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Consumer protection and trade governance: A critical partnership?

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Abstract: *The argument often goes that trade liberalisation, amongst other things, leads to lower prices, better quality products and increased choice for consumers. Yet, in recent years, consumer organisations have renewed demands for the prioritisation of consumers in international trade governance frameworks. This article considers these demands and argues that they mask two important points. First, they highlight a normative quest to redefine the aims of trade liberalisation. Second, they expose a possible dissatisfaction with the current international consumer protection regime. Against this background, the article concludes that these two underlying points should inform any policy and academic engagements with the demands highlighted.*

Keywords: consumer protection; trade governance; consumer organisations; trade liberalisation; international consumer law; WTO

Introduction

Trade liberalisation produces significant benefits to several stakeholders, including consumers. It is understood that increased market access ensures consumers have access to more goods and services at competitive prices (Gasiorek, 2019). Yet, in recent years, despite expressing support for a "strong, rules-based multilateral trading system," consumer organisations have, in unison, made it clear that trade governance does not prioritise consumers (Consumers International 2019).

The concerns informing this assertion can be summarised as follows: First, trade agreements require that countries refrain from imposing barriers that can negatively affect trade. Barriers may include taxes imposed on foreign goods (tariff barriers) or all non-tax restrictions like quotas, regulations, standards, etc., which impede trade (non-tariff barriers).

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Hence in the context of international trade, consumer protection laws may constitute a non-tariff barrier because they increase compliance and transaction costs and justify regulatory discrimination against foreign goods. Seeking to prevent this, trade agreements often focus on the extent to which governments are willing to compromise on their own domestic standards to allow foreign producers access their markets (Which?, 2020). The focus on reducing non-tariff barriers raises concerns that such commitments may force national governments to reduce available consumer protections or limit them from setting higher levels of protection in the future (BEUC, 2015).

Second, where trade liberalisation conflicts with other legitimate socio-economic values, the World Trade Organisation (WTO) appears to elevate trade interests above those values. To address potential conflicts, WTO rules permit countries that meet certain conditions to deviate from their WTO obligations in order to address other socio-economic values conflicting with free trade (Van den Bossche & Zdouc, 2021). However, where national authorities purport to act per these exceptions, trading partners may challenge any higher standards imposed as disguising a protectionist agenda. Where such conflicts arise, the WTO's dispute resolution bodies must decide if the domestic measures are for a legitimate purpose or whether they constitute an illegitimate non-tariff barrier. Some WTO decisions have created a perception that trade interests will prevail in such conflicts.

But these concerns are not new, and neither are they exclusive to discussions on consumer policy. The question of whether (and how) the trading system should deal with socio-economic policies has been an issue since the 1970s, when tariffs became less important in trading relationships and governments struggled to respond to the proliferation of non-tariff barriers (Steger, 2002). This question received more attention with the WTO's formation in 1995. Debates questioning the place of non-trade values in the trade regime have featured prominently in discussions relating to labour rights, human rights, environmental law and competition law. Debates in consumer policy circles appeared to have been more muted in comparison.

However, this discussion has resurfaced in the consumer protection field due to recent developments in the trade governance space, including (1) the negotiation of recent regional mega-trade agreements,[1] (2) the reformulation of the UK's post-Brexit trade policy, which

[1] E.g., Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU (2017); The African Continental Free Trade Area Agreement (2018).

involves the negotiation of new trade agreements and (3) the commencement of exploratory work towards future WTO negotiations to develop multilateral rules governing e-commerce.[2]

In response to the developments at the WTO, the Trans-Atlantic Consumer Dialogue (TACD, 2019) released a resolution recommending, amongst other things, that the WTO should put consumers first in these negotiations. The TACD noted that:

> Consumer interests and protections have not been high on the trade agenda. The failure to prioritize consumer interests and protections must not be replicated in any future international negotiations relating to e-commerce matters. Regardless of the forum, any negotiation or prospective outcome on e-commerce must put consumers at the centre…

The TACD further explained that:

> if international rules relating to international cross border e-commerce are to be negotiated in any forum, they should focus on guaranteeing consumers a floor of basic protections relating to provision of the information needed to make informed choices and have easy access to dispute resolution and redress.

Echoing these thoughts, the UK's Consumers Association (Which?, 2020) highlights that consumers are the least likely group to be represented in trade negotiations. Regarding the WTO negotiations, Which? explains that the negotiations 'should be seen as an opportunity to promote consumer rights and interests within any agreement.' Concerning trade agreements generally, they recommend that trade deals can be used to 'enhance consumer protection and reciprocal enforcement cooperation on cross border issues that cannot be dealt with through national jurisdictions alone.' Furthermore, like the TACD, they advocate for a 'floor on consumer rights and protection that the UK and partners will not fall below.'

At first glance, these statements are straightforward recommendations. However, this article argues that they mask two underlying issues which merit further consideration. First, they raise a normative question: should trade liberalisation goals be defined more broadly to include consumer interests more explicitly? Second, the statements may be construed as communicating a broader dissatisfaction with the current international consumer protection regime – a dissatisfaction that justifies borrowing the perceived advantages of the trade regime. Following this premise, the article further argues that these underlying points should inform future policy and academic engagements with the highlighted demands.

[2] https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (accessed 10 August 2022).

Following this introduction, this article is structured in four parts. The first part outlines the current status of consumer interests in relevant WTO agreements. The discussion focuses on WTO agreements because they are multilateral and have the most signatories. Moreover, other smaller-scale trade agreements draw on the provisions in existing WTO agreements (Pitschas and Gerstetter). The second part considers the normative and strategic considerations underlying the abovementioned demands. The third and fourth parts of the article highlight possible policy responses from the normative and strategic perspectives discussed.

Setting The Context: Consumer Protection as A By-Product – The Consumer's Position Under WTO Agreements

Multilateral trade governance is based on rules emanating from contractual obligations governing trade and economic policy (Ruggiero 1997). WTO members must accept the obligations contained in the Marrakesh Agreement Establishing the World Trade Organization ('The Marrakesh Agreement') and other multilateral agreements annexed to it (collectively referred to as 'WTO Agreements' in this article). The WTO Agreements facilitate trade liberalisation by enshrining core WTO rules on non-discrimination and market access. Where disputes arise, WTO members can access the WTO's dispute resolution framework consisting of panels and an Appellate Body (AB) established by its Dispute Settlement Body (DSB).

Questioning the place of consumer interests in trade governance first requires an examination of their current status in relevant WTO Agreements. This is the focus of this section. However, before proceeding, it is necessary to highlight that this paper takes a narrow view of consumer protection to mean interventions that primarily seek to protect consumers from potential abuse by traders due to unequal bargaining power (Durovic 2019). Further, in this context, the thematic scope of consumer protection issues considered in this section is informed by reference to the policy priorities and consumer interests recognised in the United Nation's Guidelines on Consumer Protection (UNGCP). The UNGCP is arguably the most representative international document on consumer protection. Certain WTO agreements impact some of the policy priorities highlighted in the UNGCP. Some of these policy priorities include (a) the need for countries to establish strong national consumer protection policies, (b) the need to ensure that consumers can access adequate information to enable them make informed choices, and (c) the protection of consumers from health and

safety hazards. Thus, while several WTO agreements can impact consumer interests in broader contexts,[3] the thematic focus of this section is limited to agreements reflecting the consumer protection priorities highlighted above.

Against this background, this section covers three themes, including 1) the existence of exceptions permitting national governments to deviate from WTO obligations to legislate in favour of consumer protection; (2) the rules impacting measures affecting product safety; and (3) the rules impacting the provision of information on goods and services offered to consumers. Accordingly, discussions in this section focus on the WTO Agreements and panel/AB decisions considered relevant to these themes.

Exceptions Supporting Consumer Protection Legislation

Trade-restrictive measures which otherwise violate WTO rules are justified by reference to exceptions recognised in applicable WTO Agreements. Hence, these exceptions provide a defence which can excuse the breach of WTO obligations (Kalderimis, 2004). Specifically relevant to our discussion are the general exceptions permitted under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).

Article XX of the GATT permits WTO members to adopt restrictive measures which may derogate from their commitments under the GATT in ten instances.[4] Some of the listed exceptions include measures deemed necessary to protect non-economic values. For example, countries may adopt measures to protect public morals (Article XX (a)), conserve exhaustible resources (Article XX (g)) and protect national treasures of artistic, historic or archaeological value Article XX (f)). Consumer protection is *not* explicitly listed as a regulatory objective justifying restrictive measures. However, under Article XX(b), countries can adopt necessary measures to protect human, animal or plant life or health. [5] Article XX(d) also allows countries to adopt measures deemed necessary to secure compliance with laws or regulations which are not inconsistent with the GATT, including those relating to the prevention of

[3] For example, a broader interpretation of consumer protection would include a discussion on the price of goods which is affected by measures such as tariffs and duties directly impacted by WTO agreements such as the Agreement on Subsidies and Countervailing Duties Agreement.

[4] GATS, Article XIV contains similar provisions.

[5] A corresponding provision is contained in the GATS Agreement, Article XIV(b).

deceptive practices. [6] Both provisions can be broadly interpreted to permit some consumer protection measures.

Where a WTO member seeks to rely on Article XX(b), they must cross two hurdles. First, they must show that the disputed measure pursues a goal within the scope of the policy objective. Hence, they must satisfy the panel that a risk to human, animal or plant life or health exists and that the measure is designed to contribute to addressing that risk (*Brazil – Retreaded Tyres*). A second hurdle is contained in the chapeau to Article XX. The chapeau includes a proviso requiring that such measures must not be applied in a manner that would constitute a "means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" (Article XX).[7] In effect, the restrictive measure adopted must be "necessary" for protecting human, animal or plant life or health.

The term "necessary" was initially interpreted narrowly to mean that a country could not justify a measure inconsistent with the GATT if there was another available alternative measure which it could have reasonably adopted that is consistent with the GATT (*United States – Section 337 of the Tariff Act of 1930*; *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*). This suggested that if a less trade-restrictive measure could address the identified policy objective without contravening the GATT, the WTO member would be required to adopt that measure. This narrow interpretation was considered necessary to keep the objective of ensuring market access from being eroded (Sutherland, 1998).

However, recent decisions suggest that the AB is prepared to take a more flexible approach to interpreting the necessity requirement (*Brazil– Retreaded Tyres*; *Korea – Various Measures on Beef*). The AB is willing to consider several factors, including the importance of the interests/values at stake. However, even where their analysis yields a preliminary conclusion that the measure is necessary, they are still required to compare the disputed measure with other less trade-restrictive alternatives to confirm their preliminary finding ((*Brazil– Retreaded Tyres)*. The continued priority ascribed to identifying less trade-restrictive alternatives shows that maintaining market access remains paramount in the balancing exercise. For example, in *EC-Asbestos*, the AB agreed that France's ban on

[6] A corresponding provision is contained in the GATS Agreement, Article XIV(c)(i).
[7] A corresponding provision is contained in the chapeau to Article XIV of the GATS Agreement.

asbestos and products containing asbestos was "vital and important in the highest degree" because it aimed to preserve human life and health. Despite this admission, it still considered if there was a reasonable, less trade-restrictive measure which could provide an alternative to the ban. It agreed with France's actions because there was no such alternative.[8]

Where a country wishes to rely on Article XX(d), it must also satisfy a similar two-tier requirement (*Korea – Various Measures on Beef*). First, they must show that the restrictive measure is designed to secure compliance with laws or regulations which are not themselves inconsistent with GATT. This suggests that if a country wishes to adopt measures to prevent deceptive practices, the underlying law prohibiting those practices must itself be GATT compliant (*India – Certain Measures Relating to Solar Cells and Solar Modules*). If they can cross this hurdle, they must show that the adopted measure is necessary to secure compliance with the law. The considerations that apply to interpreting the term necessity under Article XX(b) are also relevant in the context of Article XX(d).

Article XX(d) was in issue in the *Korea–Various Measures on Beef* case. In this case, the US complained against a dual retail distribution system adopted by the Republic of Korea, which required that imported beef be sold in separate stores. These stores also had to display a sign indicating they sold imported beef. These measures were implemented to prevent consumers from being misled about the origin of the beef sold and to address fraudulent misrepresentations.

Korea sought to justify their action on the basis that it was a measure necessary to secure compliance with its Unfair Competition Act. However, the AB found that Korea's actions discriminated against imported beef in favour of domestic beef and were inconsistent with Korea's obligations under the GATT. Korea was unable to successfully rely on the exemptions under Article XX(d) as a defence. While acknowledging that the measure was designed to secure compliance with the Unfair Competition Act, the AB held that the measure was not necessary to secure compliance because Korea had failed to demonstrate that alternative, less restrictive measures could not be adopted to achieve its desired level of enforcement.

[8] Note that the discussions on Article XX(b) were moot because the crucial finding in the case was that France did not fail to meet its national treatment obligations under the GATT, Article III(4). If a substantive GATT obligation has not been breached, then considering a possible defence under Article XX is of little significance.

From the above, it is clear that even if a country successfully passes the first hurdle of showing that a consumer protection measure falls within the scope of Article XX(b) and (d), they still face a tougher hurdle in establishing that those measures are necessary.

Obligations Affecting Product Safety

The rules most relevant to ensuring product safety for consumers are found in the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement).[9] The SPS Agreement was negotiated due to concerns that countries could adopt (1) sanitary measures aimed at protecting human and animal health and (2) phytosanitary measures aimed at protecting plant health, which could act as non-tariff barriers impeding the trade of agricultural products (Blakeney, 2013). The Agreement's recital declares that "no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health" (first recital). To this end, the SPS Agreement (sixth recital) seeks to encourage the use of harmonised SPS measures based on international standards, guidelines and recommendations developed by relevant organisations.

Hence, countries may base their SPS measures on international standards, guidelines or recommendations where they exist (Article 3(1)). Alternatively, countries may adopt measures conforming to such international standards as they are deemed consistent with GATT, i.e., they are deemed necessary to protect human, animal or plant life (Articles 2(4) and 3(2).). Because the SPS Agreement confirms the right to adopt SPS measures, where a dispute arises, the complaining country has the burden of showing that an adopted measure is inconsistent with the SPS Agreement (Van den Bossche & Zdouc, 2022). Based on the above, the SPS Agreement has been described as constituting "the essence of the WTO consumer protection legislation." (DiMatteo, et al 2003, p.132)

However, a few points must be highlighted about the Agreement. First, although the Agreement's recital clarifies that countries can legislate to protect human, animal and plant life, it does not require them to do so. Hence, countries choosing not to adopt SPS measures do not breach the SPS Agreement. However, where a country elects to do so, it must ensure that the measures adopted are not applied in a manner that "would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail

[9] The TBT Agreement discussed in the next section also bears relevance to product safety since it covers production methods and conformity assessment procedures.

or a disguised restriction on international trade" (Article 2(3); first rectal). Hence SPS measures which fail to meet these requirements will be deemed to impede trade.

Second, the SPS Agreement permits countries to introduce or maintain measures resulting in higher levels of protection than would have been achieved by measures based on international standards. However, this is not an absolute right (*EC – Hormones*). Countries choosing higher standards of protection must establish that there is a scientific justification supported by an appropriate risk assessment (Articles 2(2) and 3(3)). Where scientific evidence is insufficient, a country may provisionally adopt an SPS measure based on available information (Article 5(7)). This approach incorporates a loose version of the precautionary principle.[10] However, the SPS Agreement requires that countries must obtain additional information necessary for a more objective risk assessment within a reasonable period (Article 5(7)).

Moreover, one must note that the relationship between the SPS agreement and the precautionary principle is complex for several reasons. First, while there appears to be a general understanding that the principle permits some positive action before the existence or seriousness of a risk has been scientifically established (Bohannes 2002), there is no uniform agreement on the precise details of the principle as this differs in several instruments endorsing it (Gruszczynski 2010). For example, the Rio Declaration (1992) supports reliance on the principle where there are threats of serious or irreversible damage. On the other hand, the EC (2000) accepts recourse to the principle if a potential risk threatens the high level of protection expected within the EU. Second, the implication of the differing understandings of this principle is that different thresholds trigger its application. For instance, the provisions of the SPS Agreement permitting the adoption of provisional measures are triggered by the insufficiency of scientific evidence about a risk. This is considered a more demanding criterion than the presence of mere scientific uncertainty, which is an acceptable trigger in other contexts, such as the Rio declaration (Gruszczynski 2010). As will be seen subsequently, this difference can have important implications where a country's understanding and application of the precautionary principle is triggered by thresholds much lower or less rigorous than that recognised by the SPS Agreement. This is because the

[10] Arising from environmental law, the principle suggests that where threats of serious or irreversible damage exist, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent the identified threat. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (accessed August 2022).

application of the principle will only be valid within the WTO framework if it is consistent with the provisions of the SPS Agreement (Priess & Pitschas 2000).

The third point to note is that all SPS measures adopted must be necessary and applied only to the extent required to protect human, animal or plant life or health (Article 2(1) & (2)) Therefore, such measures should not be more trade-restrictive than required to achieve the appropriate level of protection (Article 5(6)). In deciding whether a measure is more trade-restrictive than required, countries must consider the technical and economic feasibility of such measures. Di Matteo et al (2003) argue that the requirement to consider technical and economic feasibility exposes that the SPS Agreement is primarily concerned with reducing trade barriers.

Overall, these restrictions confirm that the SPS Agreement is not concerned with encouraging countries to adopt measures that will protect consumers; instead, it is concerned with placing limitations on introducing such measures if they impede trade (Blakeney, 2013). Furthermore, the burden involved in scientifically justifying a measure discourages countries from introducing higher levels of protection while incentivising them to adopt existing international (uniform) standards in order to avoid legal challenges (Reich, 2004). From a trade liberalisation perspective, this is acceptable. However, from a consumer protection standpoint, this is worrisome because countries may avoid higher levels of protection even if it is in the public interest.

Where principles accepted under national law support regulatory intervention, they may be insufficient in justifying consumer protection measures if they contravene the SPS Agreement. This is worsened by the complex relationship between the SPS Agreement and the precautionary principle described earlier. The *EC –Hormones case* highlights this problem.[11] In this case, certain EU directives prohibited the import of meat and meat products derived from cattle treated with certain growth hormones. The prohibition reflected concerns about possible cancer risks associated with the hormones. Canada and the US challenged this prohibition. The panels dealing with the complaints agreed that: (1) the SPS measure was not based on an appropriate risk assessment, (2) the SPS measure was not based on existing international standards and could not be otherwise justified under the SPS Agreement (3) the SPS measure was discriminatory and disguised restriction on international trade. All three

[11] See also *EC – Biotech Products*

findings confirmed that the EU's actions were inconsistent with the SPS Agreement. The EU appealed.

The AB reversed the finding that the measures were a disguised restriction on trade. However, it found that the EC measures were inconsistent with the obligation that SPS measures be based on appropriate risk assessment and that such assessment must sufficiently warrant the measure at stake. The AB found that the EC confined its risk assessment to the risks arising in situations where good veterinary practices had been followed in administering growth hormones. It did not consider the risk arising from the abusive use of hormones and the difficulties of controlling their administration for growth purposes. Hence, the risk assessment did not satisfy the requirements of the SPS Agreement. The AB also found that the scientific reports the EC sought to rely on did not rationally support the adopted measures because some of the reports concluded that the growth hormones in issue, save for one, were safe.

Notably, the EU unsuccessfully sought to rely on the precautionary principle (recognised under EU jurisprudence) to justify the measures adopted. Although the SPS Agreement incorporates a loose form of the principle (Article 5(7)), the EU did not seek to justify the measures under the Agreement. Instead, the EU argued that the precautionary principle was a general customary rule of international law (or at least a general principle of law) justifying its actions. The AB declined to make a definitive finding on whether the principle was established as a principle of general or customary international law outside the realm of international environmental law. However, the AB confirmed that the principle was not written into the SPS Agreement as a ground for exempting its obligations. Although the SPS Agreement reflects a version of the precautionary principle, the AB emphasised that the principle does not override the core provisions of the SPS Agreement.

Overall, the SPS Agreement does not promote consumer protection values since there is no obligation to legislate to protect human life and health. Instead, the SPS Agreement curtails and penalises any measures unnecessarily interfering with trade. The requirement that measures conform to or are based on international standards and scientific risk assessment provides a potent weapon for justifying the striking down of interfering measures. Moreover, while countries can challenge a consumer protection measure for being restrictive and inconsistent with the SPS Agreement, there is no corresponding opportunity to challenge states who fail to adequately protect consumers (DiMatteo et al, 2003). Finally, the threat of

disputes can cause regulatory chill. For example, Butcher and Ip highlight that the Croatian and Sri Lankan governments were forced to abandon proposals to ban biotech foods in the early 2000s after the US threatened to take WTO action (Butcher and Ip, 2007).

Obligations Affecting the Provision of Information

Although several WTO Agreements impact the information provided to consumers,[12] they do not generally mandate the disclosure of specific information (Rolland, 2014). Instead, the agreements create a framework guiding states who wish to regulate in this area. A key agreement in this respect is the Agreement on Technical Barriers to Trade (the TBT Agreement) which is of broad application. The TBT Agreement aims to ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade (fourth recital). A technical regulation is defined as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (Annex 1, para 1)

A standard is a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (Annex 1, para 2)

Both definitions show that the marking and labelling of goods, two important mechanisms for providing consumers with product information, fall within the TBT Agreement's scope. Such

[12] E.g., the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) contains rules on geographical indications to ensure the public is not misled about a product's origin. This section does not cover the TRIPS Agreement because it is substantively concerned with IP rights, with its information requirements being only incidental. In contrast, the TBT Agreement is of broad application, and some of its requirements directly impact national regulatory efforts focusing on providing consumer information.

information enables consumers to differentiate between products in order to make informed choices (Kalderimis, 2004). Where labelling schemes impose mandatory requirements, they qualify as technical regulations under the TBT Agreement, but if they are voluntary, they qualify as standards. Since divergent labelling schemes (mandatory or not) can be a non-tariff barrier, the TBT Agreement seeks to address this problem.

Like the SPS Agreement, the TBT Agreement affirms that countries can take measures necessary to ensure the quality of their exports, the protection of human, animal or plant life or health, the environment, or the prevention of deceptive practices, at the levels it considers appropriate (fifth recital). While countries are not obliged to adopt any technical regulations or standards, if they choose to do so, the right to adopt such measures is qualified.

First, concerning technical regulations, central government authorities must ensure that they do not discriminate against like products imported from other WTO members (Article 2.1; *US – Clove Cigarettes*). Second, they must ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of impeding international trade (Article 2.2). Accordingly, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. The TBT Agreement recognises legitimate objectives to include national security requirements, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment (Article 2.2). The prevention of deceptive practices and the protection of human health or safety are the most relevant objectives supporting consumer protection measures under the TBT Agreement.

Third, WTO members should not maintain technical regulations where the circumstances or objectives giving rise to their adoption no longer exist (Article 2.3). This also applies where the changed circumstance or objective can be addressed in a less trade-restrictive manner. With a harmonising objective in mind, the TBT Agreement enjoins members to base their technical regulations on international standards except where such standards would be an ineffective or inappropriate means for fulfilling the legitimate objective in issue (Article 2.4).

Regarding non-mandatory standards, where these are being developed, countries must ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the TBT Agreement (Article 4.1). Central authorities must take reasonable measures to ensure

that local governments and non-governmental standardising bodies within their territories comply with the Code of Good Practice. They must not also take measures inconsistent with the Code (Article 4.1).

There have been cases involving measures purportedly designed to prevent consumers from being misled or deceived about a product. However, in these cases, the panels have managed to avoid a full discussion on the legitimacy of consumer protection objectives either because the disputing parties agreed on the legitimacy of the objective (*EC –Sardines*) or because the decisive aspects of the disputes focused more on other issues (*US-Tuna II (Mexico)*).

Overall, the TBT Agreement does not explicitly mention consumer protection as a legitimate objective justifying the adoption of technical regulations and standards. However, identified objectives like preventing deceptive practices and protecting human safety and health may be broadly interpreted as such. Like the SPS Agreement, the TBT Agreement does not directly promote consumer protection as it neither prescribes mandatory disclosure requirements for products nor obliges members to adopt measures to protect consumers. Instead, the TBT Agreement is more concerned with discouraging the adoption of such measures in a manner that may unnecessarily impede trade. Therefore, any benefits to consumers from labelling measures based on or conforming to international standards are incidental.

In summary, the discussion in this section shows that (1) Consumer protection is not explicitly recognised as a regulatory objective justifying the adoption of trade-restrictive measures. While there is room to adopt consumer protection measures relying on the exceptions under Article XX (b) and (d) of the GATT, the strict conditions to be met make it difficult to successfully defend such measures. (2) Although the SPS and TBT Agreements allow countries to adopt measures which can protect consumers, they do not encourage any consumer protection values. Instead, they introduce hurdles which indirectly discourage the adoption of consumer protection measures if they impede market access. One can, therefore, understand why consumer organisations assert that consumer interests are not high on the trade agenda.[13]

[13] Nonetheless, it is important to note that some regional and bilateral trade agreements include commitments beyond those contained in WTO agreements. Some of these commitments directly touch on issues involving consumer protection. As is argued subsequently in the paper, this trend suggests an explicit desire by several members of the WTO to include non-trade issues like consumer protection in trade agreements.

Prioritising Consumer Interests in Trade Governance: The Underlying Whys

Consumer protection is not an explicit goal of trade liberalisation. International trade governance currently assumes that the benefits of cheaper and more varied products/services will offset any costs to or needs of consumers not addressed by trade liberalisation (Rolland, 2014). The Marrakesh Agreement emphasises that the WTO is focused on providing a common institutional framework for trade relations amongst its members (Article II(1)). Therefore, it has no consumer protection mandate. Also, the term "consumer" is not mentioned in the GATT or GATS. Neither is it mentioned in the SPS and TBT Agreements.

From this perspective, how can one justify the calls for prioritising consumer interests in the trade agenda? This section argues that two underlying issues explain these demands. First, there is a normative explanation – the demands can be interpreted as questioning current trade liberalisation goals while proposing a reimagined framework that prioritises consumers. Second, the demands may point to weaknesses in the international consumer protection regime, which justify the need to borrow the perceived advantages of the international trade governance regime

A Normative Quest to Redefine Free Trade

As the international trade regime prioritises market access for producers, a dichotomy exists between values and interests within the regime's scope (trade values) and those outside its scope (non-trade values). For example, since preventing discrimination and improving market access lie at the heart of trade governance, issues surrounding customs duties, quotas, technical regulations, etc., are understood to fall naturally within this regime. Conversely, non-trade values like consumer protection, labour protection, environmental rights, human rights etc., though impacted by the trade regime, fall outside its scope. This does not mean that the trade regime does not interact with these values. However, the interaction has primarily been informed by a need to ensure that regulatory intervention in these areas does not impede trade.

Where commentary questions the place of non-trade values within trade governance, observers agree that such discussions raise normative questions (Garcia, 1998; Driesen, 2001). For example, Lang (2008) correctly observes that debates about the trade regime raise

"fundamental questions about the nature and social purpose of the liberal trade project and the 'meaning' of free trade" Hence, comments questioning the place of consumer interests in international trade governance represent a debate between the "ought" and the "is" (Kalderimis, 2004)

Lang (2008) explains that the concept of free trade is not static and varies in meaning across time and political cultures. The purpose of free trade reflects ideas informed by particular historical and cultural milieux. Therefore, it is appropriate to question what free trade means and what goals it seeks to achieve in light of contemporary social and political conditions and priorities. This point becomes clearer if one considers the historical evolution of the multilateral trade regime.

For example, early arguments supporting the idea of modern free trade are attributed to economists like Adam Smith (1776) and David Ricardo (1817). They primarily sought to show that trade liberalisation could maximise the wealth of states. Smith showed that countries could mutually benefit from trading with each other by specialising in certain lines of production and exchanging the excess produced (Alessandrini, 2005). Ricardo's theory of comparative advantage suggested that free trade would allow countries to focus on what they were best suited to produce, thereby increasing global consumption. These ideas were informed by the historical context in which they found themselves – the mercantilist system of the day levied high tariffs and banned exports to protect local producers (Driesen, 2001). Both theorists sought to show that these practices were counterproductive and made a case for liberalising import regimes irrespective of commitments from other countries. In this context, free trade depended on unilateral measures which were not concerned with the internal redistributive effects of liberalisation (Howse 2002).

Multilateralism, as we know it today, finds its roots in the post-second world war efforts to build stable trading relationships to guarantee international long-term peace and security (Lang, 2008). It was understood that maintaining political and social stability would prevent countries from setting up trade barriers that could trigger a protectionist race to the bottom, leading to future wars (Howse, 2002). In effect, there was support for the idea that constructing a liberal international order would promote social stability and cohesion (Lang, 2008). This led to the birth of the GATT 1947.

Designed to promote international economic cooperation, the GATT 1947 focused narrowly on trade in goods and required states not to impose quotas and other import

restrictions (Howse, 2002). Efforts to liberalise trade concentrated on areas least likely to threaten social and political stability; hence sensitive sectors like agriculture and textiles were excluded. In this period, free trade thus came to be associated with multilateralism and non-discriminatory trade (Lang, 2008). At this point, trade liberalisation served to promote international economic cooperation, which would preserve socio-political stability in the post-war period. Domestic interventionism was desirable to ensure stability (Ruggie, 1982).

By the 1970s, economic turmoil linked to the gold standard's collapse meant that countries began to adopt non-trade barriers in the form of domestic interventions, violating the non-discrimination principle that served as the pillar of international trade (Ruggie, 1982). The next round of multilateral negotiations (the Tokyo Round) began considering how these non-tariff barriers could be managed. Besides further reducing tariffs, the Tokyo Round resulted in the development of codes to counter the proliferation of non-tariff barriers involving product standards, domestic subsidies, government procurement, etc (Ruggie, 1982). This period signalled a movement away from an idea of free trade that focused on limited issues like tariffs and quotas. Hence, the scope of interests falling within the multilateral trade regime began to expand.

Further negotiations (The Uruguay Round) saw the inclusion of trade in services, health and safety regulations, trade-related investment measures and intellectual property into the multilateral trade agenda (Sutherland, 1998). Wolfe (1996) describes the Uruguay Round as part of the political response to the shifts occurring in the 1980s-1990s due to increased internationalisation of economic activity and greater integration of developing countries into the international trading system. These shifts saw the concept of free trade assume the cultural significance and purpose that we are more familiar with today, i.e., the idea that free trade is an engine for growth and a driver of modernisation. Embracing a free-market ideology, eliminating governmental interference in global trade came to be seen as part of the modern idea of the liberal trade project (Lang, 2008).

Further multilateral negotiations commenced in 2001 (The Doha Round). The negotiation agenda covered broader policy themes like competition and environmental policies. However, the negotiations failed due to a lack of consensus. Considering the historical account discussed above, the Doha Round's failure reflects a missed opportunity to update the idea and purpose of trade liberalisation. The structure of the current multilateral trade regime is based on the Uruguay Round, which took place between 1986 and 1993. It

has been 28 years since the WTO was formed in 1995. The world today is much different from the late 1980s to the mid-1990s. The growth of the internet and the surge in cross-border consumer transactions due to electronic commerce have not been reflected in current trade governance frameworks. While domestic consumer protection laws were sufficient in protecting consumers in the 1990s, this is no longer the case with cross-border transactions. Hence, the current trade regime is arguably obsolete, having not evolved to reflect contemporary social and economic contexts.

But there is an important argument that the multilateral system set after the second world war was, in fact, designed to balance free trade with other socio-economic objectives (Howse, 2002). Ruggie (1982) argued that the GATT 1947 devised what he described as an embedded liberalism compromise which ensured that multilateralism would be predicated upon domestic interventionism and would not detract from domestic social protections. One aspect of this compromise was that the GATT 1947 supported derogations to protect various domestic social policies. The assumption behind this compromise was that if countries could protect their domestic and political stability, this would prevent spillover effects that could threaten global stability (Howse, 2002).

Howse (2002) argues that this delicate balance at the heart of embedded liberalism was destabilised when the administration and development of the trade system became entrusted to specialised trade policy elites insulated from the socio-political conflicts of the age. These specialists replaced the embedded liberalism compromise with an economic ideology that was indifferent to any notion of a just distribution of benefits and burdens arising from trade liberalisation. The WTO and intrusive harmonising agreements like the SPS and TBT Agreements are considered products of this new approach. For example, one main objection to the SPS and TBT Agreements is that they permit a successful challenge of domestic measures without a need to prove that the GATT (or GATS) has been breached (Kalderimis, 2004). Where a breach of the GATT does not have to be proved in a particular dispute, countries cannot resort to using the general exceptions under Article XX as a defence. Since the SPS and TBT Agreements allow dispute resolution without recourse to the exceptions under the GATT, they destabilise the compromise and balance ensured by embedded liberalism (Kalderimis, 2004). Going by these arguments, the failure to balance trade values with non-trade concerns can be explained as a consequence of deviating from the embedded liberalism compromise in the GATT 1947, worsened by the insularity that characterised trade governance institutions.

Whether one accepts that the trade regime's shortcomings are a consequence of outdated negotiations which do not reflect contemporary socio-economic realities or that they reflect the deviation from the embedded liberalism compromise, one still arrives at the same conclusion. The conclusion is that the normative foundation of trade liberalisation must continually respond to the tensions existing in the international trading system at any given time. Trade agreements provide the platform to support the dialogues responding to these tensions. It is these dialogues that define the normative justification for trade liberalisation. From this perspective, it is not misplaced for consumer organisations to look to the frameworks that define trade liberalisation goals.

Recent developments confirm that the current trade governance framework needs to be reconsidered. For instance, the EU, an influential bloc in the WTO, noted in its 2015 trade strategy that changes introduced by the digital revolution have raised new consumer protection concerns (European Commission, 2015). The European Commission (EC, 2015) asserted an interest in developing a trade and investment policy based on values. Expanding on this, the EC acknowledged that while trade liberalisation has ensured that consumers benefit from a broader choice of products at lower prices, consumers also care about product safety and other values like human and labour rights and environmental sustainability. Hence, the EU's trade policy needs to respond to these concerns to ensure consumers are confident in the products purchased.

The EC further states that by engaging its partners in regulatory cooperation, it can exchange ideas and best practices to promote EU standards to ensure consumers have the highest and most effective levels of protection. The trade strategy explicitly notes that trade agreements are an avenue for giving political momentum to this kind of dialogue. Furthermore, in its 2021 trade strategy, the EC has posited that the "WTO rules and practices must be updated and improved to reflect today's trade realities" (European Commission, 2021b). The current efforts at spearheading negotiations for multilateral e-commerce rules are an acknowledgement that new rules are needed to reflect contemporary trends. One can interpret these developments as evidence that countries will continue to renegotiate the normative justification of trade liberalisation to suit contemporary socio-economic and political realities. It is these renegotiations that determine the scope of values that fall within the trade regime. Hence, consumer organisations are justified in demanding that the dialogues capable of renegotiating the aims and scope of trade liberalisation prioritise consumer interests.

A Pragmatic Reaction to the Limitations of Existing Consumer Protection Frameworks

The TACD and Which? both propose that trade agreements include a floor of basic protections. This proposal can be interpreted as calling for the explicit linking of consumer protection to trade governance. One question this raises is what benefits will accrue from such a link? If the trade regime is perceived as wielding certain advantages, it may point to limitations in the international consumer protection regime. This section considers these issues.

Current Mechanisms for Consumer Protection in Global Markets

Consumer protection frameworks are primarily built around national laws and, in some instances, legislation emanating from regional organisations like the EU. This does not mean that there are no international soft law initiatives in this policy area. Institutions like the Organisation for Economic Co-operation and Development (OECD, 2010), the United Nations (UN) and the World Bank (2017) have developed relevant soft law recommendations. However, there is no international consumer rights treaty. The Convention of closest relevance which might have addressed consumer transactions in an international context, is the UN Convention on the International Sale of Goods 1980. However, the Convention excludes consumer transactions from its application (Article 2(a)).

Nonetheless, as stated previously, the most influential international document focusing on consumer protection is the UNGCP. The UN's General Assembly adopted the UNGCP in 1985, expanded them in 1999 and revised them in 2015. The UNGCP contains principles setting out the main characteristics of effective consumer protection frameworks. The UNGCP aims to assist UN Members in designing effective consumer protection laws and seek to facilitate international cooperation.

Criticisms of earlier versions of the UNGCP highlighted the absence of institutional machinery to support their implementation (Izaguerri Vila, 2019). In 2015, the UNGCP was revised to address this problem. An Intergovernmental Group of Experts on Consumer Protection Law and Policy (IGE), which operates within the United Nations Conference for Trade and Development (UNCTAD), was established (Article VII). The IGE performs

several functions, including providing a forum for consultations, producing research, providing technical assistance, and undertaking voluntary peer reviews, etc.

Although the UNGCP has been adopted by the UN's General Assembly, representing a broad political consensus, they are not legally binding. Implementation is discretionary as Member States decide whether and how to implement the UNGCP. Though the IGE is empowered to conduct voluntary peer review of the consumer protection policies of Member States, it has no enforcement powers, and none of its findings or decisions is binding (Izaguerri Vila, 2019). While the UNGCP encourage international cooperation on several issues, including the resolution of disagreements, it hosts no formal dispute resolution system to resolve conflicts between consumer protection authorities. In effect, though influential, the UNGCP's contributions to the international enforcement of consumer protection are limited (Durovic, 2020).

Finally, it is necessary to note that the UNGCP acknowledges the trade regime. It interestingly provides that:

> In applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations. (Article V, paras 13; Article VI, paras 94).

This provision appeared in the 1985 text of the UNGCP and has survived subsequent revisions. While it is reasonable to acknowledge the importance of other international commitments, the provision is odd because it appears to prioritise trade obligations. Since the document is dedicated to advancing consumer protection principles, one might have expected it to urge countries to ensure that their trade obligations do not negatively impact consumer protection. Instead, it advocates for the opposite.

There are also other significant international efforts in the consumer protection field. One notable example is the International Consumer Protection and Enforcement Network (ICPEN), a voluntary network formed to address the limitations in the international enforcement of consumer rights. The organisation comprises consumer protection enforcement authorities from around 70 countries and provides a forum that supports inter-agency cooperation.[14] ICPEN focuses on important matters like sharing information and intelligence on consumer protection issues and sharing legislative and enforcement best

[14] https://icpen.org/ (accessed August 2022).

practices.[15] While the ICPEN does not resolve individual consumer complaints, it runs a website allowing consumers to report cross-border complaints and learn about alternative options for resolving international disputes.[16] The website generates country complaints data which can be shared with relevant domestic consumer authorities participating in the initiative.

The ICPEN's efforts are important; however, they cannot resolve disputes and cannot sanction national authorities who fail to act where the complaints data indicates a systemic problem. Additionally, although the ICPEN focuses on cross-border enforcement, it does not formulate multilateral rules on enforcement. While it publishes guidance on fair trading practices, it notes that compliance with the guidance does not provide a shelter from liability in ICPEN-member countries.[17] Hence, compliance with its guidelines is inconsequential even amongst its members.

In conclusion, the existing mechanisms in the international consumer protection landscape appear limited primarily due to a lack of enforceability. Stakeholders may consider this worrisome because the growth of cross-border transactions exposes the jurisdictional limitations of domestic consumer protection frameworks.

The Lure of International Trade Governance

If current international consumer protection frameworks are deemed inadequate, it might explain the temptation to seek out other regimes that can address the identified limitations. Leebron (2002) explains that one way of addressing the limitations of a particular regime is to engage in what he describes as "regime borrowing." With regime borrowing, one regime seeks to strategically link to another regime in order to acquire institutional and procedural benefits that cannot be independently negotiated for the issues sought to be linked. Such an exercise reflects the frustration and disappointment with the borrowing regime that governs the policy issue to be linked (Leebron, 2002). In this context, calls for including consumer protection in trade agreements represent an attempt at regime borrowing. If this is correct, it is necessary to examine why the multilateral trade regime might be considered attractive.

[15] https://icpen.org/initiatives (accessed August 2022).
[16] https://icpen.org/econsumergov-0 (accessed August 2022).
[17] https://icpen.org/industry-guidance (accessed August 2022).

First, the WTO is a member-driven organisation whose broad membership allows for balanced input from developed and developing countries.[18] Decisions are reached by consensus, and unlike other Bretton Woods institutions like the International Monetary Fund (IMF) and World Bank, decisions are not based on a weighted vote reflecting the financial contributions of members (Amaral Junior, 2015). Unlike the UN, there is no Security Council with permanent members exercising veto power (Lamy, 2008). The consensus principle emphasises sovereign equality, which safeguards the rule of law in the international trading framework (Guan, 2014). Consequently, some perceive the WTO as providing a negotiating forum that places all members on an equal footing.[19]

Second, and more significant, is the WTO's status as a hard law organisation with a level of institutionalisation and power that sets it apart from other international clubs (Guan, 2014). Unlike the UNGCP, WTO Agreements are binding. The WTO also adopts a single undertaking approach meaning that members must accept all WTO obligations as a single package and cannot cherry-pick which ones to commit to (Kwa, 2000). Countries failing to adhere to their WTO obligations must amend any non-complying measures or face sanctions with significant socio-political impact (Kalderimis, 2004). The WTO boasts of a mandatory and binding dispute settlement system to support this system. The WTO's DSB, consisting of all member governments, is authorised to establish dispute settlement panels, refer matters to arbitration and adopt dispute resolution reports.[20]

The decisions of panels and the AB are automatically binding unless a party to the dispute formally notifies the DSB of their intention to appeal or the DSB decides by consensus not to adopt the report (Article 16). The DSB also monitors the implementation of the recommendations and rulings contained in such reports and authorises the suspension of trade concessions where a disputing party fails to comply (Article 2).

The DSB does not suffer some limitations other international dispute resolution bodies face. For example, the International Court of Justice (ICJ) only has the jurisdiction to deal with contentious matters if parties expressly consent to the court's jurisdiction.[21] The ICJ also has limited enforcement powers (Al-Qahtani, 2002). Conversely, the WTO's dispute settlement system is part of the Marrakesh Agreement. Due to the single undertaking

[18] https://europa.eu/capacity4dev/file/50803/download?token=5iZZXOUo (accessed August 2022).
[19] This is a controversial assumption as many WTO critiques argue that developed countries manoeuvre negotiations in their favour: (Consumers International, 2003).
[20] https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm> (accessed August 2022).
[21] https://www.icj-cij.org/en/basis-of-jurisdiction (accessed August 2022).

approach, the panels and AB established by the DSB have jurisdiction over all members. Additionally, the panel and AB decisions are enforceable and backed by sanctions.

Cumulatively, these features have led observers to describe the WTO as a supranational law-making and law-enforcing authority (DiMatteo et al 2003). These features ensure that in a contest with multiple regimes, especially those backed by soft law, the WTO rules at the top (Kalderimis, 2004). If the WTO is perceived as wielding substantive and procedural advantages in setting and enforcing norms, it is unsurprising that other regimes seek to take advantage of this. Since WTO obligations are mandatory, consumer protection standards will become enforceable if incorporated into WTO Agreements. Accordingly, one can interpret the calls for including consumer protection in trade agreements as a demand for the international enforceability of consumer rights.

Engaging With the Underlying Whys – Responding from a Normative Perspective

The academic and policy responses that focus on the normative question should be internal to the multilateral trade regime. Internal responses will serve to acknowledge that contemporary developments justify prioritising consumer policy within the trade regime. Possible internal responses are considered below.

Using Consumer Protection Standards as Swords – Creating Obligations

One internal solution could involve adopting binding consumer protection commitments in multilateral trade agreements. This would require negotiations amongst members to agree on what consumer protection issues ought to be addressed in a trade context. For example, one of the proposed articles under the current e-commerce initiative suggests obligations requiring countries to adopt or maintain measures proscribing misleading, fraudulent and deceptive commercial practices that can harm e-commerce consumers (WTO, 2021).

A variant of this approach would be incorporating relevant principles in the UNGCP into a multilateral trade agreement. This approach may deflect any criticisms that the WTO is meddling in policy areas in which it lacks traditional expertise (Reich, 2004). The WTO's approach with the Agreement on Trade-Related Aspects of Intellectual Property Rights

(TRIPs Agreement) provides the required precedent suggesting that the WTO has some experience with harmonising norms.

The TRIPS Agreement stands out from other WTO Agreements discussed so far. The SPS and TBT Agreements encourage countries to design measures based on or conforming to international standards. However, the main aim of both agreements is to preserve market access by curtailing unnecessary domestic measures. In contrast, the TRIPS Agreement is designed to protect intellectual property rights, even if this may interfere with trade. The TRIPS Agreement sets minimum standards for intellectual property (IP) protection by incorporating obligations from existing IP Conventions. It goes further by including new obligations not contemplated in the existing Conventions (Moschini, 2003). Significantly, in addition to creating positive obligations for member countries, the TRIPS Agreement permits the provision of more extensive IP protection (Article 1(1)). Due to the WTO's single undertaking approach, the obligations contained in the TRIPS Agreement are binding on all members. This move enables countries to protect IP rights under the WTO's framework for enforcing compliance with trade rules (Moschini, 2003).

Some have described the TRIPS Agreement as progressive because it increases the scope and internal values of the WTO (Kalderimis, 2004). In addressing the tension between free trade and a non-trade value (IP), the TRIPS Agreement chose to place the protection of certain IP rights above the goal of unrestricted trade. It is possible to argue that the TRIPS Agreement aligns with the WTO's narrow agenda of preserving market access and furthering trade. This is because companies may be unwilling to supply IP products if protections are inadequate (Kalderimis, 2004). This reasoning finds support when one considers the prefix "trade-related" has been explicitly included in the TRIPS Agreement's title. However, Reich (2004) contends that this argument is unconvincing because the TRIPS Agreement adopts standards from IP treaties that the WTO did not previously consider to be trade-related.

From a normative perspective, the TRIPS Agreement can be understood as reflecting a renegotiation of the scope and aims of trade liberalisation. Increased international trade in the 70s and 80s elevated the importance of trade in services and IP.[22] The cultural and socio-economic realities of the time justified the need to prevent the exploitation of the underlying ideas driving the production of goods and services.[23] Therefore, it became acceptable for the

[22] https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules1_e.pdf (accessed August 2022).
[23] One must also note the push by developed countries to ensure that IP rights became protected globally influenced the negotiation of the TRIPS Agreement. See Yu (2006).

trade regime to evolve to protect IP rights. If the issues of the day justified the TRIPS Agreement, the current increase in cross-border consumer transactions and the limitations of domestic laws similarly justify including consumer protection within the trade regime.

However, one must recognise that the TRIPS approach remains highly controversial. It attracts significant criticisms that cannot be ignored. For example, the TRIPs Agreement is thought to reflect the western interpretation of intellectual property rights (IPRs). Thus, it promotes an inappropriate uniform standard across various countries (Willis 2013). This one-size-fits-all approach imposes significant costs on developing countries with limited resources seeking to raise their domestic standards (Willis 2013; Yu 2011). Furthermore, although the TRIPs agreement strengthened certain IPRs, it removed previously available flexible arrangements serving the public interest. For example, before TRIPS, the patent policies applied to pharmaceuticals were diverse. In the public interest, many countries did not grant patents for medicines or granted patents only for the manufacturing processes but not for the end product (Hoen et al 2011). TRIPs ended these arrangements, and many developing countries had to offer patents on pharmaceutical products for the first time, leading to problems involving access to medicines.

From a consumer protection perspective, the TRIPs experience thus raises concerns that a "trade-related" consumer protection agreement may end up being a double-edged sword. First, such an agreement may reflect protections championed by developed countries which impose costs on developing countries needing to raise their standards. This could also be interpreted as disguised protectionism in developed country markets. Similar concerns have been raised in other areas, such as labour standards (WTO, n.d). Second, it could allow corporate interests in the Global North to use their strong bargaining powers to push for an agreement that dilutes existing domestic and regional protections to ensure a lower international standard of consumer protection. Hence, such an agreement may nominally bring consumer protection under the purview of trade but simultaneously weaken domestic protections.

Even if one were to consider the TRIPS approach uncontroversial, it is necessary to highlight that, unlike the relevant IP Conventions, the UNGCP does not create obligations. Instead, they recommend principles which can inform the design of consumer protection legislation. This suggests that it will be tricky to directly transplant the TRIPS Agreement approach. One way of addressing this is to draft the obligation placed on Members as one

requiring them to adopt a consumer protection legislation that implements the principles outlined in the UNGCP. Hence, legislating according to the UNGCP or conforming to it would be sufficient to meet this obligation. This approach would support the flexibility needed to allow Members to design responses reflecting their domestic realities. Moreover, if provisions for cooperation and technical assistance support such an obligation, there may be reduced objections from developing countries concerned about implementation.

If the WTO were to require members to implement the UNGCP, it would need to address the provision in the UNGCP requesting that the design of consumer protection measures does not affect trade obligations. If the WTO adopts the principles in the UNGCP or imposes an obligation to adopt consumer measures based on the UNGCP, those principles will effectively represent trade obligations. The provision in the UNGCP will then be unnecessary and can be deleted. To reinforce the priority granted to consumer protection, the WTO could emphasise that countries must ensure that their other trade obligations do not negatively impact the obligation to adopt and implement consumer protection measures. Failing to do this will invite accusations that the reimagined trade regime still treats consumer protection as an external value subordinate to free trade.

Using Consumer Protection Standards as Shields – Expanding the Grounds for Derogations

Earlier, we considered the alternative argument that the difficulties in balancing trade and non-trade values within the trade regime reflect the movement away from the embedded liberalism compromise. Ruggie (1982) argued that embedded liberalism ensured that the GATT 1947 supported derogations to protect various domestic social policies. If we accept this argument, one internal solution would be to expand the permitted derogations forming part of this compromise.

As discussed previously, subject to conditions, the GATT (and GATS) allow members to adopt restrictive measures derogating from their trade commitments. However, consumer protection is not recognised as a stand-alone policy objective justifying restrictive measures. While the relevant objectives highlighted in Article XX(b) and Article XX(d) of the GATT (and Article XIV(b) and Article XIV(c)(i) of the GATS Agreement) are important aspects of consumer protection, relying on both exceptions to pursue a broader consumer objective is limiting. This is because other consumer interests exist beyond protecting human life and health and preventing deceptive practices. For example, the existing exceptions may not

efficiently capture other interests revolving around consumer dispute resolution, cooling-off periods, and cancellation rights.

Since the policy objectives are defences to allegations of breach of WTO obligations, it is necessary that consumer protection be explicitly recognised as a stand-alone policy exception. In deciding whether national measures are necessary to meet the identified consumer protection objective, members should be able to rely on arguments detailing conformity with international standards like the UNGCP. For example, if a country mandates that foreign traders establish accessible consumer dispute resolution procedures before offering products to domestic consumers, the necessity of the requirement would be justified by arguing that it conforms to the principles highlighted in the UNGCP (Article V, para 37).

Another way of strengthening the use of consumer protection as a shield involves granting the policy area interpretive priority. This means that opportunities should be taken to embed consumer protection as one of the issues to be considered in the overall interpretation of WTO Agreements. For example, if multilateral agreements explicitly recognise the importance of consumer protection in preambles and identify it as one of the underlying objectives of trade agreements, this may affect the weight given to consumer protection measures by panels and the AB. WTO members could also adopt an interpretive understanding of existing agreements which prioritises consumer protection. An interpretive understanding is an international agreement seeking to clarify certain provisions of another agreement (Krajewski, 2001). Interpretive understandings have been used in the WTO context, so this will not be unfamiliar.[24]

A further aspect of strengthening consumer protection as a shield would require that intrusive agreements like the SPS and TBT Agreements are properly linked to the GATT. In practice, the SPS and TBT Agreements have been interpreted as creating freestanding obligations (Kalderimis, 2004). Hence, the SPS and TBT Agreements permit a successful challenge of domestic measures without a need to prove that the GATT has been breached. Where a breach of the GATT does not have to be proved, countries cannot utilise the GATT's general exceptions to justify domestic measures. Kalderimis (2004) argues that it may be useful to amend the SPS and TBT Agreements to clarify that they merely elaborate

[24] E.g., the WTO's Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/1/GATT/U/2.

rules for applying Article XX of the GATT. This would mean that the provisions of the TBT and SPS Agreements cannot be invoked in the absence of a proven breach of the GATT.

Explained in our context, this would mean that since the SPS Agreement focuses on measures protecting human, animal or plant life, it should be seen as clarifying the Article XX(b) exception. Similarly, since the TBT Agreement focuses on measures adopting technical regulations and standards, it should be seen clarifying the Article XX(d) exception. The preambles to the SPS and TBT can support this position. The SPS Agreement's preamble acknowledges that the Agreement desires to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)" (Eighth recital). The preamble to the TBT Agreement is less explicit, but it confirms a desire to "further the objectives of GATT 1994" (First recital). A reasonable alternative interpretation of these preambles would be that the SPS and TBT Agreements should not be construed as creating obligations independent of the GATT. Consequently, disputes involving both Agreements should consider if the GATT has been breached. If a defence under Article XX exists, this should be an important factor when resolving a dispute involving a potential breach of the SPS and TBT Agreements. This approach will contribute to ensuring the primacy of a stand-alone consumer protection exception under the GATT.

Outstanding Questions – Feasibility

The suggested responses work on the assumption that the normative aims/scope of the multilateral trade regime can embrace consumer protection as an internal value. However, this assumption is open to criticism. First, one may argue that the WTO has a single trade liberalisation mandate which prevents it from absorbing non-trade issues like consumer protection. One response to this is that the mandate of international organisations is not immutable and often evolves to reflect global changes. A good example is the World Bank, whose primary mandate at formation was to provide loans for reconstructing countries devastated by the second world war (Alvarez, 2002). The World Bank's mandate shifted from reconstruction to development, and its reach expanded geographically to include developing countries. Today, the World Bank's mandate covers issues relating to economic

growth, poverty, migration, climate change and sustainable development. [25] This evolution in its mandate has reflected cultural, economic, social and political changes that require constant readjustment of its priorities. The WTO's shift to harmonisation-oriented agreements like the SPS and TBT Agreements and its involvement in protecting IP rights can also be interpreted as reflecting such an evolution. Hence, this criticism is not convincing.

A second response to this objection is that international consumer protection and international trade are not diametrically opposing policy areas. On the contrary, the WTO's mandate to further international trade can be better achieved where consumer protection is prioritised. If consumers' interests are adequately protected, this engenders consumer trust, which ultimately enhances and facilitates trade. This is especially important with the current significance of e-commerce. For example, UNCTAD (2021) recognises that cross-border business-to-consumer trade holds unlocked potential, particularly in e-commerce. To fully reach its potential, UNCTAD admits that consumer trust is central to facilitating trade. Such trust can be enhanced if consumer protection measures are prioritised alongside trade. Viewed this way, improving international consumer protection and furthering international trade are complementary objectives. Hence prioritising adequate consumer protection within the trade governance framework works in favour of the WTO mandate and, therefore, should not be divorced from its mission.

Second, owing to its origins, the WTO is said to have an institutionalised trade bias which makes it difficult to effectively embrace and balance competing values. Thus, in carrying out its functions, there are concerns that the natural inclination of the WTO personnel may be to favour liberal trade values over non-trade values (Leebron 2002). This bias is reinforced by the personnel's lack of expertise on non-trade issues, which affects the negotiation of agreements, the day-to-day running of the organisation and the dispute resolution process (Guzman 2004). This highlights the difficulty of changing the WTO's focus without changing the culture and ethos of its personnel. Furthermore, this raises concerns about whether the WTO's personnel can be trusted to decide upon and enforce consumer protection values appropriately.

The problem with this argument is that it accepts the current categorisation of trade-related and non-trade-related values as self-evident. Hence, values like consumer protection will always be perceived as extrinsic to the trade regime. This view refuses to consider a

[25] https://www.worldbank.org/en/about/history (accessed August 2022).

possible reimagined version of the current trade regime. The WTO and its personnel have a trade bias because the underlying ideas justifying the current framework elevate the so-called trade-related issues as a priority. As discussed earlier, all changes to the scope and aim of free trade have been influenced by ideas shaped by the realities of the relevant period. Trade institutions have, in turn, reflected the prevailing ideas. Hence, so long as opportunities remain room to politically renegotiate the aims of trade liberalisation, there remains the possibility that a narrow trade agenda can expand to embrace multiple priorities. Moreover, as Guzman (2004) argues, should the WTO expand its focus, the concerns around expertise can be resolved by appointing personnel (including panellists and AB members) with expertise in relevant non-trade issues.

The third likely criticism is more potent. Currently, the WTO is a troubled organisation in certain respects, suggesting that it may not be as attractive as presented. For example, the lure of its dispute resolution system is now questionable, considering the crisis facing its appeals mechanism. Since 2019, blocked appointments to the AB have meant that WTO members cannot effectively enforce WTO obligations through the dispute settlement system (EC 2021a). Hence the features that once made the WTO attractive are currently absent. This means that the WTO presents no current advantages to those seeking to exploit it in furtherance of consumer protection objectives.

Finally, the question of reimagining multilateral trade governance and determining what interests should be served by trade liberalisation is ultimately political. It is, therefore, a question to be determined by WTO members as a matter of political preference (Rolland, 2014). To embrace more issues also requires a clear political or constitutional mandate (Rolland, 2014; Steger, 2002). Trade negotiations provide the platform for deciding these issues, but this process is politically charged. With such a broad membership reflecting diverse interests, it will be difficult to reach (or amend) an agreement on a sensitive issue like consumer protection. The Doha Round's failure is a significant example of the difficulties in reaching consensus at multilateral level.

The WTO's continued failure to successfully facilitate multilateral trade negotiations raises questions about whether the normative quest to redefine free trade remains viable within the WTO framework or should be pursued elsewhere in the interim. This question appears partly answered by the proliferation of bilateral and regional trade agreements. Some of these agreements suggest a desire amongst WTO members to explicitly include non-trade

values in trade agreements. For example, the European Commission's 2015 Trade Strategy recognised that 'changes in the way the world economy works imply a different way of designing trade policy." (European Commission, 2015). Hence, the EU would be moving from free trade agreements (FTAs) narrowly focusing on tariff cuts and trade in goods, to new-generation FTAs (Salm & Andre, 2017). The new generation FTAs aim to take a more holistic approach covering broader issues like public procurement, competition, etc (European Commission, 2015). One example of these new-generation FTAs is the EU–Canada Comprehensive Economic Trade Agreement (CETA). CETA includes a chapter on electronic commerce that requires both parties to adopt or maintain laws to protect the personal information of users engaged in electronic commerce (Article 16.4). Both parties are expected to take into due consideration international data protection standards (Article 16.4). They have also adopted a joint interpretive agreement (2017) preserving both parties' right to adopt and apply laws to achieve legitimate public policy objectives, including consumer protection.

Outside the EU, another example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), an FTA signed between 11 countries around the Pacific Rim. The CPTPP contains an e-commerce chapter requiring parties to adopt or maintain consumer protection laws proscribing fraudulent and deceptive commercial activities that may cause harm to e-commerce consumers (Article 14.7(1)).

While it is easier to enter bilateral and regional trade agreements with like-minded countries, the main challenge is that this approach introduces fragmentation and does not guarantee regulatory convergence internationally (Lianos et al, 2019). Despite this limitation, such agreements provide useful pointers for future multilateral rules and are thus valuable in the journey towards renegotiating trade liberalisation goals.

Engaging with the Underlying Whys – Responding to Matters Underlying Regime Borrowing

If one chooses to engage with the issues underlying regime borrowing, then the response(s) may be designed around frameworks external to the trade regime. Such responses should maintain a recognised and defined relationship with other multilateral frameworks, including the WTO. Possible responses are considered below.

Adopting Binding International Rules

Demands for including a basic floor of rights in trade agreements may indicate that some stakeholders prefer a hard law instrument setting out consumer rights that countries must guarantee. This may be perceived as the strongest way of highlighting the importance of consumer rights at the international level since it strengthens the credibility of commitments made by contracting parties (Abbott and Snidal, 2000). Furthermore, from a consumer protection perspective, this approach encourages some form of harmonisation at the international level, ensuring that consumers are guaranteed similar rights in cross-border transactions. This will also be desirable from a trade perspective since a harmonised approach reduces compliance costs and prevents discrimination between foreign and domestic goods and services.

A binding instrument may be designed in several ways, with the choice of design impacting how it is received. Where the goal is to eliminate jurisdictional differences, such an instrument may focus narrowly on harmonised substantive consumer protection rules. For example, there could be harmonised rules on product liability, the disclosure of consumer information, the availability of cooling-off periods and cancellation rights and the provision of consumer dispute resolution procedures. Such an approach will likely receive strong objections because it may not sufficiently recognise the differences between countries, making implementation difficult. It will also be regarded as more intrusive since it will require that national legislators relinquish an area within their legislative competence. Any consensus reached will not go beyond the lowest common denominator; hence the agreement may be vague or limited in achieving important objectives (Staal, 2016).

However, if the goal is to encourage countries to adopt consumer protection while respecting their cultural and socio-economic differences, a binding instrument outlining principles and outcomes (as opposed to substantive rules) might be better received. Applying this approach, the binding instrument could (1) mandate the adoption of consumer protection legislation and (2) identify core principles and outcomes which the legislation should address. This approach introduces coherence built around principles but maintains the necessary flexibility allowing countries to design consumer protection laws fitting their peculiar circumstances. It also provides room for an internationally agreed consumer protection framework while preserving the powers of national legislators to make specific rules

reflecting their democratic mandate. In implementing the binding principles, legislators can enact rules reflecting the socio-economic conditions in their country and the public perception of risk.

Since the UNGCP identifies general principles and specific consumer outcomes, a treaty focused on principles and outcomes will serve to elevate the UNGCP to a binding treaty. Where a country ratifies the treaty and adopts its principles into domestic legislation, it will make it easier for consumers to enforce commitments against private and public entities.

Since WTO members are usually also UN members, a UN consumer treaty will carry some weight if consumer principles outlined in such a treaty are raised in multilateral trade disputes. This is because the Vienna Convention on the Law of Treaties suggests that when interpreting a treaty, account should be taken of 'any relevant rules of international law applicable in the relations between the parties' (Article 31(3)(c)). Hence, in a dispute between WTO members, a consumer rights treaty would qualify as "rules of international law applicable in the relations between the parties." Consequently, WTO Panels and the AB would need to take the treaty into account when resolving the dispute. For example, in one WTO case (US –*Shrimp*) the US imposed import prohibitions on certain shrimp and shrimp products sourced using unsustainable methods. The US sought to justify the import prohibition under Article XX(g) of the GATT. Article XX (g) permits countries to adopt restrictive measures for conserving exhaustible natural resources.

On whether natural resources covered only finite minerals and not renewable biological resources, the AB referenced international conventions like the UN Convention on the Law of the Sea and the Convention on Biological Diversity to interpret the term "natural resources" as including both living and non-living resources. The AB highlighted that the treaty documents reflected an acknowledgement by the international community of the importance of protecting living natural resources. The AB also referred to the Rio Declaration on Environment and Development when interpreting whether the US' measures could be justified under Article XX(g) of the GATT. This case shows that other treaty obligations accepted by WTO members are considered when interpreting WTO Agreements. Hence a consumer protection treaty, even if negotiated outside the WTO, will signify a strong consensus on consumer protection, which will be considered in WTO disputes.

Although a treaty focusing on binding principles may seem promising, it raises certain issues. The first issue involves the perceived legitimacy of such a project's motives. Durovic

(2020) highlights that consumer protection rules can play two roles in an international context. International efforts may serve to (1) protect consumers by setting a floor of protection below which no jurisdiction must fall or (2) reduce trade barriers by streamlining compliance requirements for businesses. Although both goals can overlap and function within a single system, as is the case with the EU, some consumer protection rules can be designed with a clear preference for one goal over the other. Should perceived efforts be interpreted to focus on the latter role (improving market access), they will be unsatisfactory to consumer protection advocates as they will be seen as prioritising market access, not consumer protection. Such an effort will not differ from the approach taken with the SPS and TBT Agreements.

The second issue concerns flexibility and adaptability. Hard law instruments are considered less adaptable to changing situations (Izaguerri Vila, 2019). For example, the Vienna Convention on International Sales of Goods has not undergone any revisions since it was signed in 1980. This is despite its documented shortcomings (DiMatteo, 2013). Durovic (2020) compares this to the UNGCP, which has undergone revisions since they were first issued in 1985. The soft law character of the UNGCP allows for easier revisions enabling it to remain responsive to contemporary developments. Thus, Durovic (2020) argues that this soft law characteristic can be viewed positively because it supports quick adaptability to changes. Adaptability and flexibility issues will be more significant if a treaty contains substantive rules. This is because rules will need to be updated regularly to reflect changes in consumer behaviour and market trends. However, it is arguable that this will be a less significant concern where the treaty focuses on principles and outcomes which can be more flexibly interpreted to suit changing circumstances.

The third issue involves political will and feasibility. Treaties with binding obligations are more difficult to negotiate, especially when they cover issues that state actors perceive as challenging their autonomy (Abbott and Snidal, 2000). Using developments in the international tourism sector, Izaguerri Vila (2019) argues that there is currently no political support for a binding consumer protection convention. In 2015, Brazil submitted a proposal for a draft convention on cooperation and access to justice for international tourists to the Hague Conference on Private International Law.[26] While the proposal contains provisions on consumer disputes and complaints handling, calls by non-governmental organisations during

[26] https://assets.hcch.net/docs/74b12153-45a4-45fa-a86e-814fa5bf9d2a.pdf (accessed August 2022).

the revision process for a broader binding treaty on consumer protection were not followed through (Izaguerri Vila, 2019) This suggests a current political preference for a soft law approach to consumer protection. The preference for soft law may reflect the perception that when dealing with contentious issues like consumer protection, a soft law approach is an easier way of facilitating compromise and cooperation amongst actors with different interests and values (Abbott and Snidal, 2000).

Moreover, there remains the question of enforceability. If the underlying reason for looking to the WTO regime is to ensure that international consumer protection fits within a legalised regime where commitments are subject to interpretation and application by arbitral or judicial institutions, then a consumer protection treaty will need to make provisions for similar forms of enforcement. The treaty may choose the ICJ as the preferred adjudicatory body. However, as highlighted earlier, the ICJ's jurisdiction in contentious cases is based on the express consent of States, and its enforcement powers are limited.

Another option would be to create its own institutional machinery which supports the establishment of dispute panels like the WTO. However, this still leaves open the enforcement question. While the regime may rely on countries acting in good faith to maintain a good record of compliance with its decisions, this is not always sufficient. Similarly, adopting "naming and shaming" procedures may also have limited effect (Hafner-Burton, 2008). Importantly, unlike the WTO, there will be no leverage (e.g., the withdrawal of trade concessions) to ensure that parties implement decisions. Moreover, the current preference for soft law suggests that state actors will be unwilling to have domestic consumer protection laws challenged by a supranational body.

Cross–Border Enforceability Mechanisms Not Binding Rules

The growth of e-commerce means that domestic consumers can engage in cross-border transactions with foreign traders who may not be subject to the local jurisdiction of consumer protection authorities. Where consumers become victims of unscrupulous trade practices, the limitations of domestic consumer protection arrangements become glaring. From this perspective, the challenge at international level is ensuring that there are mechanisms supporting the cross-border enforcement of consumer protection laws. Where strong cross-border enforcement mechanisms exist, negotiating a binding international treaty containing substantive consumer protection rules may be considered less urgent. Hence, some consumer

law scholars submit that at the international level, the real issue is one of enforcement, not the lack of binding rules (Twigg-Flesner and Micklitz, 2010).

If cross-border enforcement of consumer norms is the crucial issue at stake, countries can prioritise cooperation in several ways. First, countries could negotiate a treaty focusing on cross-border cooperation amongst consumer protection enforcement authorities. Such an agreement can be negotiated outside the WTO framework. In the previous section, we saw what appeared to be a willingness to establish a convention dealing with complaints and consumer disputes in a tourism context. One can interpret this to mean that while there is no political interest in a binding treaty with substantive consumer protection rules, there may be an appetite for a treaty covering procedural matters involving consumer dispute resolution, enforcement and cooperation. If this accurately reflects the political mood, it may be more politically feasible for countries to reach an agreement focusing on cooperation and enforcement. With this approach, domestic legislators will maintain their legislative competence over substantive consumer protection matters, making it less likely to attract objections. Such an agreement may also build on the international cooperation provisions under the UNGCP, with the IGE playing a key role in these efforts.

Second, within the trade governance framework, specific chapters in trade agreements can oblige states to cooperate in enforcing consumer protection laws. For example, the proposed multilateral e-commerce agreement may adopt the international cooperation provisions under the UNGCP (Article VI). Alternatively, it may include specific arrangements requiring that parties cooperate in enforcing consumer protection laws in an e-commerce context. For example, such arrangements may oblige consumer protection authorities to investigate complaints lodged by other enforcement authorities on a consumer's behalf. It may also include obligations to share information with other relevant enforcement authorities to support the investigation of complaints. If a treaty on cooperation and enforcement is negotiated outside the WTO framework, the WTO could choose to incorporate the treaty's obligations within a WTO Agreement. For stakeholders interested in accessing the WTO's binding dispute resolution processes, bringing such agreements within the WTO system will be considered advantageous. From a normative perspective, it will signal a shift in the WTO's current narrow focus on producer interests. It will also show that the WTO acknowledges that consumers are active stakeholders and not passive recipients of trade liberalisation benefits.

Outside the multilateral level, there is a trend towards including provisions encouraging dialogue on consumer protection issues. For example, the new generation FTAs entered by the EU contain specific chapters on electronic commerce, which call for the parties to maintain a dialogue on consumer issues raised by e-commerce. For instance, CETA requires dialogue on issues which will address the "protection of personal information and the protection of consumers and businesses from fraudulent and deceptive commercial practices in the sphere of electronic commerce." (Article 16.6(1)). CETA further confirms that the dialogue envisaged may involve exchanging information on the parties' laws, regulations and measures on the issue (Article 16.6(2)). While these commitments are generic, they suggest that countries may be willing to insert obligations focusing on international cooperation and enforcement of consumer protection in trade agreements.

A third option is to strengthen the relevance of existing institutional mechanisms encouraging international cooperation and enforcement in consumer protection. The ICPEN should be the central focus in this regard. As seen earlier, the ICPEN provides a voluntary forum supporting cooperation between consumer protection agencies. Importantly, it maintains a website that allows consumers to report cross-border complaints, and such complaints data can be shared with participating domestic consumer protection authorities. One way of strengthening the ICPEN's work includes providing a rebuttable presumption that a country is meeting its obligations under a proposed cooperation treaty or a WTO agreement if its relevant consumer protection authority is part of the ICPEN initiative. Adopting such a presumption will encourage more enforcement authorities to join the ICPEN, increasing its reach and making its work more effective.

Conclusion

This article argued that demands for prioritising consumers in the trade regime mask (1) a normative quest to redefine the aims and scope of trade liberalisation and (2) dissatisfaction with the current international consumer protection regime justifying regime borrowing. In providing a better understanding of these demands, the article sought to show that policy and academic engagement with them ought to be informed by the underlying issues driving them. If one gives precedence to the normative question raised, then responses internal to the trading system appear more appropriate. However, if emphasis is placed on supporting cooperation in enforcing consumer protection laws, policy responses can be external to the trade system. The article provided examples of possible responses from both perspectives. Given the current political realities, it appears that the most feasible response in the short to

medium term is one focusing on strengthening international cooperation in enforcing consumer rights. While this can be achieved within the multilateral trade regime, the current difficulties with reaching consensus suggest that an external response may be more pragmatic.

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References

Abbott K.W. and Snidal, D. (2000) Hard and soft law in international governance. *International Organization,* 54(3) 421–456.

Al-Qahtani, M. (2002). The role of the International Court of Justice in the enforcement of its judicial decisions. *Leiden Journal of International Law,* 15(4), 781–804.

Alessandrini, D. (2005). WTO and current trade debate: an enquiry into the intellectual origins of free trade thought. *International Trade Law and Regulation*, 11(2), 53–60.

Amaral Junior, A. (2015). Is trade governance changing?. *Revista de Direito Internacional, Brasilia* 12(2), 371–382.

Alvarez, J.E. (2002). The WTO as linkage machine' *American Journal of International Law,* 96(1), 146–158.

Blakeney, M. (2013). Food labelling and international trade. *International Trade Law and Regulation*, 19(1), *15–24.*

Bohanes, J. (2002). Risk regulation in wto law: procedure-based approach to the precautionary principle. *Columbia Journal of Transnational Law*, 40(2), 323-390

Butcher, B. & Ip, M. (2007). Are Chinese consumers winners or losers under WTO membership. *Macquarie Journal of Business Law*, 4, 71–83.

Consumers International, (2019). Summary of points raised by consumer groups. https://www.wto.org/english/news_e/news19_e/summary_of_points_raised_trdia_06may19_e.pdf (accessed 11 August 2022).

Consumers International. (2003). Consumer policy and multilateral competition frameworks: A consumers international discussion paper. https://www.wto.org/english/tratop_e/dda_e/sympo03_ci_disc_paper.pdf (accessed 12 August 2022).

DiMatteo, L.A. (2013). CISG as basis of comprehensive international sales law' *Villanova Law Review,* 58(4), 691–722.

DiMatteo, L.A., Dosanjh, K. et al. (2003). The Doha declaration and beyond: Giving a voice to non-trade concerns within the WTO trade regime. *Vanderbilt Journal of Transnational Law*, 36(1), 95–160.

Driesen, D.M. (2001). What is free trade-the real issue lurking behind the trade and environment debate. *Virginia Journal of International Law*, 41(2), 279–368.

Durovic, M. (2020). International consumer law: What is it all about?' *Journal of Consumer Policy,* 43(1), 125–143.

European Commission. (2021a). Reforming the WTO: Towards a sustainable and effective multilateral trading system. https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf (accessed 25 February 2023).

European Commission. (2015). Trade for all: Towards a more responsible trade and investment policy. https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (accessed 12 August 2022).

European Commission. (2021b). Trade policy review – An open sustainable and assertive trade policy. https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf (accessed 12 August 2022).

Garcia, F.J. (1998). Trade and justice: Linking the trade linkage debates. *University of Pennsylvania Journal of International Economic Law*, 19(2), 391–434.

Gasiorek, M., Magntorn Garrett, J. & Serwicka, I. (2019). Winners and losers from international trade: What do we know and what are the implications for policy? https://blogs.sussex.ac.uk/uktpo/files/2019/07/BP33.pdf (accessed 11 August 2022).

Gruszczynski, L. (2010). Regulating health and environmental risks under WTO Law: A critical analysis of the SPS Agreement. Oxford University Press.

Guan, W. (2014). Consensus yet not consented: A critique of the WTO decision-making by consensus. *Journal of International Economic Law,* 17(1), 77–104.

Hafner-Burton, E.M. (2008). Sticks and stones: naming and shaming the human rights enforcement problem. *International Organization*, 62(4), 689–716.

Hague Conference on Private International Law, (2015). Proposal by the government of Brazil on a draft convention on cooperation and access to justice for international tourists. https://assets.hcch.net/docs/74b12153-45a4-45fa-a86e-814fa5bf9d2a.pdf (accessed 10 August 2022).

Hoen, E.T., Berger, J., Calmy, A., et al. (2011) Driving a decade of change: HIV/AIDS, patents and access to medicines for all. *Journal of the Intl Aids Society* 14(1) 1–17.

Howse, R. (2002). From politics to technocracy-and back again: The fate of the multilateral trading regime. *American Journal of International Law,* 96(1), 94–117.

https://tacd.org/wp-content/uploads/2019/02/TACD-Resolution_digitaltrade_Jan2019_final.pdf (accessed 10 August 2022).

International Court of Justice. Basis of the court's jurisdiction. https://www.icj-cij.org/en/basis-of-jurisdiction (accessed 12 August 2022).

Izaguerri Vila, A. (2019). International consumer protection at the United Nations: Towards global governance' *Journal of Consumer Policy*, 43(1), 91–103.

Kalderimis, D. (2004). Problems of WTO harmonization and the virtues of shields over swords. *Minnesota Journal of Global Trade*, 13(2) 305–352.

Krajewski, M. (2001). Public services and the scope of the General Agreement on Trade in Services. http://www.ciel.org/Publications/PublicServicesScope.pdf (accessed 10 August 2022).

Kwa, A. (2000). The a la carte undertaking: A new form of special and differential treatment?. https://www.iatp.org/sites/default/files/A_La_Carte_Undertaking_A_New_Form_of_Special_a.htm (accessed 12 August 2022).

Lamy, P. (2008). Trade expansion is insurance against financial turbulences. https://www.wto.org/english/news_e/sppl_e/sppl85_e.htm (accessed 12 August 2022).

Lang, A.T.F. (2007). Reflecting on linkage: Cognitive and institutional change in the international trading system. *Modern Law Review* 70(4), 523–549.

Lianos, I., Mantzari, D., Durán, G.M., et al, (2019). The global governance of online consumer protection and e-commerce: Building trust. https://www3.weforum.org/docs/WEF_consumer_protection.pdf (accessed 12 August 2022).

Moschini, G. (2003). Intellectual property rights and the World Trade Organization: Retrospect and prospects. https://www.card.iastate.edu/products/publications/pdf/03wp334.pdf (accessed 10 August 2022).

OECD., (2010). Consumer policy toolkit. https://doi.org/10.1787/9789264079663-en (accessed 12 August 2022)

Pitschas, C. & Gerstetter, C. (2017). Consumer rights in international trade agreements. https://www.vzbv.de/sites/default/files/downloads/2017/03/20/17-03-18_study_vzbv_consumer_rights_in_trade_agreements.pdf (accessed 12 August 2022).

Priess, H., & Pitschas, C. (2000). Protection of public health and the role of the precautionary principle under wto law: trojan horse before geneva's walls. Fordham International Law Journal, 24(1 & 2), 519-553.

Reich, A. (2004). 'The WTO as a law-harmonizing institution. *University of Pennsylvania Journal of International Economic Law*, 25(1), 321–382.
Ricardo, D. (2000). *On the principles of political economy and taxation.* Electric Book Company. (Original work published 1817).
Rolland, S.E. (2014). Are consumer-oriented rules the new frontier of trade liberalization. *Harvard International Law Journal,* 55, 361–419.
Ruggie, J.G. (1982). International regimes, transactions, and change: Embedded liberalism in the postwar economic order. *International Organization,* 36(2), 379–415.
Ruggiero, R. (1997). The future path of the multilateral trading system. https://www.wto.org/english/news_e/sprr_e/seoul_e.htm (accessed 12 August 2022).
Salm C. & Andre, M.C. (2017). Benefits of EU international trade agreements. https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603269/EPRS_BRI%282017%29603269_EN.pdf (accessed 12 August 2022).
Smith, A. (1843) *An inquiry into the nature and causes of the wealth of nations.* Thomas Nelson. (Original work published 1776).
Staal, T. (2016). Exercising or evading international public authority: The many faces of environmental post-treaty rules. *Gottingen Journal of International Law*, 7(1), 9–48.
Steger, D.P. (2002) Afterword: The "trade and..." conundrum – a commentary. *American Journal of International Law* 96(1), 135–145.
Sutherland, J. (1998). International trade and the GATT/WTO social clause: Broadening the debate. *Queensland University of Technology Law Journal*, 14, 83–107.
The European Consumer Organisation (BEUC). (2015). Consumers at the heart of trade policy: BEUC position on the future trade and investment strategy. https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153849.pdf (accessed 11 August 2022).
The World Bank, History. https://www.worldbank.org/en/about/history (accessed 10 August 2022).
Trans-Atlantic Consumer Dialogue. (2019). Resolution on digital trade.
Twigg-Flesner, C. & Micklitz, H.W. (2010). Think global – Towards international consumer law' *Journal of Consumer Policy,* 33(3), 201–207.
United Nations guidelines for consumer protection. Resolution 70/186 (2015) https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf (accessed 12 August 2022)
United Nations guidelines for consumer protection. Resolution 39/248 (1985) https://www.refworld.org/docid/3b00f2271f.html (accessed 12 August 2022).
United Nations General Assembly, (1992). The Rio declaration on environment and development. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (accessed 12 August 2022).
Van den Bossche, P. & Zdouc, W. (2021). *The law and policy of the world trade organisation: Text, cases and materials.* Cambridge University Press.
Which?. (2020). Ensuring trade deals work for consumers https://campaigns.which.co.uk/trade-deals/wp-content/uploads/sites/31/2020/01/5e2f163d92b97-Trade-deals-v4-2.pdf (accessed 11 August 2022).
Willis, B. (2013) The arguments for and against the TRIPS Agreement. https://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/ (accessed 26 February 2023).
Wolfe, R. (1996). Global trade as a single undertaking: The role of ministers in the WTO. *International Journal,* 51(4), 690–709.

World Bank. (2017). Good practices for financial consumer protection. http://hdl.handle.net/10986/28996 (accessed 12 August 2022).
WTO Joint Statement on E-Commerce. (2021). E-commerce talks: Two "foundational" articles cleaned; development issues discussed. https://www.wto.org/english/news_e/news21_e/jsec_12sep21_e.htm (accessed 10 August 2022).
WTO. Joint initiative on e-commerce. https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (accessed 10 August 2022).
WTO. Introduction to the TRIPS Agreement. https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules1_e.pdf (accessed 10 August 2022).
WTO. (2008). 10 Common misunderstandings about the WTO. https://europa.eu/capacity4dev/file/50803/download?token=5iZZXOUo (accessed 12 august 2022).
WTO. Dispute settlement body. https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm> (accessed12 August 2022)
Yu, P.K. (2011). TRIPs and its achilles' heel. *Journal of Intellectual Property Law* 18(2), 479–531
Yu, P.K. (2006). TRIPS and its discontents. *Marquette Intellectual Property Law Review*, 10(2), 369–410.

WTO Agreements

Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10,
Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A-1A/12
General Agreement on Tariffs and Trade 1947 (LT/UR/A-1A/1/GATT/2)
General Agreement on Tariffs and Trade 1994 (LT/UR/A-1A/GATT/1).
General Agreement on Trade in Services (15 April 1994) LT/UR/A-1B/S/1.
Marrakesh Agreement establishing the World Trade Organization (15 April 1994) LT/UR/A/2.
Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1
Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1

WTO Cases

Brazil – Measures Affecting Imports of Retreaded Tyres (WT/DS332/AB/R)
EC – Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291/R; WT/DS292/R; WT/DS293/R)
EC Measures Concerning Meat and Meat Products – Complaint by the US (WT/DS26/R/USA)
EC Measures Concerning Meat and Meat Products (Hormones) (WT/DS26/AB/R, WT/DS48/AB/R)
European Communities - Trade Description of Sardines (WT/DS231/R, WT/DS231/AB/R)
European Communities – Measures Affecting Asbestos and Asbestos Containing Products (WT/DS135/AB/R).

India – Certain Measures Relating to Solar Cells and Solar Modules WT/DS456/AB/R
Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (WT/DS161/ AB/R, WT/DS169/R)
Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes (DS10/R–37S/200)
United States – Measures Affecting the Production and Sale of Clove Cigarettes (WT/DS406/AB/R)
United States – Section 337 of the Tariff Act of 1930 (L/6439–36S/345)
United States –Importation of Certain Shrimp and Shrimp Products (WT/DS58/AB/R).

Treaties

Comprehensive economic and trade agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.
Joint interpretative instrument on the comprehensive economic and trade agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L11/3.
United Nations Convention on the International Sale of Goods, April 11, 1980. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf
Vienna Convention on the Law of Treaties, May 23, 1969. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf