protection. 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.”⁸⁸ 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,’”⁸⁹ demonstrating that this provision of the Regulation “was, in fact, applied to take account inter alia of the legitimate interests of consumers.”⁹⁰

Overall, then, labeling represents perhaps the most consumer-oriented area of WTO rules, but labeling standards vary across WTO agreements, including SPS, TBT, rules of origin, and TRIPS.⁹¹ In a number of instances, the rules aim to prevent a form of unfair competition by producers rather than to protect consumers, and the case law, to some extent, also reflects this producer orientation.

DS291/AB/R, WT/DS292/AB/R, WT/DS293/AB/R (Sept. 29, 2006) (*adopted* Nov. 21, 2006) [hereinafter *EC– Approval and Marketing of Biotech Products*], paras. 6.52, 6.60.

86. *Id.* para. 7.410.

87. *Id.* para. 7.412.

88. *EC–Trademarks/GIs* (Panel Report), *supra* note 68, para. 7.676.

89. *Id.* para. 7.677.

90. *Id.* para. 7.678.

91. Wendy Johncheck, *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 Applied Nutrition Program Discussion Paper, No. 43. (Mar. 22, 2010), available at <http://ssrn.com/abstract=1579828> (discussing the *U.S.–Meat COOL* dispute with respect to consumer information labeling regulations).

2. *Protecting Consumers' Health and Safety*

Most notably, the SPS and TBT Agreements allow states to impose health and safety standards.⁹² The GATT allows members to take measures necessary to protect public health⁹³ and the environment.⁹⁴ For instance, the EU bans on meat produced using growth hormones and on genetically modified organisms both allegedly sought to prevent consumption of potentially harmful products.⁹⁵ However, the GATT provisions are not aimed exclusively at consumers, and indeed, have been used for a variety of other purposes, including the protection of the public at large, as well as protection of 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 producers.⁹⁶

A number of cases deal with measures allegedly devised to protect consumers against physical risks from consumption or exposure. *EC—Hormones* inaugurated this line of cases.⁹⁷ Here, the EC presented its ban on the import of meat produced with certain growth hormones as a response to consumers' health concerns.⁹⁸ Ultimately, however, WTO adjudicators assessed the measure 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.⁹⁹ In other words, states can only take measures to protect consumer health if there is scientific evidence of a risk to health.¹⁰⁰ The issue is not whether the EC could protect consumers—as it is

92. SPS Agreement, *supra* note 63, Preamble, art. 2.1 (“*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”); TBT Agreement, *supra* note 63, Preamble, art. 2.2 (“*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”).

93. GATT, *supra* note 5, art. XX(b).

94. GATT, *supra* note 5, art. XX(g).

95. *EC—Approval and Marketing of Biotech Products*, *supra* note 85; Panel Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R, WT/DS48/R, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R (Aug. 18, 1997) (*adopted* Feb. 13, 1998) [hereinafter *EC—Hormones*], paras. 4.14, 4.18 n.22.

96. Larry A. DiMatteo et al., *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 meant to protect public health but rather is a business-oriented agreement).

97. *EC—Hormones*, *supra* note 95.

98. 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).

99. *EC—Hormones*, *supra* note 63, paras. 8.233, 8.256-258.

100. SPS Agreement, *supra* note 63 arts. 2.2, 5; GATT, *supra* note 5, art. XX(b) (necessity interpreted to require a showing of an actual risk).

well established, in theory at least, that states can decide what level of risk is acceptable to them—but rather whether there was anything against which to protect, rendering consumers' perception of risk irrelevant to the inquiry.

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 misled, the directive's "fundamental purpose" was to "ensure that the covered novel foods and food ingredients: (1) not present a danger for the consumer; (2) not mislead 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."¹⁰¹ 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."¹⁰² It then equated the possible presence of undesirable substances in the GMO products to the potential danger to life or health, concluding 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."¹⁰³ In contrast, with respect to the third purpose of the directive, 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 the SPS Agreement]."¹⁰⁴

This reasoning exemplifies the possible disparity 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 prove impossible.

Consumer protection measures have also arisen in the context of differential tax treatment of domestic and foreign products. Under GATT Article III's national treatment obligation, an imported product cannot be treated less favorably than the like domestic product with respect to domestic taxes. In *Chile–Alcoholic Beverages*, 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

101. *EC–Approval and Marketing of Biotech Products* (Panel Report), *supra* note 84, para. 7.127.

102. *Id.* para. 7.404.

103. *Id.* para. 7.407.

104. *Id.* para. 7.414.

deciding to impose a higher tax on beverages with higher alcohol levels, which happened to be the imported products.¹⁰⁵

Lastly, arguments relating to consumer safety have also surfaced in relation to trade in services. In *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the United States invoked a risk-to-consumers'-health argument to justify the adverse treatment of online gambling services.¹⁰⁶ The United States used expert support to argue that the risk of pathological gambling for consumers was increased in the online environment, compared to "brick and mortar" gambling facilities.¹⁰⁷ The Panel found that, "while the United States has legitimate specific concerns with respect to . . . health . . . that are specific to the remote supply of gambling and betting services," the way in which the measures were implemented did not comply with the WTO requirements.¹⁰⁸

Some health-related cases focused on whether the consumer perception of two products as being alike is relevant to the determination of product likeness.¹⁰⁹ 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.¹¹⁰ Canada, in response, contested the relevance of consumer tastes and habits to the likeness determination.¹¹¹ Overall, there appears to be a discrepancy between what 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 consumers does not directly correlate with preferences in product likeness analysis, it does in-

105. Panel Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303, (June 15, 1999) (*adopted* Jan. 12, 2000) [hereinafter *Chile—Alcoholic Beverages* (Panel Report)], para. 4.470.

106. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), para. 3.19.

107. *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).

108. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 105, paras. 6.533–6.535.

109. 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.

110. *EC—Asbestos* (Panel Report), *supra* note 107, para. 4.449. The EU conceded elsewhere that consumer tastes had limited relevance to certain parts of the enquiry. *Id.* para. 3.446.

111. *Id.* para. 3.450.

form the broader point of the WTO as a producer-centric trade liberalization system that insufficiently takes consumers into account 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 inquiries into consumer protection objectives by focusing on objective risk assessment and compatibility with affirmative GATT or WTO disciplines. In other words, the WTO agreements are permissive of consumer protection, but the issue remains of secondary importance to 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 several elements other than production costs, such as transaction costs, transportation, insurance, duties, and other export and import related fees. WTO rules do not govern all of these costs, but they have a bearing on most. For instance, Members' tariff schedules set the bound duties, which affect the price of the products to consumers. Disciplines prohibiting less favorable domestic taxes on imported products also affect the pricing of the goods. Rules and current negotiations on trade facilitation would help to decrease transaction costs and other administrative costs related to import and export processing. Additionally, trade remedies, such as safeguard duties, anti-dumping duties, and countervailing duties,¹¹² may be imposed in certain circumstances, typically resulting in a price increase for consumers, in extreme cases making the foreign good so uncompetitive that it will no longer be offered to domestic

112. 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 65, art. XIX; 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]. Anti-dumping 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 65, art. VI; 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]. 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 65, art. XVI; 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*, chs. 11, 14–15 (2d ed. 2006).

consumers. Such trade remedies are typically imposed to protect domestic producers of competing goods from foreign trade practices or general circumstances that WTO members have deemed “unfair” to their domestic producers. This section first focuses on trade remedies, including safeguards, anti-dumping, and countervailing duties, which are a unique area where the interests of domestic producers may conflict with 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 account for these potentially diverging interests. The section then discusses how product likeness analysis relates to the price of the goods to consumers, yet differentiation by consumer between similar products plays an uncertain role in the analysis. Last, this section will address the effect of state-enabled market segmentation on consumer pricing and how it is disciplined at the WTO.

Intersection between Price and Trade Remedies

Certain aspects of anti-dumping investigations call for producers and users of the product, including industrial users and consumers if the product is sold at the retail level, to submit information regarding the sales and marketing of the product. “Representative consumer organizations” are supposed to convey information from consumers.¹¹³ Similarly, the Subsidies and Countervailing Duties Agreement (SCM Agreement) requires the investigative authorities to give “representative consumer organizations” an opportunity to comment on the subsidy, injury, and causality elements.¹¹⁴ The SCM Agreement also calls for the domestic authority to determine whether and at what level a countervailing duty should be imposed to take into account “representations made by domestic interested parties,” which are defined to include “consumers . . . of the imported product subject to investigation.”¹¹⁵ 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 mandatory conduct. In all of these cases, consumers’ interests may be adverse to those of the domestic industry petitioning for anti-dumping or countervailing duties. Indeed, domestic consumers may be paying less for a good because the good is subsidized by foreign taxpayers. Not only do consumers get a better price, but they also 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 con-

113. Anti-Dumping Agreement, *supra* note 112, 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.”).

114. SCM Agreement, *supra* note 112, 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.”).

115. *Id.* art. 19 and n.50.

sumer.¹¹⁶ With respect to anti-dumping, 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. Similarly, if the domestic industry wishes to be protected by a safeguard measure it must show that the damage or threat thereof that it sustains is caused by the increased quantity in imports of the competing foreign product, and not by other factors such as changes in consumer preferences.¹¹⁷

However, the WTO agreements are largely silent regarding how domestic authorities might balance the information and interests originating from consumers against those 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.¹¹⁸ The role and legal effect, if any, of representations from consumers in anti-dumping and countervailing investigations is less clear and likely minimal. Very little attention has been paid to the interests of consumers in countervailing duty and anti-dumping cases at the WTO level.¹¹⁹ Somewhat more weight has been given to consumer perception and representations in the product likeness and market analyses.¹²⁰

In WTO disputes, members have not challenged how other members seeking to impose trade remedies have weighed consumer interests in their domestic proceedings. WTO adjudicators have been similarly reluctant to

116. Economists hotly debate the economic and social effects of subsidies and countervailing duties and the long-term impact of subsidized goods (and to some extent dumped goods) can be complex. Some analogies have been drawn from the antitrust context where a good sold at a predatory price may benefit consumers in the short term but, by driving out the competition, poses the risk of later monopoly pricing or decreased availability of alternate suppliers.

117. Agreement on Safeguards, *supra* note 112, 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.”).

118. *Id.* art. 4(2)(b).

119. In Panel Report, *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 and leasing companies, and the travelling public, and that this militates against a finding that those subsidies cause adverse effects to the United States’ interests.” *Id.* para. 7.1990. In Panel Report, *Mexico—Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R (Sept. 4, 2008), the Panel noted a report submitted by the EC stating that “for many consumers, olive oil is the most important source of oils and fats . . . it is necessary to support this production through appropriate actions.” *Id.* para. 7.164. Interestingly, the Panel also pointed out that the EC had not mentioned that part of the report. The Panel, however, quoted the report for a different purpose.

120. See e.g., *EC—Aircrafts*, *supra* note 119, paras. 5.30, 7.1629; Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) (*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.

give serious thought to the legal effect of consumer interests in trade remedy cases.

The *EC–Aircrafts* case offers perhaps the most explicit example of 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 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.¹²¹

In sum, while the Anti-dumping Agreement and the SCM Agreement call for consumer interests to be considered in the investigations on dumping and subsidies, the texts are silent on how to balance these interests against those of the affected industries. In practice, consumer interests play a minimal role at best in trade remedy investigations. WTO cases are similarly elusive regarding the proper role of consumer interests in trade remedy proceedings, but overall are not particularly favorable to a serious consideration of such interests.

Price and Product Likeness Issues

In some 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 different from 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?

121. *EC–Aircrafts*, *supra* note 119, para. 7.1991.

The *Japan—Alcohol* case¹²² 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 these products differently based on their respective categories.¹²³ As a result, shochu was taxed at a lower rate than vodka, gin, rum, whisky, and brandy, many of which were imported products.¹²⁴ Japan argued that “the primary objective of the policy . . . [was] 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.”¹²⁵ The objective was, according to Japan, to create equity between consumers of different tax-bearing ability.¹²⁶ 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, which is presumably domestic shochu. Conversely, high-income consumers, including foreigners, who might be less price sensitive bear a heavier tax burden on the type of spirits that they consume, which are presumably imported spirits such as gin, vodka, and brandy. 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 it came to hard liquors, such that gin, rum, brandy, vodka and whisky were really similar products to shochu and should therefore be subject to the same tax rate.¹²⁷ The Panel and AB found that vodka was taxed in excess of sochu in violation of GATT Article III:2.¹²⁸ Additionally,

122. Panel Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125 (July 11, 1996) (adopted Nov. 1, 1996). Consumer taste was examined briefly in the pre-WTO *Spain—Unroasted Coffee* case and essentially dismissed by the Panel. See *supra* note 83.

123. *Japan—Taxes on Alcoholic Beverages*, *supra* note 122, para. 2.3.

124. *Id.*

125. *Id.* para. 4.133.

126. *Id.* para. 4.107(1), para. 4.108.

127. *Id.* para. 4.172. In a similar case involving Chile, the Panel took into account:

(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 tax level 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. See, Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R. Panel Report at 7.159.

128. *Id.* para. 6.27 (prohibiting internal taxes on imported products in excess of taxes on like domestic products).

internal taxes could not be applied to imported or domestic products so as to afford protection to domestic production,¹²⁹ 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.¹³⁰

Price and Consumer Market Segmentation

Segmenting markets based on different groups of consumers' ability to pay is a policy used in many areas and many countries. In a number of instances, such measures, when imposed by the state, are challenged at the WTO. One series of cases deals with differential taxes on alcoholic beverages, where the imported drinks, which are typically considered more up-market, are taxed at a higher rate than the comparable local drinks, which are often perceived as more down-market. Consumer segmentation for purposes of sharing the tax burden was at issue in *Korea—Alcoholic Beverages*¹³¹ and *Chile—Alcoholic Beverages*, where Chile argued:

[I]t 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.¹³²

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)."¹³³ 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."¹³⁴

Most recently, the Philippines made an equally unsuccessful argument in *Philippines—Taxes on Distilled Spirits*.¹³⁵ There, the Panel ultimately found "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

129. *Id.* para. 6.33.

130. *Id.* para. 6.34.

131. Panel Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (Sept. 17, 1998), paras. 5.169, 5.179, 10.43.

132. Panel Report, *Chile—Alcoholic Beverages*, *supra* note 105, para. 4.258.

133. *Id.* para. 7.159.

134. *Id.*

135. *Philippines—Taxes on Distilled Spirits*, *supra* note 109, para. 7.60.

that would consume distilled spirits made from other raw materials.”¹³⁶ 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 have been found to exist.

In a different type of market segmentation, a number of developing countries 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.¹³⁷ This could be interpreted as a discriminatory measure that gives less favorable treatment to foreigners than it does to domestic consumers. 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.¹³⁸

Trade economists identify lower prices for consumers as a major benefit of free trade. While liberalization certainly tends to have that price decreasing effect, the WTO veers away from that model in a number of important ways. Trade remedies, market segmentation, and even product likeness analysis all have direct impacts on prices for consumers of both intermediate goods and finished products, but WTO rules allow states to implement protectionist instruments.

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 this Article,¹³⁹ 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 the price and availability of goods and services in a closed economy. 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.¹⁴⁰ These disciplines mostly focus on protecting foreign producers from protectionist domestic measures, with the benefits to consumers assumed through a “trickle down” effect. However, consumers will only harvest the benefits of trade liberalization if the savings in prices are passed on to them.

136. *Id.*

137. See *supra* note 6. Other policy objectives are at stake here (such as access by the local population to national cultural and historical resources) and may well override any interest in trade liberalization, particularly with respect to public museums and sites.

138. See *supra* note 48 and accompanying text.

139. See *supra* Section I.A and accompanying footnotes. However, some recent economics studies cast doubts over whether the GATT and the WTO have really created as much trade as originally thought. See e.g., Andrew K. Rose, *Do We Really Know That the WTO Increases Trade?* (Nat’l Bureau of Econ. Res., Working Paper No. 9273, October 2002), available at <http://www.nber.org/papers/w9273>.

140. GATT, *supra* note 5, arts. II, XI; GATS, *supra* note 5, art. XVI.

Producers, in contrast, are primarily concerned with maximizing their profits, not necessarily with serving the greatest number of consumers. The debate regarding access to medicines and patents has generated a lot of data to show that, from an economics point of view, it is not always in the interest of the producers to serve the greatest number of consumers by cutting prices.¹⁴¹ It may therefore be that market access would translate into different rules depending on whether the objective is to ensure the kind of market access that producers want or the type that consumers want. For a more sophisticated analysis more empirical and economic studies are needed, but at this preliminary stage we can at least raise the question of who gains from market access 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.”¹⁴² In effect, Canadian dairy producers would benefit, at the expense of consumers, from prices for dairy that would not have been as high absent the measure. The United States, the complaining party, argued that “Canadian consumers would use more milk if domestic prices were lower.”¹⁴³ Most likely, the United States was really concerned about Canadian market opportunities for U.S. dairy producers, rather than simply trying to protect Canadian consumers. However, the United States framed its argument with respect to those foreign consumer interests in order to protect its domestic producers’ interests.

The arguments between Canada and the United States largely centered on the definition of the word “consumer.” Canada argued for a narrow definition of the term, 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.¹⁴⁴ The United States referred to the New Shorter Oxford English Dictionary definition of “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.”¹⁴⁵ The Panel adopted the broader definition of the term.¹⁴⁶ However, that seemed of limited importance to its decision as the Panel immediately shifted the focus back to the WTO members’ expect-

141. See, e.g., Sean Flynn, Aidan Hollis, Mike Palmedo, *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. MED. & ETHICS 184, 186–88 (2009).

142. Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097, (May 17, 1999) (adopted 27 October 1999), para. 4.86.

143. *Id.* para. 4.177.

144. *Id.* paras. 4.503, 4.472, 4.489, 4.497, 4.500–4.507.

145. *Id.* para. 4.503 (internal citation omitted).

146. *Id.* para. 7.152.

tations resulting from the balance of negotiated concessions. In this case, this means that the Panel shifted the expectations of U.S. dairy producers, in finding that the measure was in breach of Canada's binding schedule of concessions.¹⁴⁷

In conclusion, several trends emerge from the 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, 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 inquiry point exist that is able to answer questions from other members about the measure. On the other hand, when it comes to considering consumers' and producers' interests, the interpretative approach almost always focuses on the latter. The number of cases that raise consumer interest 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 engage with consumer protection measures as such and rather have reframed and reduced the measures to producer discrimination devices. In many cases, the consumer protection 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 trade transactions. Panels have declined to consider balancing 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, 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

147. *Id.* paras. 7.154–7.155.

WTO, at least with respect to treaty interpretation 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*

Consumers as a legal category have little weight in the interpretation of WTO disciplines. Indeed, 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, such as standard-setting institutions. As discussed above, consumers are recognized only to a very limited extent as objects and even less so as subjects in the covered agreements.¹⁴⁸ 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 interests to those of producers, without much examination of the legal and economic implications of doing so. As suggested in the first part of this Article, this choice is a political one, rather than one dictated by economic theory.

As a consequence, domestic consumer protection measures cannot be evaluated in relation to a consumer protection objective under the covered agreements. Rather, the measure has to be recast as a measure for which there is an explicit allowance under the WTO agreements, including public health or the protection of the environment. In other words, 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 that is 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 considered a foreign protection measure unless it meets the requirements of GATT Article XX(b) or the SPS Agreement allowing measures to protect *public health*.¹⁴⁹ Ultimately, the stated objective of the measure may be different in both the domestic and WTO legal systems and both systems might allow the measure. In other cases, the overlap might not be sufficient to find a basis under the WTO to justify the measure. In other words, there is a discrepancy between the normative underpinnings for consumer protection measures

148. See *supra* Part II.A.

149. GATT, *supra* note 5, art. XX(b); SPS Agreement, *supra* note 63, art. 5.

under domestic law and the assessment of those measures against the producer-centric trade liberalization disciplines of the WTO.

A few hypotheticals may illustrate this point. 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 to the extent that 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 fish imports alleged to have been “sustainably produced” if 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; in a number of areas of WTO law that is not a legitimate differentiation.¹⁵⁰ With respect to sustainably produced fish, the member state could 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 glaring. Fair trade labels typically indicate that the original producer received living wages. However, this classification does not mean that there is any physical difference between the fair trade and non fair trade products themselves. A state might pass a measure regulating the use of fair trade labels 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 allow such a consumer protection measure. A fairly traded and non-fairly traded banana would probably be considered “like products,” which would prohibit treating one banana less favorably than the other so as to not grant to one banana beneficial treatment under the WTO agreements. The state would have to find a justification for its measure under one of the exceptions listed in the agreements, as it did in the earlier example of sustainably produced fish. However, the state would not even have the fallback

150. See generally CHRISTINE R. CONRAD, PROCESS AND PRODUCTION METHODS (PPMs) IN WTO LAW – INTERFACING TRADE AND SOCIAL GOALS (2014).

of a GATT exception here because Article XX does not provide an exception for measures protecting the labor conditions of workers.

In sum, consumer protection in itself is generally not a recognized legitimate regulatory basis for imposing a trade-restrictive measure under the WTO.¹⁵¹ Rather, states may enact 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, or certain types of standard-setting.¹⁵² Additionally, it is likely that the measure would need to pass the “least trade-restrictive alternative” test.¹⁵³ In some cases, that framework will be good enough to allow the state to maintain the consumer protection measure, but in some 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,¹⁵⁴ there is no such presumption with respect to the level of protection for consumer interests.

Three types of solutions could be envisioned to bridge the disconnect highlighted above between consumer protection objectives and recognized regulatory objectives under the WTO. First the WTO agreements could be revised. At minimum, the agreements could provide a stronger enabling framework for consumer protection. Indeed, states have repeatedly demonstrated their interest in consumer protection in WTO disputes. Beyond that, states might engage in a more careful examination of which trade tools might be most effectively deployed to address the shortcomings of domestic consumer protection. Without presuming that the WTO is the appropriate forum to tackle these questions, inasmuch as the WTO’s trade liberalization disciplines prove to have spill-over effects on consumer protection, 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.¹⁵⁵ Second, the WTO organs could leverage provisions already built into the system to address consumer interests. Since the WTO agreements textually do

151. With the exception of the TBT Agreement and the SPS Agreement allowing some limited types of consumer protection regulations. See *supra* Part I.A.

152. 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, *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).

153. See, e.g., SPS Agreement, *supra* note 63, art. 5.6, n.3.

154. See, e.g., SPS Agreement, *supra* note 63, Preamble, arts. 2, 5.4.

155. For example, consider the ongoing process to ratify the amendment to TRIPS Article 31(f). This is reflected in a list of members accepting amendment of the TRIPS Agreement. See World Trade Org., *Members Accepting Amendment of the TRIPS Agreement* (January 25, 2014), http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm. 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. See, e.g., *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).

provide some opportunities for considering consumer interests—particularly the more regulatory agreements such as the TBT Agreement, SPS Agreement, 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.¹⁵⁶

Equally important, though, is a preliminary question regarding whether the protection of consumer interests should be regulated at the multilateral level and if so what the optimal forum might be. Indeed, even agreeing that both producers and consumers play crucial roles in the trade liberalization process and hence that one should not necessarily be subordinated to the other in the regulatory framework, still does not establish that states should take up the issue of consumers at the supra-national level. The next section seeks to map some of the issues rather than to fully answer the question. Certainly, it does not answer whether consumer protection should be regulated at the multilateral level (multilateralizing) as a matter of principle, but instead sheds light on various regulatory experiments to address consumer interests that states have undertaken in the trade context.

III. WHY MULTILATERALIZE CONSUMER PROTECTION AND WHERE?

Exploring 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 to complement states' domestic frameworks and reduce the regulatory failures that they currently face.

The EU example demonstrated that trade liberalization may be pursued by considering both consumer and producer interests while, in comparison, the WTO has focused on a producer-centric model.¹⁵⁷ 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 resolve the issue of the appropriate, or even the optimal locus of consumer protection regulation. It could be argued that even if trade barriers could be further decreased by protecting both producer and consumer interests, the WTO should be concerned mostly with facilitating trade for producers while states can simply protect consumers domestically. Policy rationales in support of this perspective include the different preferences, expectations,

156. As discussed in Section II.A.3 above, the Anti-dumping Agreement and the SCM Agreement could be interpreted in ways that give more weight to the interests of consumers.

157. See *supra* Section I.

and risk tolerance of consumers in different parts of the world, as well as the different polity models for states' control over individual choices, such as consumption choices. At a theoretical level, some may argue that states only enter into trade agreements in order to reduce externalities and 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. For example, lead paint toys, tainted baby formula milk, vitamin supplements, 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 consumers' demand for protection 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.¹⁵⁸ Prevention tools, such as border inspection, are impractical given the enormous volume of trade and the difficulty of tracing the chain of production back to the problem. Mitigation tools, such as import bans and domestic product labeling 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.

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,¹⁵⁹ 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 inquiries as a debate between producer and consumer interests. Rather, they root consumer protection in the need to remedy a market failure, widely acknowledged and

158. Elizabeth Trujillo & Jacques de Lisle, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135 (2010) (surveying U.S. 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).

159. Cary Coglianese, et al., *Import Safety: Consumer Protection in the Global Marketplace*, 35 ADMIN. & REGULATORY L. NEWS 5 (2010). See also Adam I. Muchmore, *Private Regulation and Foreign Conduct*, 47 SAN DIEGO L. REV. 371, 376 (2010) (identifying current U.S. food safety policy being limited to "ex post measures" rather than "ex ante requirements" that address foreign production of goods); Kenneth A. Bamberger & Andrew T. Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CALIF. L. REV. 1405, 1417 (2008) (noting FDA regulators do not have the authority to enter foreign factories unannounced).

theorized in the domestic realm most recently in relation to consumer finance.¹⁶⁰ There is no reason to believe that these market failures do not also occur at the international level, particularly when those failures are not addressed—or are 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 most importantly, states themselves are increasingly looking to international and transnational frameworks to address the consumer protection challenges in a free trade environment. Renewed interest in the Codex Alimentarius Commission,¹⁶¹ the activities of the International Standards Organization and their popularization through information campaigns aimed at individual consumers and businesses, and bilateral and multilateral regulatory cooperation processes¹⁶² are all examples of voluntary undertakings by states at the supranational 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 level¹⁶³ is further indication that in an integrated trade system consumer interests do not stop at the border.

Even though 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 settlement.¹⁶⁴ Most recent cases focus on regulatory issues, rather than on tariffs and quantitative trade restrictions.¹⁶⁵ It seems, then, that trade concerns have migrated into a regulatory realm. This makes it all the more pressing to examine how the current WTO rules respond or fail to respond to market shortcomings other than those reflected by price and quantity. Far from being the result of pressure by domestic consumer groups and lobbies, most of the consumer interest

160. See Kathleen C. Engle and Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002); Oren Bar-Gill, *Seduction by Plastic*, 98 N.W. U. L. REV. 1373 (2004); Adam Levitin, et al., *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk Capital to the Securitization Market?*, 29 YALE J. ON REG. 155 (2012).

161. See Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 776 (2006) (discussing States' incentives to adopt the Codex Alimentarius); see also Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605, 640 (2008) (WTO endorsement of Codex illustrates the voluntary code's conversion from soft law to hard law by means of safe harbor within the SPS).

162. The International Organization for Standardization (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. See generally ISO – INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <http://www.iso.org/iso/home.htm> (last visited January 27, 2014).

163. See *supra* Part I.

164. See *supra* Part II.A.

165. Of the 19 disputes initiated in 2013, only one dealt with duties (Peru — Additional Duty on Imports of Certain Agricultural Products, DS 457, Request for Consultations received April 12, 2013) and 8 dealt with anti-dumping, countervailing, and safeguard duties. All others focused on regulatory issues.

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.¹⁶⁶

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, the WTO legal system included, to not 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 EU's market integration objective 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 on their emphasis on producers. This Part turns to public choice theory and its progeny as well as to other political economy theories to inquire whether trade agreements should be concerned with consumer protection issues or whether their producer-focus reflects a political economy and negotiation optimum.

Public choice theory is a seminal attempt at explaining the reasons that countries enter into trade agreements. The original insight is that public officials pursue their self-interest, which includes maximizing their chances of reelection. For that purpose, they are more likely to cater to groups that are well-organized because these groups can leverage votes and campaign

166. See *supra* Part II.A.

contributions.¹⁶⁷ In the United States, where this theory originated, as well as 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 imported intermediate goods. The result 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 explaining why states engage in multilateral trade liberalization. According to this theory, 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.¹⁶⁸ States therefore enter into multilateral trade agreements to reduce the collective action problem that would otherwise lead to an inefficient tariff equilibrium.

However, terms-of-trade theory does not explain why trade agreements are primarily concerned with reducing discrimination between producers, and not between consumers. According to the 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.

Several problems arise at the theoretical and empirical levels. First, terms-of-trade 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 a "political market"—all constituents, consumers and producers alike—had full and free information and were atomized such that no group had any preponder-

167. See generally Dennis C. Mueller, *Public Choice: A Survey*, 14 J. ECON. LITERATURE 395 (1976).

168. See Harry G. Johnson, *Optimum Tariffs and Retaliation*, 21 REV. ECON. STUD. 142, 142 (1953-54).

ant voice. This, of course, is not true in practice. As noted above, industry groups are well-organized and thus positioned 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 policymaking. As Gene Grossman and Elhanan 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 organized¹⁶⁹—conditions that are typically not verifiable 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 assumption 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. For instance, the ultimate set of commitments may end up 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 in the national welfare position.

Grossman’s and Helpman’s model considers terms-of-trade theory and public-choice preferences of political officials in a small country that cannot freely set its optimal tariff. The theory uses Putman’s two-level game theory to describe the interaction between domestic processes and international positions. It also highlights the role of trade in effectuating domestic income redistribution and acknowledges that some individuals are both consumers and asset owners in particular industries, such that they have multiple interests.¹⁷⁰ The authors assume that politically unorganized individual asset owners have no means to influence policy with their campaign contributions, rendering them 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.”¹⁷¹ Rather, the authors show that “the politically motivated governments tilt trade policies in favor of their organized

169. Gene M. Grossman & Elhanan Helpman, *Trade Wars and Trade Talks*, 103 J. POL. ECON. 675, 689–90 (1995).

170. See *id.* at 680.

171. *Id.* at 682.

special interests” compared to what would be predicted by the traditional terms-of-trade theory optimal equilibrium.¹⁷² Trade agreements, then, are not so much a device to reduce tariff inefficiencies as they are a way to reduce the political costs that politicians impose on each other by choosing their national policies non-cooperatively (independently of other governments).¹⁷³ The authors caution that this 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.”¹⁷⁴

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 economic welfare theory. For instance, Krugman argues that “optimal tariff argument . . . plays almost no role in real-world disputes over trade.”¹⁷⁵ 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.”¹⁷⁶ If that is true, then the decision to ignore barriers to trade created by discrimination between domestic and foreign consumers is a political, 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 domestic political cost to doing so. Trade agreements remove trade policymaking from policy-makers captured by those interests, increase the power of exporting interest groups, and raise the cost of yielding to a high tariff policy. In this framework, one might imagine that governments, believing that non-discrimination among consumers could enhance their trade position, would want to include such a

172. *Id.* at 692.

173. *See id.* at 694.

174. *Id.* at 706.

175. Paul R. Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT. 113, 113 (1997).

176. ROBERT E. BALDWIN, *TRADE POLICY IN A CHANGING WORLD ECONOMY* 138 (1988).

feature in trade agreements in order to resist the pressure from better-organized and more vocal import-competing industries. Governments could also thwart the 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 persons' mobility 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: (1) trade policy outcomes (unilateral domestic or bargained internationally), (2) the strength of organized pressure groups domestically, and (3) the strength of organized pressure groups relative to their foreign counterparts. This suggests that there is no reason why the interests of producers should trump those of consumers in absolute terms. Rather, it only suggests that trade policies reflect 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: because 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.

Andy Baker explores the latter issue.¹⁷⁷ 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.”¹⁷⁸ His theory incorporates a traditional perspective on the welfare effects of high-skilled and low-skilled labor markets derived from the Heckscher-Ohlin model, with an empirical analysis from consumption behavior.¹⁷⁹ He finds that public attitudes regarding the desirability of trade liberalization correlate well with the Heckscher-Ohlin model's predictions with respect to high-skilled labor market countries.¹⁸⁰ However, he points out that traditional analyses fail to tease out the expected negative correlation with pro-trade

177. See Andy Baker, *Who Wants to Globalize? Consumer Tastes and Labor Markets in a Theory of Trade Policy Beliefs*, 49 *AMERICAN J. POL. SCIENCE* 924, 924 (2005).

178. *Id.*

179. *See id.*

180. *See id.*

attitudes in low-skilled markets, as in many developing countries.¹⁸¹ He also argues that dynamic consumption patterns have been overlooked, and that there are economic, cognitive, and psychological reasons why consumption habits might inform trade-policy preferences.¹⁸² A key element of his analysis is 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 that a lower-income person (nonhomothetic tastes) would.¹⁸³ By contrast, most international trade theories assume that consumer tastes do not vary when incomes increase (homothetic tastes). His four models show that consumers' interests 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."¹⁸⁴ 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 of consumer attitudes in determining trade-policy preferences and the positions taken by governments.¹⁸⁵

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 consumers and producers might be considerably thrown off when all of 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 domesti-

181. *See id.*

182. *See id.* at 926.

183. *Id.* at 925. The theoretical relevance and empirical foundation of nonhomothetic tastes for trade has been increasingly recognized in recent decades. *See, e.g.,* Linda Hunter, *The Contribution of Nonhomothetic Preferences to Trade*, 30 J. INT'L ECON. 345 (1991); Kiminory Matsuyama, *A Ricardian Model with a Continuum of Nonhomothetic Preferences: Demand Complementarities, Income Distribution and North-South Trade*, 108 J. POL. ECON. 1093 (2000); Jeffrey J. Reimer & Thomas W. Hertel, *Nonhomothetic Preferences and International Trade*, 18 REV. INT'L ECON. 408 (2010).

184. Baker, *supra* note 177, at 936.

185. *Id.* at 934.

cally 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. Political economy, and to some extent international relations, thus suggests that the producer-centric model of trade liberalization espoused by the WTO can be explained by domestic and multi-level power plays rather than by economic efficiency. As such, it does not provide a convincing argument against multi-lateralizing 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 desirability of a multi-level framework for consumer protection. The next Part 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, one might posit that protecting consumers is indeed beneficial to achieving trade liberalization, but one 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 Común del Sur (MERCOSUR), the Association of South East Asian Nations (ASEAN), the Asia-Pacific Economic Cooperation Organization (APEC), and the ongoing Trans-Pacific Partnership (TPP) negotiations 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.

Similar to the WTO, the Treaty of Asunción creating the MERCOSUR generally prohibits discriminatory restrictions to trade, which are in violation of the national treatment obligation of Article 7, or of the 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.¹⁸⁶ 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 creat-

186. Montevideo Protocol on Trade in Services of MERCOSUR art. XIII, Dec. 15, 1997, *available at* <http://www.cvm.gov.br/ingl/inter/MERCOSUL/montv-e.asp> (last visited July 2, 2013).

ing an opportunity for some level of consumer protection.¹⁸⁷ We have seen that the absence 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 among 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.¹⁸⁸ 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.¹⁸⁹ A 1994 resolution stated that pending approval of common regulations, member states' legislation on consumer protection will continue to apply.¹⁹⁰ A 1998 resolution began to provide substantive rules on the form of consumer contracts.¹⁹¹

At the institutional level, the Technical Committee, CT No. 7 Defensa 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.¹⁹² In 1996,

187. Jean Michel Arrighi, *Integration and Consumer Protection: the Case of Latin America*, 15 J. CONSUMER POLICY 179, 181 (1992).

188. See Gabriel A. Stiglitz, *Consumer Law in Argentina and the MERCOSUR*, 17 J. CONSUMER POLICY 459, 467–68 (1994); see also Norbert Reich, *El Mercado interno de la Comunidad Europea y la protección al consumidor en las relaciones contractuales*, DEFENSA DE LOS CONSUMIDORES DE PRODUCTOS Y SERVICIOS 379–422 (Gabriel A. Stiglitz ed., 1994).

189. See, e.g., ANTONIO PEREIRA GAIO JUÚNIOR, A PROTEÇÃO DO CONSUMIDOR NO MERCOSUL: INTEGRAÇÃO REGIONAL, SOLUÇÃO DE CONTROVÉRSIAS, PROTEÇÃO DO CONSUMIDOR NA UNIÃO EUROPÉIA [CONSUMER PROTECTION IN MERCOSUR: REGIONAL INTEGRATION, DISPUTE RESOLUTION, CONSUMER PROTECTION IN THE EUROPEAN UNION] 152–53 (2004) (Braz.); DORA SZAFIR & ROBERTO M. LÓPEZ CABANA, EL CONSUMIDOR EN EL DERECHO COMUNITARIO: PROYECTO DE PROTOCOLO DE DEFENSA DEL CONSUMIDOR DEL MERCOSUR [THE CONSUMER IN EU LAW: DRAFT CONSUMER PROTECTION PROTOCOL MERCOSUR] (1998) (Uru.).

190. 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." *Id.*

191. Grupo Mercado Común, Defensa del Consumidor–Garantía Contractual, Resolución 42/1998 (Aug. 12, 1998).

192. Modificación de la Nomenclatura común del MERCOSUR y su Correspondiente Arancel Externo Común, MERCOSUR/CXXII CCM/DT N° 29/11; see generally Report to the Trade Commission, MERCOSUR/CCM/ACTA N° 05/11, ¶ 1.4 (Sept. 20–22, 2011).

MERCOSUR parties also agreed on a Protocol on jurisdiction regarding disputes involving consumers.¹⁹³

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.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶

Building on that framework, an inter-governmental ASEAN Coordinating Committee on Consumer Protection, later renamed the ASEAN Committee on Consumer Protection (ACCP), was established in August 2007. Consumer protection is explicitly linked to promoting a regional trade bloc:

193. Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo (Nov. 20, 1996). Mercosur/CMC/Dec. N° 10/96, reproduced in RUBEN B. SANTOS BELANDRO, BASES FUNDAMENTALES DEL DERECHO DE LA INTEGRACION Y MERCOSUR (2001), 475.

194. David K. Round & Sporer Zeljka, *Globalisation and Consumer Protection in East Asia: Is It a Zero Sum Game?*, 12 ASIAN-PACIFIC ECON. LIT. 39, 48 (2003).

195. John T. D. Wood, *Consumer Protection in the Asia-Pacific Region*, 14 J. CONSUMER POL'Y 99, 99 (1991).

196. Association of South East Asian Nations, *ASEAN Economic Community (AEC) Blueprint* (2008), 23, available at <http://www.asean.org/archive/5187-10.pdf>.

“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.”¹⁹⁷ The Committee’s strategic approach to fostering consumer protection within the region is threefold: “(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.”¹⁹⁸

With respect to APEC, consumer protection activities have emerged in the Electronic Commerce Steering Group, which is a subgroup of the Committee on Trade and Investment.¹⁹⁹ This work builds on the broader mandate laid out in the 1998 APEC Blueprint for Action on Electronic Commerce, where APEC ministers agreed that “[g]overnment and business should co-operate 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.”²⁰⁰ In several reports, the Steering Group has researched and compiled the state of the law in member states on various consumer protection issues, including data protection and privacy.²⁰¹ 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,²⁰² 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. 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.

197. ASEAN Committee on Consumer Protection, *Consumer Protection in ASEAN*, 2 (2010), available at <http://www.asean.org/images/2012/publications/FactSheet/Consumer%20Protection.pdf>.

198. *Id.*

199. Asia-Pacific Econ. Cooperation (APEC), *Summary Report - Electronic Commerce Steering Group Meeting 2002*, APEC Doc. 2002/ECSG2/SUM (Aug. 17, 2002), available at <http://mddb.apec.org/Pages/search.aspx?setting=ListMeeting&DateRange=2002/08/01%2C2002/08/end&Name=Electronic%20Commerce%20Steering%20Group%20Meeting%202002>.

200. APEC, 6th APEC Economic Leaders’ Meeting, Nov. 17-18, 1998, *APEC Blueprint for Action on Electronic Commerce*, ¶ 5, APEC Doc. 1998/AELM/DEC/3 (Nov. 17, 1998), available at http://www.apec.org/Meeting-Papers/Leaders-Declarations/1998/1998_aelm/apec_blueprint_for.aspx.

201. See generally *Electronic Commerce Steering Group*, ASIA-PACIFIC ECONOMIC COOPERATION, <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group.aspx> (last visited Jan. 26, 2014).

202. See, e.g., U.N. Conference on Trade and Dev., *Review of e-commerce legislation harmonization in the Association of Southeast Asian Nations*, U.N. Doc. UNCTAD/DTL/STICT/2013/1 (2013), available at http://unctad.org/en/PublicationsLibrary/dtlstict2013d1_en.pdf (last visited Jan. 26, 2014).

3. *The Trans-Pacific Partnership: 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 Trans-Pacific Partnership (TPP) project.²⁰³ 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.²⁰⁴ At least at the rhetorical level, the recurrent juxtaposition of producer and consumer interests is noteworthy, compared to the WTO's main focus on producers and near silence on consumers.

While the current drafts under discussion 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 intellectual property rights owners. A few instances of the complex relationship between intellectual property rights and consumer interests are illustrated below, but a full analysis will only be possible with the full text of the Trans-Pacific Partnership Agreement.

Article 2 of the Intellectual Property Rights Chapter²⁰⁵ 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 lawmaking. The

203. See, e.g., *Trans Pacific FTA Outline*, AMERICAN FED'N OF LABOR AND CONG. OF INDUS. ORG. (last visited June 30, 2013), <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Free-Trade-Agreement/Trans-Pacific-FTA-Outline>; Jeremy Malcolm, *The Trans-Pacific Partnership threatens hard-won consumer rights in Asia and the Americas*, CONSUMER INTERNATIONAL BLOG, (Oct. 8, 2012), <http://consumersinternational.blogspot.com/2012/10/the-trans-pacific-partnership-threatens.html>; *Obama Administration Takes Aim at TPP Countries' Public Interest Policies in New Report*, TRUTHOUT (Apr. 8, 2013), <http://www.truth-out.org/news/item/15597-obama-administration-takes-aim-at-tpp-countries-public-interest-policies-in-new-report>; Keith Wrightson, *Verizon Joins OSHA List of Severe Safety Violators*, CITIZENVOX (August 30, 2012) <http://www.citizenvox.org/2012/08/30/verizon-joins-osha-list-of-severe-safety-violators/>.

204. Touting market access opportunities, both generally and in the financial and telecommunications sectors specifically, that "create new opportunities for our workers and businesses and immediate benefits for our consumers," a competition framework that will "promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies," a reduction in "impediments to both consumer and businesses" engaging e-commerce and improved consumer protection in e-commerce transactions, "market-opening opportunities [in the financial sector that] benefit businesses and consumers of financial products." Outlines of the Trans-Pacific Partnership Agreement, Office of the United States Trade Representative, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (last visited June 30, 2013).

205. Proposed United States Text for Intellectual Property Rights Chapter, *Trans-Pacific Partnership Agreement*, art. 2 (Feb. 10, 2011), <http://infojustice.org/download/tpp/tpp-texts/tpp%20IP%20chapter%20feb%20leak.pdf>.

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

The Intellectual Property Rights Chapter's Article 7 on the protection of cable and satellite programs, which is aimed primarily at protecting program producers, includes a broad provision for civil remedies for "any person injured" by the activities sanctioned in this Article.²⁰⁶ Enhancing recourses and transparency regarding services providers is a standard feature of consumer protection measures.²⁰⁷ Consumers who pay for program content but are not getting the service that 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.²⁰⁸ This is presumably meant to include patenting of human biomaterials. While patent advocates typically might 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 regional trade 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 conclusion is further confirmed by the practice of states in regional trade negotiations. Both combined suggest that taking into account consumer interests is a 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

206. *See id.* art. 3.

207. *See id.* art. 7.

208. *Id.* art. 8.2.

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 primarily focus on the reduction of trade barriers. 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."²⁰⁹ The issue is for whom exactly is the scheme "mutually advantageous"? As the law currently stands, the scheme is advantageous 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 is reflected in the current understanding of the WTO agreements.

The question of 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.²¹⁰ Consumer interests would therefore be addressed through 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

209. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

210. See, e.g., Petros C. Mavroidis, *Come Together? Producer Welfare, Consumer Welfare, and WTO Rules*, in *REFORMING THE WORLD TRADING SYSTEM—LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE* 277 (Ernst-Ulrich Petersmann & James Harrison, eds.) (2005); see also Patrick A. Messerlin, *Non-Discrimination, Welfare Balances, and WTO Rules: An Historical Perspective*, *REFORMING THE WORLD TRADING SYSTEM—LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE*, 291.

much more to say about the overall gains from trade, compared to protectionism than they say about the allocation of the gains from trade among various constituencies. Mavroidis admits that in a static system, there are few opportunities for fostering consumer welfare at the WTO where the emphasis is 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,”²¹¹ and that the same can be said of contingent protection instruments, including anti-dumping, safeguards, and countervailing duties. Nonetheless, he argues that over time, the trade liberalization process will enhance consumer welfare.²¹² 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 terms and more diffuse positive impacts on market access. In some cases, they might hinder the sales of one product but foster those 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 and requirements for product information, among other things. 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 might be an inquiry 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 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 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, while allowing producers 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 marketing products in the EU. However, a growing number of mechanisms exist to bridge those

211. Mavroidis, *supra* note 210, at 286.

212. *Id.* at 279.

discrepancies. For instance, the “UL” itself offers an EU-UL mark that meets the requisite standard for marketing certain products in both the EU and US markets. Additionally, agreements on mutual recognition of conformity assessment²¹³ streamline the process for producers while assuring consumers that the products meet local safety standards.²¹⁴ Such initiatives are in line with the WTO preference for internationally recognized standards and procedures, which offer some measure of harmonization. Standards can emerge from private, supranational, or domestic bodies.²¹⁵

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 WTO agreements suggests, for instance in the SCM and anti-dumping fields, 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. This is possible if it is capable of quantifying the more intangible costs of not having consumer protection—such as 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 there is no clearly articulated reason from trade theory why the WTO should not consider consumer interests in addition to producer-oriented trade liberalization. There is also no comprehensive study proving that consumer welfare is maximized by simply putting in place the best market conditions for producers. One must therefore look elsewhere for explanations as to why the WTO-style of trade liberalization focuses on non-discrimination amongst producers, whereas the EU-style of trade liberalization accounts both for the reduction of discriminatory practices amongst producers

213. See, e.g., Agreement on Mutual Recognition between the United States of America and the European Community, May 18, 1998, Temp. State Dept. No. 99-53; Asia Pacific Economic Cooperation (APEC) Mutual Recognition Arrangement, Inter-American Commission on Telecommunications's mutual recognition agreement (1998), Publication No. APEC#202-TC-01.1, available at http://publications.apec.org/publication-detail.php?pub_id=1104.

214. On the mixed effects of product standards and regulations on free trade, see ALAN O. SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* (1995).

215. See, e.g., TBT Agreement Preamble, arts. 1.1, 2.4, 2.5, 2.6, 2.9, 5.4, 5.5, 5.6, 6.1, 9.2, 9.3, 10.6, 11.2, 11.6, 11.7, 12.5, 12.6; SPS Agreement, *supra* note 63, Preamble, arts. 3, 5.1, 5.7, 6.1, 9.1, 12.2, 12.3, 12.4, 12.6, Annex A, ¶ 3.

and consumers. Further research on these issues would help establish a better understanding of the value of different trade liberalization regimes and how they could be best optimized for producers and consumers.

Ultimately, 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 the 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 net benefit to trade liberalization—if that could even be determined. Rather, the question is whose interests the trade liberalization project is meant to serve. The latter question is for WTO members to determine as a matter of political preference, but the current status quo is not neutral; it reveals a preference for producers' interests in the trade liberalization process over those of consumers. The WTO agreements' relative silence 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 AB have recognized. The EU and regional trade agreements also question the presumption of consumer welfare gains as a mere trickle-down result of the reduction of trade barriers, 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 consumer interests.

The experiences from the EU and Latin American and ASEAN market integration processes leave WTO members with several models to frame the consumer trade relationship at the WTO. Without modifying the agreements, WTO members could reorient their interpretation of the agreements to include a balancing standard between producers' interests and consumers' interests. The WTO could also continue to foster international harmonization efforts to promote a convergence on product safety and quality that is mindful of consumer interests. More radically, the WTO 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.

