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Doctoral Thesis

Consumers' Interests and WTO

Jurisprudence:

Towards a Consumer Friendly Application for a

Balanced System

소비자의 이익과 WTO 법리:

소비자 친화적 적용에 의한 균형된 체제의 수립방안

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Abstract

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International tribunals play a significant role in shaping a regime for which they are established. The WTO dispute settlement system is one of such systems established to settle disputes that arise among its members in relation to trade covered by the system. Thus, this research examines how the adjudicatory process of the multilateral trading system is shaping the rules of the multilateral trading system that have relevance to consumers' interests. It focuses on the examination of the interpretation of the rules of the multilateral trading system that have relevance to consumers' interests. It examines how the jurisprudence of the multilateral trading system has developed so far and the implication of such jurisprudence on safeguarding consumers' interests. The research focuses on the capacity of the adjudicatory process in employing various techniques while interpreting the rules of the multilateral trading system. The examination reveals that the method of analysis of the rules of the multilateral trading system by the

adjudicators can have significant implication on the promotion of consumers' interests. The adjudicatory process so far followed different analysis regarding the determination of the 'likeness' of products in a way that could have their own implication on safeguarding consumers' interests without jeopardizing free trade. The adjudicators have tried to maintain the balance between regulatory autonomy of members and free trade as envisaged by the multilateral trading system. The examination reveals the struggle of the adjudicators to maintain this balance through various approaches in interpreting the rules of the multilateral system. The research argues that the adjudicators of the multilateral trading system have sufficient mandate to shape the rules of the multilateral trading system by designing the appropriate approach for the interpretation of the rules of the multilateral trading system. The thesis also examines how normative integration can help the adjudicatory process to incorporate various rules and principles of international law that would help in the interpretation of the multilateral trading system in harmony with the economic and non-economic interests of consumers. The research has found out that the adjudicators can contribute to the promotion of consumers' interests through the proper interpretation of the rules of the system by employing the appropriate interpretative approach that would reflect both the demand and supply sides.

Keywords: Consumers' Interests, Evolutionary interpretation, Interpretive Approach, Likeness Analysis, Normative Integration, WTO Jurisprudence

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List of Acronyms and Abbreviations

| | |
|-------|--|
| AB | Appellate Body |
| COOL | Country of Origin Labeling |
| DES | Diethylstilbestrol |
| DSB | Dispute Settlement Body |
| DSM | Dispute Settlement Mechanism |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| EC | European Communities |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| EHRC | European Human Rights Convention |
| EU | European Union |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| ICJ | International Court of Justice |
| ICTSD | International Centre for Trade and Development |
| LDC | Least Developed Countries |
| MFN | Most Favored Nation |
| NT | National Treatment |
| SPS | Sanitary and Phytosanitary Measures |

| | |
|--------|---|
| TBT | Agreement on Technical Barriers to Trade |
| TFEU | Treaty on the Functioning of the European Union |
| TRIPS | Trade Related Aspects of Intellectual Property Rights |
| UNCTAD | United Nations Centre for Trade and Development |
| UNIDO | United Nations Industrial Development Organization |
| US | United States |
| USA | United States of America |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

Chapter 1

Introduction

1.1 General Introduction

The Dispute Settlement Mechanism of the WTO is an adjudicatory mechanism incorporated in the multilateral trading system at the conclusion of the Uruguay Round. The establishment of a rule based dispute settlement body was acclaimed by many as a breakthrough in international economic relations. This research focuses on the examination of the jurisprudence that develops under this dispute settlement system vis-à-vis consumer interests. It is uncommon to observe questions as to how the WTO rules are affecting consumers in one way or another. Keeping the discussions of the rules of the multilateral trading system as they are, this study mainly focuses on how the WTO adjudicators can contribute in shaping the rules of the multilateral system through their adjudicative roles. It examines the trend in the interpretation of the multilateral rules and the development of the jurisprudence of the multilateral trading system. The aim of the research is to analyze how a given approach in interpreting the rules of the covered agreements can affect the interests of consumers within the system. In doing so, it will try to evaluate the role of the adjudicators of the multilateral trading system in addressing consumers' interests within the existing frame work and existing rules in the covered agreements. The study will try to analyze methods of interpretations employed by the adjudicators in interpreting some of the rules of the multilateral trading system that have relevance to consumers' interests and how they try to balance non-economic interests of consumers' and free trade. In so doing the research will try to show how the adjudicatory process of the multilateral trading system can be utilized to maintain the

underlying balance that should exist between the promotion of the non-economic concerns of consumers and free trade as envisaged under the rules of the multilateral trading system. The research focuses on the examination of the capacity of the adjudicatory process in addressing consumers' interests through its interpretive role on the basis of the existing rules. An attempt will also be made to discuss the role of normative integration in the interpretation of the rules of the multilateral system that have relevance to consumers and the system in general. The research will also address how other rules and principles of international law can be used in interpreting the rules of the multilateral trading system so as to respond to the growing demands of consumers.

1.2 Background of the Study

Consumers are at the heart of any discussion in relation to trade. They have significant role in shaping the market, be it international or domestic trade.¹ They are key players in International Trade. Currently we have the WTO, an organization meant to regulate international trade through its multi-lateral agreements which are negotiated and adopted by its members. Sometimes questions are raised as to the attention given to consumers' economic and non-economic interests by the multilateral trading system as it does for goods and services. It is understood that 'most discussions of the WTO are focused on trade issues rather than people in the trade' and it is argued that this is due to the constitution of the WTO, which is based on the principles of trade rather than rules for people involved in the trade.² It

¹See Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, 21 INT. J. IND. ORGAN. 129 (2003).

² George YijunTian, *Consumer Protection and IP Abuse Prevention under the WTO Framework*, 1 Consumers In The Information Society, Access, Fairness And

is common to resolve issues of market impairments merely on the basis of the goods and services at issue irrespective of other attributes of the goods and services.³ This tendency appeared to drive much of WTO jurisprudences so far even though there might be some exceptions to the strict application of product related factors alone.⁴

It is commonly held that the covered agreements contain few provisions that specifically deal with the mechanisms to address the various concerns of consumers. One commentator even argued that “consumers, as a legal category, are virtually absent from the WTO agreements”.⁵ It is clear that most of the rules of the multilateral system are designed by focusing on the trade itself rather than the persons involved in the trade and as such it may appear that the WTO is not the appropriate platform for safeguarding consumers’ interests within individual members, rather a forum for protecting the interest of product suppliers and promoting free trade of goods and services.⁶ However, even though most of the rules talk in terms of goods and services, there are many areas in the WTO disciplines that have a direct impact on consumers.⁷ One thing that should be emphasized is that, it is not absolutely necessary to include provisions that specifically address consumers’ interests or the balance that should exist between consumer interests and free trade. It is sufficient to

Representation 11, 13-14 (Consumers International Conference Proceeding, Kuala Lumpur, 2012).

³ This can be inferred from WTO cases, like the *US — Tuna* case, *United States — Restrictions on Imports of Tuna*, DS21/R - 39S/155, (September 3, 1991) [hereinafter *US — Tuna I* Panel Report] which disregards any measure that does not concern a product as a product. See Douglas A Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118(2) HARV.L.REV. 525, 543 (2004).

⁴ See the discussion on the *Shrimp/Turtle* case *id.* at 8; Sonia E Rolland, *Are Consumer-Oriented Rules the New Frontier of Trade Liberalization*, 55(2) HARV. INT’L L. J. 361, 362 (2014).

⁵ Rolland, *supra* note 4.

⁶ Tian, *supra* note 2, at 18-19.

⁷ Rolland, *supra* note 4, at 376.

design a system that can accommodate a mechanism which recognizes the balance that needs to exist in the system in general terms and create the means through which the rules can be interpreted in tandem with the underlying balance.

There are also arguments that go further in the direction of criticizing the system as abandoning the interests of consumers in favour of free trade. They claim that the choice for more emphasis to producers than consumers is a policy decision and is not dictated by economic theory.⁸ They claim that the multilateral trading system does not pay sufficient attention as required by economic theories and went on to state that:

Consumers are recognized only to a very limited extent as objects and even less so as subjects in the covered agreements. Yet, regardless of the macro-economic creed that one subscribes to, from Chicago school neo-liberals to Marxists, it is difficult to describe the economic transaction of international trade without reference to consumers. While the WTO's trade liberalization ethos is strongly embedded in a classical economics model, it simply subordinates their interest to those of producers, without much examination of the legal and economic implications.⁹

Basically, such approach is not in itself something to be condemned as a reflection of lesser attention to consumers' interests. However, this overemphasis may lead to neglecting the important considerations that need to be addressed in international trade if mechanisms to ensure the proper balance are not in place. Overemphasis on the goods and services alone may ignore not only basic consumers' interests but also the impacts of consumers in shaping international trade. In addition, the lack of

⁸ Tian, *supra* note 2, at 14.

⁹ Rolland, *supra* note 4, at 397.

sufficient coverage of consumers' interests in the covered agreements of the WTO can make difficult the evaluation of consumer protection measures by member states under the covered agreements.¹⁰ Lack of sufficient coverage, in turn, may lead to exert unwarranted pressure on a member state whenever trade equilibrium is disturbed due to consumers' actions. This is a natural extension of the fact that there are no sufficient provisions that deal with specific consumers' interest or the balance that should exist between consumer interests and free trade in the WTO disciplines.¹¹ It does not mean, however, that to address the interests of consumers we need to have a direct reference in the covered agreements. It would be sufficient to interpret and apply the rules in line with consumers' interests if we agree that the system is meant to safeguard consumers' interests. Such understanding will also help to appreciate the invaluable contribution of consumers to the healthy functioning of the system. Acknowledging and promoting consumers' interest in the system not only promotes the wellbeing of consumers, for which trade is meant, but also expedites international trade in a manner that would satisfy the needs of both consumers and producers.¹²

Sometimes even those who acknowledge the importance of addressing consumers' interests tend to simplify the issue on the premise that consumer choices are similarly predicated on a rational choice directed to price. They tend to argue that consumers' choice globally is driven by the same force and hold that consumers' behaviour is now converging and is homogenized across the globe due to globalization.¹³ Contrary to this,

¹⁰ Tian, *supra* note 2, at 14.

¹¹ Rolland *supra* note 4, at 397.

¹² Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32(3) J. LAW & SOC. 349, 350-351 (2005).

¹³ Theodore Levitt, *The Globalization of Markets*, 249 Readings in International Business: A Decision Approach, 249 (1993); MARIEKE DE MOOIJ, CONSUMER BEHAVIOR AND CULTURE: CONSEQUENCES FOR GLOBAL MARKETING AND ADVERTISING 103 (2010).

others argue that there is no convergence and consumers' interests are divergent as reflected by the variations in consumers' taste and preference across the globe due to different factors.¹⁴ The basic idea underlying these arguments is that there are no global consumers, and consumer behaviour is not converging across countries.¹⁵ It is natural to observe a degree of difference among consumers, even though the underlying idea of consumers' interests in the market can be addressed in general terms. It is quite natural to observe differences in tastes to a certain item due to, for instance, the cultural orientation of a given society thereby demanding a different mechanism to address their demands.¹⁶ Still, some may claim that due to globalization some cultures may influence other cultures and result in the convergence of consumers' choices thereby triggering similar responses from regulatory organs.¹⁷ There are also others who tend to argue that there is a possibility to create a convergence of consumers' tastes driven by global brands.¹⁸ However, it is maintained that there is no evidence that would show the harmonization or existence of universal price-minded consumer segments and the assumption of rationality is being regarded as unrealistic that would place consumers outside cultural

¹⁴ See MOOIJ, *supra* note 13, at 103-113. Argue that the convergence of income leads to individualized choices rather than result in convergence of choices.

¹⁵ *Id.* at xiii.

¹⁶ See Chan Yie Leng & Delane Betelho, *How Does National Culture Impact on Consumers Decision-Making Styles? A Cross Cultural Study in Brazil, the United States and Japan*, 7(3) BRAZ. ADM. REV. 260-275 (2010). Argues that cultural difference have an impact on consumer choices and purchasing patterns; *see also* Zhu Mingxia, et al., *The Impact of Sino-Western Cultural Differences on IT Products Consumption*, 1(2) J. TECH. MANAG. CHINA 159 (2006). (Argues that the cultural difference between countries is reflected in the consumption behavior of their citizens)

¹⁷ Edwin J. Nijssen & Susan P. Douglas, *Consumer World-mindedness, Social-Mindedness, and Store Image*, 16(3) J. INT. MARKETING 84 (2008). (Argue that ease of communication facilitates the understanding of consumers about products elsewhere and resulted in world-minded consumers).

¹⁸ Aysegül Özsoy & Selin Altaras, *Global Brand Purchase Likelihood: A Critical Synthesis and an Integrated Conceptual Framework*, 16(4) J. INT. MARKETING 1 (2008). Argues that global brands can create a sense of belongingness with likeminded global consumers and thereby create global taste and preference.

context.¹⁹ We need to take into account the cultural contexts as well to understand why consumers exhibit a certain preference to goods from different sources. It should also be noted that no matter how it appears to have convergence at the macro level that does not necessarily imply convergence of consumer choice.²⁰ It is also clear that if consumers have all the information they need about the products they consume, their choice will diverge accordingly.²¹

Consumers take into account different factors in their consumption patterns. For instance, consumers may look at the origin of a good in making decisions. According to a research conducted by TNS Opinion and Social, EU citizens are quite aware of the origin of the products and services they can buy and also make their decision on the basis of the origin of the product or service.²² The research also revealed the difference in the tendency of checking the origin of a product and its impact on the decision to buy depends on the socioeconomic as well as demographic factors.²³ This is a clear evidence for the assertion that consumer interests can be affected by different factors which cannot be categorized in simple headings and be dealt with the same rules across the board.

This finding appears to be a sound indicator that a system that focuses on interpreting its rules in reference to the goods and services alone will not achieve its goal of promoting the welfare of mankind through trade. That is why it is argued that not only the existence of a specific rule that addresses consumers' interests but the interpretations of

¹⁹ MOOIJ, *supra* note 13 at 6.

²⁰ *Id.*

²¹ *Id.*

²² TNS and Social, *International Trade Report*, Conducted at the request of Directorate General of Trade, European Commission, [hereinafter TNS and Social], available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_357_en.pdf (Last visited November 8, 2016).

²³ *Id.*

the rules of the system that have relevance to consumers' are very important to evaluate how the system is addressing the concerns of consumers properly. Therefore, the interpretations of the rules and practices of the multilateral trading system need to take into account the difference in interests that would exist in different countries and the need to have different approaches from member states to deal with it. Such appreciation dictates the understanding of the balance that needs to exist between the efforts of members to safeguard the economic and non-economic interests of consumers and their commitment to free trade as envisaged under the rules of the multilateral trading system. This shows that having rules that are geared towards the goods and services alone does not suffice to claim that the multilateral trading system fails to address the concerns of consumers. The performance of a rule-based system should be evaluated taking into account not only the rules but also the mechanism in which these rules are interpreted. Therefore, the way these rules, which are crafted in line with the goods and services, are interpreted also determines the attitude of a system towards the other components of the market; that is consumers.

Many commentators talk about how the multilateral trading system is successful in trying to safeguard international trade through its multidisciplinary and multilateral agreements.²⁴ From the other angle consumer groups and other non-governmental entities claiming allegiance to consumers' interests propagate the argument that WTO mechanism undermines consumers' interests.²⁵ Its disciplines are crafted in a way to

²⁴ See Jean-Christophe Bureau, et al., *Non-tariff Trade Barriers and Consumers' Information: The Case of the EU-US Trade Dispute Over Beef*, 25 EUR. REV. AGRIC. ECON. 437 (1998).

²⁵ See for instance Saul E. Halfon, *Confronting the WTO: Intervention Strategies in GMO Adjudication*, SCI. TECHNOL. HUM. VAL. 307 (2009) (Discusses the critiques of NGOs against WTO and mechanisms to mitigate them).

enable more access to international trade. It is argued that “in its current form, the WTO operates primarily as a venue for negotiating and transferring access rights to the markets of member countries”.²⁶ The other argument appears to focus on the implication of a consumer agenda to the promotion of free trade as envisaged under the rules of the multilateral trading system. In fact, it is possible that stricter consumer protection may protect not only consumers but also firms competing against imported foreign products and limit free trade. Proponents of a free market tend to argue that strong consumer protection measures tend to raise the costs of foreign producers and can serve as a disguised protection to domestic producers that are competing against imported products.²⁷ It is uncommon that there are cases where the demands of consumers and import-competing domestic producers that seek stringent regulation to ward off competition may coincide.²⁸ However, this should not be a reason to disregard a valid consumer demand irrespective of its impact on domestic producers. It should also be noted that a strong consumer protection also has its own contribution to the healthy functioning of the market and for smooth implementation of the WTO commitments.²⁹ Therefore, the rules of the multilateral trading system need to be interpreted by taking into account the underlying rationale of the system that is safeguarding the interests of consumers through trade liberalization. The rules of the system need to be understood as means to ascertain the balance between trade liberalization and other interests of consumers. This understanding should

²⁶ David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 10(3) J. INT'L ECON. L. 707, 709 (2007).

²⁷ See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, U. CHI. L. REV. 1 (1999). (Argues that there are some regulatory measures that would distort competition in the guise of protecting consumers.)

²⁸ Thomas Bernauer & Erika Meins, *Consumer Protection in a Global Market*, 6(2) SWISS. POLIT. SCI. REV. 79, 96 (200).

²⁹ Howells, *supra* note 12, at 350-351. (Argues that a well informed consumers facilitates competition in the market.)

be reflected in the examinations of domestic regulatory measures taken to address non-economic interests of consumers against the rules of the multilateral system. This is precisely what is expected from a rule-based adjudicatory process like the WTO dispute settlement system.

So far researchers have tried to show how the WTO needs to take into account the various non-trade concerns of consumers and the efforts of member states to address these concerns through internal regulations. However, they appeared to fail to acknowledge the role of the adjudicatory process in addressing such concerns in the current system. They tend to rely on the law making process and thereby try to suggest rules that would specifically address consumer interests in the same fashion as it did for many aspects of the goods and services. Such argument appears to rest on the assumption that the world is moving towards globalization and hence towards a harmonized interest that can be addressed with one-size-fits-all multilateral rules and misses the point.³⁰ Despite globalization and decreasing information asymmetry, the world is still exhibiting diverse demands and needs. Such diverse interests and continually changing consumers' concerns cannot be addressed by rules alone, if at all necessary. Rather, it needs a well-functioning adjudicatory process capable of addressing the ever-changing demands through a well-crafted interpretive approach. Such approach will also help to accommodate the demands of consumers and their effort in harmonizing international trade with the growing concerns of consumers. It will help consumers and governments forge a workable alliance to promote a healthy and beneficial international trade.

³⁰ See Mauro F Guillén, *Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Key Debates in the Social Science Literature*, ANN. REV. SOCIOL. 235 (2001). (Claim that there are researches that confirm that globalization leads to diversity).

It is imperative to closely examine how the jurisprudence developed through the application of the multilateral rules is affecting consumers' interests and how it can be improved to adequately address consumers' concerns. It is important to examine the contribution of the adjudicatory organs of the multilateral trading system in addressing the interests of consumers through their interpretive role of the existing rules of the system. It is also necessary to explore the areas in which adjudicators should work as to develop a more balanced jurisprudence cognizant of the importance of striking a balance between the demand as well as the supply side of international trade. This undertaking can contribute to a harmonized administration of international trade by creating conducive environment to entertain the underlying balance that should exist between members' autonomy and free trade. We need to examine how consumers' interests can be safeguarded without attracting unfavourable challenges from other WTO members due to measures aimed at addressing vital consumer interests.

1.3 Statement of the Problem

It is believed that WTO is established to improve the well-being of mankind through the administration of free international trade. At the same time, it is widely held that the rules of the multilateral trading system are crafted in a way that would address consumers' interests without imposing unnecessary barriers on international trade. It is difficult to find an agreement that addresses all the interests of consumers within the WTO framework exhaustively. It is also natural for systems like the WTO to spell out the underlying objective in general terms and deal with specific things that are only appropriate to be addressed in a multilateral setting.

Trade is an interaction between producers and consumers. Hence we need to have a harmonized rule that is meant to safeguard both the interests of consumers and producers. It is understood that it is not the lack of a specific clause in a covered agreement or a specific covered agreement; rather it is how the system as a whole works that may affect the interests of consumers positively or negatively. Together with the rules of the multilateral system the jurisprudence that developed over the years should be evaluated so as to understand the net effect of the system on consumers' interests. It is important to examine the workings of the adjudicators and to what extent it is possible to integrate other norms of international law that would help interpret the rules of the multilateral system so as to address the growing demands of consumers without the need to introduce new rules or amend the existing rules. As mentioned earlier, the focus of the system in spelling out rules meant to further trade liberalization alone should not be a concern to consumers. It is understood that the WTO's focus on market access is meant to benefit the whole actors and believed that a free trade will ultimately benefit consumers.

Having said this, the research aims at answering the following and other related questions:

- ❖ How has the jurisprudence of the multilateral trading system regarding those issues which have relevance to consumers' interests developed over the years?
- ❖ Do the adjudicators of the multilateral trading system have sufficient power to address consumers' interests under the current rules?
- ❖ How can the adjudicatory process of the multilateral trading system affect the promotion of consumers' interests?

- ❖ Is there a room under the current rules to incorporate an interpretive approach so as to adequately address the interests of consumers?
- ❖ What is the position of the multilateral trading system on consumers' interests?
- ❖ How are consumers' interests reflected in the rules of the multilateral trading system?

1.4 Objectives of the Study

The main focus of the research is the examination of the implication of the multilateral trading system jurisprudence on consumers' interests and how it can be utilized to address the non-economic interests of consumers within the existing framework. It aims at bringing to light how the adjudicatory process can contribute to the promotion of consumers' interests within the multilateral system. It will examine how the jurisprudence of the multilateral trading system is shaping the rules of the system on issues that have relevance to consumers' interests. It aims at examining areas in the jurisprudence that should be strengthened so as to adequately address consumers' interests in the multilateral trading system. It will analyze the interpretive approaches used by the adjudicatory process regarding issues which have relevance to consumers and suggests mechanisms that would improve the interpretive approach in the interests of consumers. Therefore, the discussion focuses on analyzing the interpretive process under the current rules and procedures. In doing so, it will also examine whether the current rules are sufficient to address the interests of consumers through an improvement in the interpretive approach.

1.4.1 Main Objectives

- ❖ To examine how the interpretive approach in the current jurisprudence is shaping the rules of the multilateral trading system, especially those rules that have implications to consumers' interests.
- ❖ To examine the role of the adjudicatory process of the multilateral trading system in keeping the balance between regulatory autonomy and free trade so as to address consumers' interest through internal regulations.
- ❖ To examine the impact of the current interpretive approach on the freedom of member states to take regulatory measures with a view to safeguarding consumers' interests.

1.4.2 Subsidiary Objectives

- ❖ To examine the relationship between the rules of the multilateral trading system and other rules of international law.
- ❖ To examine the roles of other rules of international law in the development of the multilateral jurisprudence.
- ❖ To point out the role of an integrative approach in the interpretation of the rules of the multilateral trading system to respond to the growing concerns of consumers.

1.5 Scope

The research focuses on the examination of the impact of the interpretive approaches in the current WTO jurisprudence on consumers' interests as well as the interaction of members' internal regulation and international trade through a theoretical discussion and analysis of the WTO

jurisprudence. Hence, the scope of the research is limited in identifying the areas that impact consumers' interests and how these areas can be interpreted harmoniously with members' regulatory autonomy so that the interests of consumers can be addressed adequately.

1.6 Significance of the Study

The study mainly focuses on the examination of the impact of the adjudicatory process, especially, its interpretive approach in the current WTO jurisprudence on consumers' interests. It examines how states can take regulatory measures to address consumers' interests in tandem with free international trade as envisaged under the current WTO rules and jurisprudence. Therefore, the study is believed to contribute to an overall understanding of the interplay of consumers' interests and international trade. It will also have a positive contribution to trade policies of states that wish to join the organization as well as existing members. It is believed that the study will pinpoint the salient issues that need to be addressed during trade negotiations and post-membership administration of international trade in relation to consumers. Knowledge of the jurisprudence of the multilateral trading system will help states understand how future disputes will be resolved and assists them in the conduct of their trade relations.

1.7 Limitation of the Study

Consumers' interest is a very subjective and variable subject difficult to conceptualize and deal with under a multilateral setting. Equally, it covers

a wide range of issues and is addressed under different areas within the covered agreements of the multilateral trading system. Given the multifaceted issues involved in the regulation of consumer interests and the mechanisms to address them, it would have been more informative had the research includes the examination of most of the covered agreements that have direct relevance to consumers' interests. However, due to lack of time and resources, the researcher decided to limit the research on the examination of representative areas in the multilateral trading system that are central to the rules of the system. The researcher equally understands that, since the research mainly focuses on the examination of the impact of the interpretive approach of the jurisprudence on consumers' interests, the quality of the research will not be compromised by the coverage.

1.8 Research Design and Methodology

The researcher aims at conducting a theoretical discussion on the basis of international law and precedents. The research focuses on the examination of the interpretive approaches of the jurisprudence of the multilateral trading system that have relevance to the regulation of consumers' interests. It focuses on discussing the jurisprudence in light of the rules of the multilateral trading system and international law. The role played by tribunals of similar institutions shall be examined to evaluate the trends so far with a view to understanding the direction followed by the jurisprudence of the multilateral trading system.

The researcher will employ both primary and secondary sources. As primary sources, the rules and case laws of the WTO shall be examined. The researcher will also use previous works as a secondary source to enrich the discussions made through the primary sources. Due emphasis

shall be given in reviewing the relevant WTO rules and case laws in light of the relevant literature in the area. In doing so, the researcher believes that a clear picture of the jurisprudence of the multilateral trading system can be obtained.

1.9 Ethical Considerations

As the research involves the examination of the multilateral trading system jurisprudence in light of international law and the practice of other similar institutions, due care shall be taken not to overlook the special status of the multilateral trading system. Due regard shall also be made to properly acknowledge resources utilized in the research.

1.10 Organization of the Study

The research is organized into six chapters including this introductory chapter. In the following three chapters, discussions in relation to consumers' interests and the WTO will be made in order to capture the basic issue involved in consumers' interests and international trade. The method of analysis used in the determination of 'likeness' shall be discussed with a view to examining how a given approach can affect the interests of consumers. Some WTO cases will also be discussed with a view to illustrate the implication of the interpretive approaches used by the adjudicators and the jurisprudence that followed on consumers' interests and the ability of members to adopt internal regulatory measures. In chapter five the dispute settlement system of the multilateral trading system and its role in shaping the multilateral trading system shall be

discussed. It focuses on the examination of the dispute settlement mechanism in light of the rules of the multilateral trading system, international law and the practices of similar institutions. In chapter six a discussion as to the role of the adjudicatory process in addressing the non-economic interests of consumers will be made. It will try to show the mechanisms through which the adjudicatory process can address the non-economic interests of consumers. It will also discuss the roles of other rules of international law in helping the adjudicatory process to address consumers' interests adequately. Finally, a conclusion shall be made pinpointing the main findings of the research.

Chapter 2

Consumers' Interests and International Trade

2.1 What is a Consumer?

It is important to set the conceptual boundary within which the discussion in this thesis is undertaken. It is necessary to look at some definition for the term “consumer” that will inform the general discussion that follows. Consumers may be defined in different ways taking into account the context in which they are used. Hence, let us take some definitions commonly used by scholars that would help inform our discussion in this study. From marketing perspective consumers are those “who have a need or wants that can be satisfied by the marketer’s product or service”.³¹ Consumers are “final users of finished products; they could be industrial, institutional, government, intermediate or households”.³² From this definition, it appears that a consumer can be a physical or a legal person and includes those buyers who buy goods for further production. In other words, a consumer is a person engaged in the consumption process.³³ Thus, consumers are those at the end of the transaction and can include both industrial consumers and those who are end users. However, the present study is concerned with individual consumers involved in the consumption of final goods and services by themselves and their families. Thus, it is appropriate to supply a definition that reflects this attribute. In this regard it

³¹ JOHN BURNETT, CORE CONCEPTS OF MARKETING, 24 (2008).

³² O Goodhope Orji, *Major Classic Consumer Buying Behaviour Models: Implications for Marketing Decision-Making* 4(4) JOURNAL OF ECONOMICS AND SUSTAINABLE DEVELOPMENT

³³ ----- *Consumer Behavior – A Theoretical Frame Work*, http://shodhganga.inflibnet.ac.in/bitstream/10603/7102/12/12_chapter%202.pdf (Last visited November 8, 2016).

could be worth mentioning the definition supplied by Walters C. Glenn who defined consumers as follows:

A consumer is an individual who purchases, has the capacity to purchase, goods and services offered for sale by marketing institutions in order to satisfy personal or household needs, wants, or desires.³⁴

We will use this definition as a benchmark for the analysis in this research. Thus, the study will focus on individual consumers and on consumer goods. Those issues that have relevance to individual consumers in the market and rules of the multilateral trading system that address those issues are the focuses of the study.

2.2 What are Consumers' Interests?

As players in the market, consumers have identifiable interests in the market as a group as well as an individual. However, in this part we are considering the interests of consumers as a group and treat them accordingly. It is understood that economic theories are expounded on the basic principle that consumers have their own preferences and are driven by their own self-interest.³⁵ Therefore; it may not be difficult to enumerate consumer interests in relation to international trade. Nevertheless, what is important here is to point out those interests that have relevance within the context of the multilateral trading system. It is also difficult to talk about consumers' interests in the abstract when consumers are very different with

³⁴ WALTERS C. GLENN, CONSUMER BEHAVIOR: THEORY AND PRACTICE, (1974).

³⁵ Daniel McFadden, *Free Markets and Fettered Consumers*, 96(1) AM. ECON. REV. 3, 5 (2006).

very diverse interests. Especially it is difficult to talk about the interest of heterogeneous groups in the abstract in the face of known diversities regarding consumption behaviours as well as many other attending factors. Thus, it is necessary to define and delimit what is meant by consumers' interests at least for the purpose of certain observations. Therefore, let us see some qualifying definitions used to delimit consumer interests for this study.

A good starting point for the discussion of consumer's interest would be the guideline prepared by the United Nations Department of Economic and Social Affairs.³⁶ To begin with the Guideline for Consumer Protection indicates the following, among others, to be legitimate needs of consumers:³⁷

- a) The protection of consumers from hazards to their health and safety;
- b) The promotion and protection of the economic interests of consumers;
- c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
- e) Availability of effective consumer redress;
- f) Freedom to form consumer and other relevant groups or organizations and the opportunity for such organizations to present their views in decision-making processes affecting them;
- g) The promotion of sustainable consumption patterns.

From the above excerpts, we can deduce that consumers' interests are not limited to economic interests alone. Rather, it encompasses both

³⁶ United Nations Guidelines for Consumer Protection, (2003) [hereinafter UN Guideline] http://www.un.org/esa/sustdev/publications/consumption_en.pdf (Last visited November 8, 2016).

³⁷ *Id. see also* Patrizio Mercial, *Consumer Protection and the United Nations*, 20 J. WORLD TRADE 206 (1986).

economic and non-economic aspects. It is important to note that the right of consumers to choose what to consume is recognized as fundamental rights by many jurisdictions. For instance, it was included under the Kennedy's Consumer Bill of Rights in 1962.³⁸ Other rights of consumers were also included in the bill and later on expanded to include more rights and were adopted by consumer unions and include those rights like the right to redress, consumer education and the right to a healthy environment.³⁹

It could be persuasively argued that free market is the best mechanism to address the economic interests of consumers as it increases consumers' choices. Accordingly, it might be argued that the multilateral trade rules predicated on the precepts of free market can address the economic interests of consumers properly without the need for the regulatory intervention of the state. Therefore, it is important to distinguish the economic interests of consumers that can be addressed by the market alone and those intangible elements that transcend economic interests of consumers that need the active involvement of the state to make sure that the market addresses them properly to the satisfaction of consumers.

Thus, the discussion in this study focuses on the examination of the role of the adjudicatory process of the multilateral trading system in accommodating those measures taken by member states in the interest of addressing the non-economic or intangible interests of consumers that may not be answered with market force alone. It focuses on the examination of the position of the multilateral trading system regarding measures taken by

³⁸ Matthew Hilton, *The Duties of Citizens, the Rights of Consumers*, 15(1) Consumer Policy Review 6-12 (2005), cited by Paul C Henry, *How Mainstream Consumers Think about Consumer Rights and Responsibilities*, 37(4) J. CONSUM. RES. 670 (2010).

³⁹ Robert J. Lampman & Robin A. Douthitt, *The Consumer Bill of Rights: Thirty-Five Years Later*, 9 *Advancing The Consumer Interest* (1997), cited by Henry, *supra* note 38, at 671.

member states to give effect to the preference of their consumers in this respect. It is also important to delimit the scope of the analysis as the non-economic interests of consumers can include a wide range of issues that can be address under other categories as well. The notion of consumers' interest is a general concept that would include many aspects that can be addressed through various mechanisms.⁴⁰ It also includes subjects that fall under different disciplines. A case in point is issues in relation to environmental protection. It is understandable that consumers have a real stake on the health of the environment and any measure aimed at preserving the environment can be considered as a measure in the interest of consumers. However, since environmental issues are addressed separately in the multilateral framework as well as other parallel disciplines, treating them under a topic of consumers' interests in general, at least in the discussion within the multilateral trading system, could amount to redundancy. Nevertheless, it is possible to address the informational aspect of conservation measures within any discussion of consumers' interests since it would give them the opportunity to respond positively or negatively to environmental measures. Therefore, the scope of the present study focuses on the examination of the position of the rules of the multilateral trading system in relation to measures taken by member states to provide information regarding goods and services as well as measures taken to protect individual consumers. Specifically, the study focuses on the examination of the position of the multilateral trading system regarding regulatory measures aimed at giving notice to consumers regarding the goods and services offered in the market and those measures aimed at protecting them from harmful products. Therefore, with this basic delimitation the study examines the possible role of the adjudicatory

⁴⁰ Frans WA Brom, *Food, Consumer Concerns, and Trust: Food Ethics for a Globalizing Market*, 12 J. AGR. ENVIRON. ETHICS 127, 128 (2000).

process of the multilateral trading system in addressing those measures within the frame work of the existing rules of the multilateral trading system.

In line with this it is instrumental to have a better look at the description of consumers' interests by Consumers International. It listed what it considered the basic interests of consumers in the market.⁴¹ However, it suffices to mention only those that have relevance to our discussion in this study as illustrated above. Accordingly, among the lists, the right to be informed, the right to choose, the right to be heard, the right to consumer education and the right to a healthy environment can be mentioned.⁴² It is important, therefore, to elaborate these listings against the objective of the study. If we start from the right to be informed, consumers are entitled to get sufficient information regarding the goods and services they purchase.⁴³ It is possible to argue that in free market the market itself can address this concern without a need from the state to take a regulatory measure prescribing mechanisms to ensure that sufficient information is provided to consumers regarding the goods and service offered in the market.⁴⁴ However, given the growing complexities of world market and the ensuing gap in the capacity of processing and accessing information that exists between consumers and suppliers it is necessary to devise a mechanism that can bridge this gap. In this regard the states regulatory arm is the better mechanism to address the information asymmetry through prescribing the appropriate mechanism to provide sufficient information. Suppliers can provide information regarding their goods and services through various mechanisms. This can be made possible through various channels such as advertisement and product

⁴¹ See UN Guideline, *supra* note 36.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

labelling. States have a duty on their part to make sure that their consumers are provided with sufficient and accurate information about the goods and services they consume as part of their consumer protection obligations. The provision of information is one of the most important aspects of consumer protection.⁴⁵The information available to consumers need to be more inclusive and should not be limited to those particulars provided by suppliers; rather it should include relevant information that is not disclosed by suppliers.⁴⁶

The right of consumers to choose is an important aspect in international trade. It is important because it can affect the market and may attract the disciplines of the multilateral trading system. This can happen from different perspectives. The first instance whereby the exercise of their right to choose among products can attract the multilateral trading system disciplining is where the state takes measure to enforce the right of consumers to choose. This might not be an obvious area of conflict between the right to choose and the disciplines of the multilateral trading system because probably it does not require the backing of the government in choosing what to consume as far as the information to make the decisions are available. The second and more important interaction with the multilateral trading system is where the choice of consumers has resulted in a reduced market share of a product from other WTO member states and such states opted to pursue a complaint, at least situation complaint, against the market state.⁴⁷

The Right to be heard includes the right of consumers to participate in the decision-making process regarding measures that have an impact on

⁴⁵ Howells, *supra* note 12 , at 352.

⁴⁶ *Id.*

⁴⁷ Note that for a situation complaint what you need is an impairment of a benefit accrued from trade concessions irrespective of any measure. *See* WTO SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 7 (2004).

their rights. This right can be evaluated from the perspective of individual member states as well as at the level of the multilateral trading system. This may include the opportunity to express their opinion whenever their government decides to enter into multilateral negotiations concerning an issue of importance to consumers. It may also include the right of consumers to express their concerns on measures and decision-making process in the multilateral trading system itself. Such participation can take various forms depending on the structure of the state as well as the performance of consumers' organizations and other interested entities. Multilateral organizations can also create forums to ensure the participation of consumers in the decision making process. Likewise, the multilateral trading system itself can accommodate the demands of consumers to participate in the decision making process as well as various forums of the multilateral trading system. There are instances where the multilateral trading system tries to realize consumers' rights to be heard. For instance, the right to submit unsolicited amicus curiae before panel and the Appellate Body can be considered as a mechanism to realize their right to be heard.⁴⁸ Other mechanisms aimed at making the multilateral trading system accessible to consumers' opinions should also be taken into account in this regard. The other right considered as an important aspect of consumers' interest is the right to consumers' education. The right to consumer education involves the right of consumers to be provided with the relevant skills and knowledge to safeguard their interests. In the presence of a right to adequate information, the inclusion of an additional right to education might appear superficial. However, it seems that both rights are meant to cover different substantive rights. The right of education includes more than the provision of information about the nature

⁴⁸ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 105-108, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US — Shrimp Appellate Body Report*]

of the goods and services offered in the market a right meant to be addressed by the right to information. The right of education can include rising the awareness of consumers as to their right in the first place. It can also include rising the awareness of consumers as to how they can promote their right and participate in the process.

The other right that needs to be addressed in relation to international trade is the right to a healthy environment. This may take us to think about the relationship between the disciplines of the multilateral trading system and the measures that can be taken to safeguard the environment on the basis of the right to a healthy environment. Coupled with the debate regarding the distinction between measures on the basis of a product on the one hand and production process, on the other hand, the right to a healthy environment is an important issue the multilateral trading system needs to strike a balance. As has been indicated earlier, the discussion in this study tries to make distinction between measure that can be considered under the topic of consumers' interests and other measures which are addressed separately within the framework of the multilateral trading system. However, it is also important to understand that there are issues that intersect many of the disciplines. A case in point is the issue of environmental measures. While it is possible to take measures aimed at directly protecting the environment, such as through the so called environmental tax, and address within the available environmental exceptions it is also possible to take measures requiring producers to supply information to consumers about environmental sustainability of their production method and process and address the measure under consumers' grounds. Thus, it is with the latter that this study focuses; those measures aimed at addressing the information demands of consumers regarding environmental sustainability of the goods offered in the market.

The Federation of German Consumers Organizations also categorized the basic interest of consumers into three generalized classes; fundamental interests, economic interests and societal interests. Fundamental interests of consumers relate to the access to the market and be able to participate in consumption and the economic interests of consumers relates to consumer protection within the market, and the societal interests of consumers relates to other interests involved in consumption such as environmental and other societal concerns. It further went on and defined consumers' rights in the following words:

Called 'consumer sovereignty', the freedom to choose if to consume and what to consume is an assumed right in economic theory that underpins the political philosophy on which market economies are based. The freedom to express values and preferences in the choice of products and services is the market equivalent of free and fair multiparty elections in democracy. In spite of this, we find that consumer interests and rights, and the requirements of consumer policy are only weakly reflected in international trade bodies and law.⁴⁹

This guideline, which was drawn in cooperation with consumers international, lists down the major components of consumer interests for the improved well-being of mankind. In effect, it would be against the interests of consumers to deny such rights of consumers in the guise of free trade. After all, free trade is nothing if it defeats the purpose of improving the welfare of consumers for which it was established.⁵⁰ As the above discussions confirmed consumers' interests are not limited to accessing

⁴⁹ Federation of German Consumer Organizations, *Consumer Interests and Sustainable Development in International Trade Law*, Policy Brief, (2003). [hereinafter Federation of German Consumer Organizations], http://www.ecologic.eu/download/projekte/1850-1899/1885/1885_vzby_policy_brief.pdf (Last visited November 8, 2016).

⁵⁰ See Preamble to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter WTO Agreement].

various quality products in different prices from different sources. It also includes other social concerns that cannot be evaluated in terms of price.

In a nutshell, it can be said that consumers have an established right to have an access to information about the goods and services they consume. They need to have information about the attributes of a product and other aspects associated with the product. Ensuring that consumers are better informed in order to make a responsible choice that would satisfy their taste, preference and lifestyle are vital for the healthy functioning of the market through building confidence and trust among consumers and suppliers.⁵¹ It should also be noted that not only the availability of information but also its suitability for easy processing determines the utility for consumers.⁵² Thus, due attention should be given to the kind of information as well as the medium of communicating such information taking into account all the factors involved. This will help to come up with the appropriate legal and policy instrument to address consumers' interests properly.⁵³ It should be noted that the mechanism devised should be able to address both the economic and non-economic interest of consumers. It is argued that the most effective method to address non-economic interest in international trade setting is through the regulatory arm of the states' concerned.⁵⁴

⁵¹ See EC Commission, *Healthier, Safer, More Confident Citizens: A Health and Consumer Policy Strategy* (2005); Howells, *supra* note 11, at 351.

⁵² Debra L Scammon, "Information Load" and Consumers, 4 J. CONSUM. RES. 148 (1977).

⁵³ See Henry, *supra* note 38, at 670; Kaela Jubas, *Conceptual Confusion in Democratic Societies Understandings and Limitations of Consumer-citizenship*, 7(2) J. CONSUM. CULT. 231 (2007).

⁵⁴ See Erik R Lowe, *Technical Regulations to Prevent Deceptive Practices: Can WTO Members Protect Consumers from [un] Fair-Trade Coffee and [Less-Than] Free-Range Chicken?*, 48(3) J. WORLD TRADE 593 (2014).

In general consumers have identifiable interests in the market both tangible and intangible regarding the goods and services they consume.⁵⁵ While it is possible for consumers to identify and deal with the tangible attributes of the goods and service while making purchases, the intangible attributes require the regulatory arms of the state. The issue is more pressing especially in international trade where redress for defects or deception is difficult due to the nature of the transaction. In international trade it is difficult to locate the source and attribute responsibility once the goods are available in the market and consumed.⁵⁶ Therefore, the best remedy to safeguard consumers' interests in such cases, for instance, is to design a mechanism to help consumers get the necessary information regarding the products offered in the market beforehand.

2.3 The Relationship among Consumers' Interests, Consumers' Taste and Preference and Consumer Protection

As the study talks about consumers' interests, consumers' taste and preferences and consumer protection, it is appropriate to discuss the relationship among these terms and draw the conceptual boundary that needs to exist among them, if any. Basically, this study is concerned with the examination of the role of the jurisprudence of the multilateral trading system in shaping the rules of the system taking consumers' interest as a variable. In this regard, it might be appropriate to delimit the conceptual

⁵⁵ Here the term "tangible" is used to refer the qualities and attributes a product that can be observed in the market such as shape size color etc and the term "intangible" refers to the attributes of the goods and services which cannot be identified from the product itself.

⁵⁶ K. N. Harilal & P. L. Beena, *Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives*, 40(51) ECON. POLIT. WEEKLY 5419(2005).

boundaries among the three related terms at least by operationalizing them for the purpose of the discussion in this thesis.

As has been discussed in the preceding section, consumers' interest refers to myriads of issues that concerns consumers in the market. In general, it relates to the demand side of the market. Consumers' interest can be equated with consumers' wellbeing and the research uses these concepts interchangeably. As it relates to the economic relationship in the market context, it is appropriate to see it from the economics perspective. In economics the term "consumer welfare" refers to "buyer's well-being"; the benefits a buyer derives from the consumption of goods and services.⁵⁷ Consumers' interest is becoming broader encompassing many issues which were not traditionally considered as consumer interests.⁵⁸ A commentator captures this development succinctly in the following words:

What is new today about consumerism is the fact that consumers' concerns today are much more directly focused on the human values and environmental considerations involved in today's economic decisions than they are on the more strictly "economic" problems of obtaining the highest quality goods at the lowest possible price.⁵⁹

On the other hand, consumer protection refers to the policies, laws and institutions designed to safeguard the interests of consumers in the market. The essence of consumer protection is spelt out by the United Nations Manual on Consumer Protection which states as follows:

Consumer protection is meant to ensure that the demand side of the market economy is functioning optimally for the market system to

⁵⁷ Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7(1) J. COMPETITION L. & ECON. 133, 138 (2011).

⁵⁸ Louis L. Stern, *Consumer Protection via Self-Regulation*, 35(3) J. MARKETING 47 (1971).

⁵⁹ George S. Day & David A. Aaker, *A Guide to Consumerism*, J. MARKETING 12 (1970).

work effectively, and is complemented by competition policy to ensure that the supply side is functioning optimally.⁶⁰

As consumers' interests are diverse among consumers and differ from country to country, the legal and institutional apparatus in every country differs accordingly. The involvement of a state in the consumer protection scheme also depends on different factors. Most importantly, the level of active participation from consumers' groups determines the level of intervention from the government. Hence, the incidence whereby a state may be called upon to use its regulatory arm in response to consumers' demand depends on the responses of consumers in the market. If they are active in crafting mechanisms to promote their interests in the market, the government may not need to involve much.⁶¹ It should also be understood that the same measure may impact consumers in different jurisdiction differently.⁶² Therefore, consumer protection measures should be tailored in accordance with the demands of a given consumer. At this juncture it should be noted that consumer protection law does not include all laws and institutions that serve consumers' welfare and a case in point in this regard is antitrust law.⁶³ Both antitrust and consumer protection laws serve the same purpose of serving consumers' choice.⁶⁴ However, they target different behaviors and administered differently. While antitrust law works

⁶⁰ Manual on Consumer Protection United Nations Conference on Trade and Development (UNCTAD) United Nations Publication, UNCTAD/WEB/DITC/CLP/2016/1, (2016) at 2 [hereinafter UNCTAD Manual]

⁶¹ See Matthew Hilton, *Consumers and the State Since the Second World War*, 611(1) ANN. AM. ACAD. POLIT. SS. 66, 75 (2007). States that for instance In Britain the existence of an extremely impressive private comparative testing magazine has partially excused the state from taking on an advocacy role for consumers.

⁶² See for instance Mark Armstrong, et al., *Consumer Protection and the Incentive to Become Informed*, 7(2-3) J. EUR. ECON. ASSOC. 399, 400 (2009). (They discussed the positive and negative impacts of government intervention through different strategies to address consumer interests).

⁶³ John B. Kirkwood & Robert H. Lande, *Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTREDAME L. REV. 191 (2008).

⁶⁴ Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65(3) ANTITRUST LAW J. 713 (1997).

to ensure the competitive environment of the market so as to help consumers find sufficient options in the market, consumer protection law are intended to ensure that consumers are able to effectively choose and buy goods available in the competitive market environment ensured by the antitrust law.⁶⁵ In other words, while antitrust law focuses on market distortions through anticompetitive acts, consumer protection law measures focus on remedying information asymmetries and potential deception even in a competitive market.⁶⁶

Finally, consumers' taste and preference refers to the choice of consumers among goods and services available in the market. For the purpose of this thesis, it would suffice to use the following definition of the term and the discussion that follows will take these definitions into account. For instance, according to McConnell, taste is a favourable change in consumer tastes (preferences) for a product.⁶⁷ Varian defines consumer preference as a "ranking of consumption bundles based on their desirability".⁶⁸ Thus, consumers taste and preference are the reflections of the attitudes of consumers towards comparable goods and services available in the market. However, we should not confuse taste and preference with demand. It is possible for a person to have a preference for something without having the demand for that particular item on that particular time. Therefore, the discussion in this thesis focuses on the examination of the position of the multilateral trading system in addressing consumers' interests by looking at the position of the jurisprudence of the

⁶⁵ *Id.*

⁶⁶ See Mark Armstrong, *Interactions Between Competition and Consumer Policy*, 4 *COMPET. POLICY INT.* 97, 112-125 (2008). (Discusses the relationship between Consumer Protection and Antitrust Policies).

⁶⁷ CAMPBELL R. MCCONELL & STANLEY L. BRUE, *MICROECONOMICS—PRINCIPLES, PROBLEMS AND POLICIES* (1996).

⁶⁸ HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH: NINTH INTERNATIONAL STUDENT EDITION* (2014).

multilateral trading system on measures aimed at addressing consumers' interests. Thus, the use of these terms in subsequent discussions should be understood against this background.

2.4 Consumer Interest vs. Free Market

It is argued that the multilateral trading system is built on the principle of free market and is supposed to operate as such. In a free market economy the assumption is that the market forces shall interact freely and determine the rule of the bargain without any interference from the state. It should be the market and consumers choices rather than the government that should determine the survival of goods and services in the market.⁶⁹ Thus, it is often asked whether it is necessary to intervene in the market in the interest of consumers since the market force itself will make sure that the interest of consumers and producers are equally served.⁷⁰ Their argument is predicated on the hypothetical economic system whereby the market is governed by the interaction of the consumers' choice and the response of producers and stated as follows:

For producers have to sell their goods to consumers in order to survive. They will only be able to sell to consumers what consumers want to buy. Consumer preference will dictate what is made available. Producers compete. Consumers choose. The 'invisible hand' of producers behaving in response to consumer preference organizes the market. The survival instinct among producers which is

⁶⁹ Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT. LAW J. 429 (1997).

⁷⁰ See Roger Sherman, *The Future of Market Regulation*, 67(4) SOUTHERN ECON J. 782 (2001). (Discusses how the market is regulated by looking at the various forms of government interventions).

instilled by the mechanism of competition will ensure an efficient allocation of resources. Given the stimulus of competition, resources will not be wasted. Production will stand in equilibrium with consumption. Viewed from this perspective, the market economy is a self-organizing system.⁷¹

The practice, however, does not seem to support this. There is a meaningful difference among consumers and suppliers in the market that requires the involvement of the state at least in helping consumers acquire the necessary information in the market.⁷² Access to information to consumers can help them to shape the market and maintain a well functioning market competition.⁷³ It is inconceivable to find consumers who can have equal leverage as producers in this globalized world whereby suppliers of goods and services are well organized and established a strong chain of supplies. It is easier to theorize than putting in place such utopian consumer-producer relationship. It is not hard to figure out how consumers are weaker than suppliers at least if we consider the relationship between consumers of a given country and a multinational supplier. In practice, consumers have less voice in the market and lack the information that would help them make a rational decision on their consumption.⁷⁴ Thus, a mechanism should be in place to help consumers make rational choice based on relevant information.

⁷¹ GERAINT G. HOWELLS & STEPHEN WEATHERILL, *CONSUMER PROTECTION LAW* 1 (2005).

⁷² See UNCTAD Manual, *supra* note 60. It argues that:

It is impossible to envisage an economy where there is no possibility of abuse, where centrally planned or a laissez-faire system. Stat intervention is necessary to ensure that suppliers behave responsibly and that aggrieved consumers have access to remedies.

⁷³ See generally Linda L Price, et al., *Information Sensitive Consumers and Market Information*, 21(2) J. CONSUM. AFF. 328, (1987).

⁷⁴ STEPHEN & WEATHERILL, *supra* note 71, at 2.

It is with this asymmetry of leverage between producers and consumers that the issue of consumer protection should be understood. The state as the guardian of its citizen must intervene in the market and regulate it so as to make it safe for its consumers. This does not mean, however, that a single consumer protection mechanism can respond to the demands of all consumers across the board or a single strategy would suffice. Consumers and their demand as well as the role they play in the economy are different requiring a different rationale and strategy.⁷⁵ Since consumers and the concerns of consumers are diverse, it is necessary to devise and implement different mechanisms taking into account the particular interest at stake. Hence, consumer protection regimes can take various forms and include different components that are geared towards ensuring that consumers get what they deserve in the market. It is because the issue of consumer protection are dependent on consumers' interaction within the economy and society that we observe different and at times conflicting rationale in consumers' protection regimes.⁷⁶ Despite all the discrepancies, however, reducing the imbalance between consumers and traders is considered as basic rationale for consumer protection.⁷⁷ Thus, it is accepted that the acknowledged asymmetry between consumers and traders regarding the market can be bridged through the provision of adequate information to consumers and the market can be corrected through the disclosure of information in the sense that it will become more competitive and efficient.⁷⁸ It is with this rationale that the involvement of states in the market is encouraged.

⁷⁵ See Brom, *supra* note 40. (Argues that as consumers interests are general and require different mechanism to deal with)

⁷⁶ STEPHEN & WEATHERILL, *Supra* note 71, at 5.

⁷⁷ *Id.*

⁷⁸ *Id.* at 64; *see also* Armstrong, *supra* note 66.

An agenda for a strong consumer protection regime might appear to be incompatible with market access endeavors. However, a close look at a neutral consumer protection strategy reveals the harmony between the two policies. A strong and properly functioning consumer protection regime is an asset for a health and competitive market.⁷⁹ The presumed concern for the advocates of free market is that states may utilize consumer protection as a pretext to accord an undue protection to domestic industries.⁸⁰ In fact it is possible to use consumers' protection agenda for a disguised protectionist measure. It is possible for domestic industries who lobby for market protection to assimilate their demand with consumer groups in order to connive their true motive. However, this should not be taken as a rationale to discard genuine and *bona fide* consumer protection endeavours. The system should be able to root out protectionist measure as far as possible while giving sufficient space for the regulatory arm of member states to adopt measures aimed at legitimate concerns. It is with this aim in mind that the research is focusing on the mechanism by which legitimate concerns of consumers can be addressed under the existing rules and existing systems. It is to see whether it is possible to identify *bona fide* regulatory measures and disguised protectionism by employing the right approach in the determination.

⁷⁹ For the benefit of empowered consumers for a healthy competition see Howells, *supra* note 11, at 350; Michael E. Porter, *The Competitive Advantage of Nations*, 68 HARVARD BUS. REV.(1990).

⁸⁰ For the interplay of Consumer protection and protectionism, see for instance Sykes, *supra* note 27.

2.5 The Roles of Consumers in International Trade

Understanding the roles of consumers in international trade is crucial in evaluating how the system addresses the issue of consumers. It is clearly understood that the pursuit of a free trade is all about serving the interests of consumers. However, as a multilateral organization operating under international law, it is the states that are the subjects of the rules of the multilateral trading system rather than the consumers. Thus, there is no direct relationship between consumers and the multilateral trading system. This does not mean, however, that consumers do not have a role to play in the governance of international trade as regulated by the multilateral trading system. It is also possible for the acts of consumers to affect international trade without there being any act or omission on the part of the state that would make it liable under international law. It is true that the WTO is concerned entirely with the behaviour of member states towards goods and services originating from other members. The attitudes of consumers towards the goods and services do not seem the direct business of the WTO. This does not mean, however, that the attitudes of consumers towards the goods and services accessible to them are not relevant to the multilateral governance. The attitude of consumers towards the goods and services are very important to the regulation of international trade.⁸¹ From the determination of the ‘likeness’ of goods and services to shaping international trade itself through their positive or negative actions, consumers play a vital role in the working of the multilateral trading system.

Active participation of consumers in the market through various channels is also important for the market itself. Empowered consumers are

⁸¹ See Brom, *supra* note 40.

catalysts for a healthy competition in the market.⁸² They help competition in the market through their demanding choices. Therefore, producers will be forced to respond to the demands of such consumers in order to survive in the market. Otherwise, if consumers are not demanding and responsive to the nature of the supply, producers who are providing good qualities will not have the incentive for a continued supply of superior quality and at the same time producers who are supplying inferior quality will not have the urge to improve their products.⁸³ At the end this may result in the inefficient utilization of resources.

Consumers also have a great role to play in achieving sustainable utilization of resources, which is declared to be one of the goals of the WTO itself, through their leverage in the market if the market is responsive to consumers' taste and preferences. It should be noted that their contribution as well as their ability to participate in the sustainability itself, are intertwined. If we can build sustainable consumers that can effectively play their roles in the market then through their choice and preference they can bring about the desired competition among producers to produce quality goods and services efficiently.⁸⁴ In so doing the efficient use of resources will promote sustainability.

2.6 Objective vs. Subjective Approach

It is possible to understand consumers' interests from two angles; treating them as a single unit within the multilateral trading system and deal with

⁸² Howells, *supra* note 12, at 350.

⁸³ DTI, *Extending Competitive Markets: Empowered Consumers, Successful Business* (2004), cited by Howells, *supra* note 12, at 350.

⁸⁴ Federation of German Consumer Organizations, *supra* note 38.

them or treating the interests of consumers in the various markets separately. Therefore, it is also necessary to address the issue of consumer interest from the perspective of globalization and acculturation. It is commonly argued that due to globalization and the spread of information technology we are witnessing global consumers and a global taste and preferences for goods and services.⁸⁵ On the surface, it may appear to be just of theoretical significance only. However, if we have a deeper look at its implication within the multilateral trading regime one can appreciate its relevance in shaping the jurisprudence of the system. If we subscribe to the notion that globalization helps in creating globalized consumers and thereby a global taste and preference, we may tend to argue that we need to have a global rule that would serve for the global consumers alike. On the other hand, if we question the validity of this assertion and argue that the effect of globalization does not necessarily mean the creation of a globalized consumer and globalized consumers' interests, we are in effect advocating a subjective approach to address the interests of consumers on the basis of their diverse taste and preference. It is important to understand that a diverse consumer interest demands a diverse approach and strategy to deal with. It is with this background that any assessment of the multilateral trading rules in relation to consumers' interests should be made.

Thus, the main point that needs to be addressed regarding the safeguarding of consumers' interests in the market is whether a multilateral solution within the multilateral framework or individual approach within the member states would effectively address the issue. It is clear that multilateral institutions are not appropriate forums to deal with issues as diverse as the participants.⁸⁶ Consumers' interest features diverse issues

⁸⁵ See Levitt, *supra* note 13.

⁸⁶ It is difficult to address the interests of all the members in a multilateral system like WTO where there are diverse member states with their own interests. As of December 1,

particular to each segments that makes it very difficult, if not impossible, to regulate through a multilaterally negotiated rules. However, it is possible to draw a basic line that needs to be adhered by all participants leaving the details to be regulated by individual members. Thus, the multilateral forum could be the right place to spell out the basic rules and principles that need to be followed by member states in dealing with the specific issues. Therefore, when we come to the issue of consumers' interests we may not need to draw up an elaborate agreement dealing with consumer issues as we see in relation to goods and services as well as other trade related issues. What the multilateral trading system can do in such cases is setting the boundaries within which member states can manoeuvre while undertaking their commitment towards the multilateral trading system in furthering free international trade. Therefore, the multilateral trading system is not the proper forum for legislating rules that deal with protecting specific consumers' interests as it does for the goods and services.⁸⁷ Rather, it is more appropriate to spell out rules and procedures aimed at furthering trade liberalization while maintaining the liberty of members to choose the mechanisms by which they implement those obligations. The rules of the system are geared towards tackling unnecessary barriers that would hinder the free flow of goods and services across the markets of members. Its rules are designed in a way to promote economic prosperity through liberal trade.⁸⁸ The multilateral trading system designed various disciplines aimed at removing, as much as possible, all impediments to international trade. This can be witnessed from the development of the rules in the multilateral trading system. For instance, it started with the elimination of all border

2016 WTO has 164 members. *See* Understanding the WTO, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Last visited December 1, 2016)

⁸⁷ *See* Tian, *supra* note 2, at 18-19.

⁸⁸ Steve Keane, *Can a Consumer's Right to Know Survive the WTO: The Case of Food Labeling*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 291, 314 (2006).

measures and replace with tariffication. This was followed by disciplining various internal measures that cannot be tackled by tariffication alone where non-tariff barriers proved to be significant obstacles to international trade.⁸⁹ Therefore, it can be said that the multilateral trading system has achieved a lot in securing equal access as well as treatment of all goods and services originating from member states within the markets of members.⁹⁰ All these moves are meant to be implemented without compromising the interests of consumers and without affecting the underlying balance that should be kept between trade liberalization and members' autonomy to adopt regulatory measures aimed at addressing other non-economic concerns. Therefore, such developments in the rules should not be understood as pushing the boundary of trade liberalization at the expenses of other vital interests. This is what the adjudicatory process should maintain while interpreting the rules of the multilateral trading system; that is to make sure that the interpretation of those rules respect the underlying balance that should exist between trade liberalization and the protection of other vital interests.

It is a common knowledge that the multilateral rules are tradeoffs between international market access and domestic autonomy. Member states acknowledge the limitations on their autonomy to adopt measures that would restrict international trade when they decide to join the multilateral trading system. However, it is equally understood that the multilateral trading system was meant for an improved well-being of mankind through the efficient utilization of the world resources.⁹¹ Hence, the presumption is that the rules of the multilateral trading system are

⁸⁹ See Robert Edward Baldwin, *Nontariff Distortions of International Trade*, 1 (1970), cited by Michael Ming Du, *Domestic Regulatory Autonomy under the TBT Agreement: from Non-discrimination to Harmonization*, 6(2) CHIN. J. INT. L. 269, 271 (2007).

⁹⁰ See Bureau, et al., *supra* note 24.

⁹¹ See preamble to the WTO Agreement.

meant to ensure free trade by disciplining protection measures that does not have any legitimate basis. It is possible to lay down the basic principles and rules that need to be followed multilaterally and adopt them individually taking into account the attending circumstances to the member state concerned. However, as the main concern of the WTO is to make sure that domestic regulations regarding international trade are in consonance with its rules and procedures, it is difficult to expect the same sets of rules that would ensure that the limitation on the domestic regulatory power is not prejudicial to the interests of consumers. Thus, it is realistic just to expect only a considerate position on the part of the WTO to those regulatory measures in the interest of consumers to be exempted from WTO scrutiny or at least to show reasonable restraint while analyzing such measures where they are not *prima facie* protectionist.

With this understanding in mind, it is wise to evaluate the working of the multilateral trading system as to whether such rooms are reserved for domestic regulatory measures or not. It should be noted, however, that the existence or otherwise of such room will not dispose totally the discussion as to the pertained approach to promote consumers' interests in the multilateral trading system since the existence of a room will not change the analysis as to the approach. From the above discussion, it appears that the subjective approach is the appropriate approach to deal with the interests of consumers within each jurisdiction. What is required from the multilateral trading system is to acknowledge the diversity of consumers' interests and accept the regulatory autonomy of member states regarding measures of consumer interests and to examine such regulatory measures from the perspective of the balance that should exist between regulatory autonomy and trade liberalization. The regulation of consumers' interests with specific legal and institutional mechanism should be left to individual

members taking into account the specific demands of their consumers as well as the means at their disposal. The multilateral trading system needs to lay down the parameters to check whether a member state oversteps its autonomy and resulted in an unnecessary restriction on international trade. This task can be easily accomplished by the adjudicatory process if the rules have set the parameters within which the measures can be evaluated. Therefore, the next chapters will focus on the examination of whether the multilateral trading system incorporates rules that address the balance between trade liberalization and the right of members to adopt regulatory measures to safeguard consumers' interests and whether the adjudicatory process is in a position to address this balance properly.

Chapter 3

WTO Rules and Consumers' Interests

3.1 WTO Disciplines that Address Consumers' Interests

3.1.1 The Structure of the Covered Agreements

Legal instruments follow different approaches in regulating subject matters. They may follow either negative or positive listing. They spell out the required behaviour expected from their subjects either through a negative listing or through listing behaviours expected from their subjects. With the same token, the covered agreements of the multilateral trading system can follow either or both approaches in prescribing trade rules. It is expected that the covered agreements would list down a positive behaviour expected from member states or require members to refrain from certain behaviours. Accordingly, a member state will be held liable if it fails to do the acts required or found doing an act from which it was required to refrain. A closer look at the disciplines of the multilateral trading system reveals both approaches used in the rules of the covered agreements. The main provisions of the covered agreements list the acts required from a member as well as the conditions that need to be fulfilled in undertaking the measures.⁹² Thus, the action or inaction of a member state shall be evaluated on the basis of the specific obligations undertaken by a member when it joins the multilateral organization.

⁹² See Agreement on Technical Barriers to Trade, art. 2.2, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 154 [hereinafter TBT Agreement].

Understanding the nature of members' obligation under the multilateral trading rules is a sine qua non for the examination of the jurisprudence of the multilateral trading system. The nature of the obligation involved dictates the interpretation of a particular provision or rule in the covered agreements. Adjudicators are expected to employ interpretive techniques that would reflect the nature of the obligation involved in the WTO and that serves best the overall object of the system. The interpretation of the rules should be based on the scope and essence of members' obligation as enshrined in that particular agreement and the obligation of the member towards the multilateral trading system in general. Thus, since the research focuses on addressing the impact of the jurisprudence of the multilateral trading system, the rules of the system and their interpretations need to be addressed to understand the impact. Therefore, in this part, some of the provisions that have relevance in addressing the balance between free trade and consumers' interests will be discussed with a view to understanding the relationship between the multilateral trading rules and internal regulations of members.

In order to understand the relationship between the obligations of members towards the multilateral trading system and their obligation towards their consumers, it is important to address how the obligations of the multilateral trading system are spelt out under the provisions of the various covered agreements. Even though there are many covered agreements with lots of provisions that have bearings on the issue, it would suffice to look at some of the basic obligations of the multilateral trading system that directly regulates the relationship between the rules of the multilateral trading system and internal rules of member states. Most importantly since the research focuses on the role of the adjudicatory process in shaping the multilateral trading system through its interpretive

tasks, those rules that underline the basic obligations and those that guides the jurisprudence of the system shall be discussed. In this respect provisions of the multilateral trading system that translates the cardinal principle of the multilateral system, that is non-discrimination, will be discussed in order to show how non-discrimination is understood in relation to internal measures that has the major implication for safeguarding consumers' interests. The discussion will also help shape our discussion regarding the 'likeness' analysis that will follow, since the issue of 'likeness' is circumscribed by the principle of non-discrimination.

3.1.1.1 General Most Favored Nation Treatment Obligation

The Most Favoured Nation (MFN) obligation is a treaty arrangement whereby a state agrees to accord to the other contracting state treatment not less favourable than to other contracting parties or a third state.⁹³ The Most Favored Nation Treatment Obligation is one of the basic obligations underlying the rules of the multilateral trading system.⁹⁴ It aims at tackling discrimination by a host state against goods and services as well as service providers originating from other member states. It forbids a state from applying different measure on goods and services originating from other members. The most favoured nation's treatment relates to the treatment of goods and services from a given member in comparison with the treatments of goods and services from another state other than the host

⁹³ Pavel Šturma, *Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law*, 15(1) LAW & PRAC. INT'L CTS. & TRIBUNALS 81, 83 (2016).

⁹⁴ Seymour Rubin, *Most-Favored-Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution*, 6 INT'L TRADE L. J. 221 (1980).

state.⁹⁵ An unconditional most favoured treatment obligation is a fundamental guiding principle in the multilateral trading system.⁹⁶ This obligation requires member states to accord not less favourable treatment as accorded to goods and services originating from any state entitled to a favourable treatment in the eyes of the importing states.⁹⁷ In effect, the fundamental rationale of the most favoured nation treatment is to ensure equal competition among goods and services of different countries in the market of the host state.⁹⁸ The tenets of the Most Favoured Nation obligation are aptly addressed under Article 5 of the International Law Commission draft provisions on the Most Favored Nation Clause which provides that:

Most Favored-nation treatment is a treatment accorded by the granting state to the beneficiary state, or to persons or things in determined relationship with the state, not less favourable than treatment extended by the granting state to a third state or to persons or things in the same relationship with that third state.⁹⁹

Again under Article 9 of the draft the scope of a most favoured nation treatment is explained in the following words:

Under a most-favored-nation clause, the beneficiary state acquires, for itself or for the benefit of persons or things in a determined

⁹⁵ The Most Favored Nation's treatment does not relate to the treatment of foreign goods and services in comparison with domestic products. See Karsten Engsig Sørensen, *The Most-Favoured-Nation Principle in the EU*, 34(4) LEGAL ISSUES OF EUR. INTEGRATION 315, 316 (2007).

⁹⁶ Rubin, *supra* note 94, at 222.

⁹⁷ Wei Wang, *National Treatment in Financial Services in the Context of the GATS/WTO*, 6 STUD. INT'L FIN. ECON. & TECH. L. 149, 149-150 (2003).

⁹⁸ *Id.*

⁹⁹ Report of the International Law Commission on the work of its Thirtieth session, 8 May - 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, U.N. Doc. A/33/10, II(2) Y. B. Int'l. L. Comm. (1978). [hereinafter Report of the ILC 1978]

relationship with it, only those rights which fall within the limits of the subject-matter of the clause.¹⁰⁰

Hence the obligation of a member under the most favoured nation treatment requires members to accord not less favourable treatment to goods and services of another member as are accorded to similar goods and services originating from any other country. The obligation sets the minimum treatment that should be accorded to products of members in relation to the products of any other state in the markets of the host state. There are specific provisions in the covered agreements that address the obligation of Most Favored Nation Treatment. To mention those provisions in the bigger packages, the most favoured nation treatment obligation is incorporated under Article I of GATT, Article II of GATS, and Article 4 of TRIPS.¹⁰¹ If we take, for instance, the provisions of Article I of GATT as an illustration of what is required from a member in order to fulfill its MFN obligation, it is provided that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and

¹⁰⁰ *Id.*

¹⁰¹ See General Agreement on Tariffs and Trade, art. I, October 30, 1947, 55 U.N.T.S. 1947 [hereinafter GATT 1947]; General Agreement on Trade in Services, art. II, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 4, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299. [hereinafter TRIPS]

unconditionally to the “like” product originating in or destined for the territories of all other contracting parties.¹⁰²

From the text of the provision, it is clear that all advantages in relation to importation and internal sale of goods in the markets of a member country accorded to goods originating from any country should be accorded to “like” goods originating from member states. In other words, members are required to accord the same favourable treatment to all goods destined for their markets unless they want to accord more favorable treatments to goods originating from members. It should be noted that members are free to accord and of course expected to accord better treatment to goods originating from member states than non-members. In a nutshell, therefore, the MFN treatment obligation requires members to accord favourable treatment to goods originating from other members if there are “like” products from other countries that are accorded a favourable treatment in the markets of the importing member.

Even though most of the time internal measures can be dealt with the national treatment obligation once goods and services cross into the borders of the member state in question, the most favoured nation’s treatment extends to internal measures as well.¹⁰³ Thus, goods originating from member states are entitled to the same or better treatment as goods originating from other states in relation to internal measures even without the operation of the national treatment obligation.

¹⁰² See GATT 1947, art. I.

¹⁰³ See *id.*

3.1.1.2 The National Treatment Obligation

The National Treatment Obligation (NT) is the other pillar of the multilateral trading system. It underlines the basic obligations of member states towards the goods and services of other members as regards internal measures applicable to the sale of goods and services. It is incorporated in the major categories of the covered agreements; under Article III of GATT, Article XVII of GATS, and Article 3 of TRIPS.¹⁰⁴ If we look at, for instance, the National Treatment obligation of the GATT, it is provided under Article III and incorporates the basic provisions that need to be observed by member states while adopting internal measures.¹⁰⁵ As the general provision under III:1 expressly indicates, the provisions of Article III relates to internal measures.¹⁰⁶ The fundamental goal of the national treatment obligation is to ensure equal treatment between goods and services of the host country with goods and services of member countries.¹⁰⁷ In a nutshell, Article III requires member states to treat domestic products and imported products originating from member states in the same manner as far as internal measures are concerned. Keeping the general discussion into account, there are some specific issues that need to be addressed in relation to the provisions of Article III that have relevance to the discussion in this part. There are clear differences between the two

¹⁰⁴ See GATT 1947, article III; GATS, art. XVII; TRIPS, art. 3.

¹⁰⁵ See GATT 1947, art. III.

¹⁰⁶ Article III:1 states that:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

¹⁰⁷ Wang, *supra* note 97, at 150.

main provisions of Article III; Paragraph 2 and Paragraph 4. It is argued that the differences in the texts of these provisions are meant to address different instances that can fall within the purview of Article III.¹⁰⁸ The interpretations of these articles so far appear to focus on the textual distinction on these articles. Most importantly the two prongs of Article 2 coupled with the note Ad thereto considered to dictate the scope of Article III: 2.¹⁰⁹ It is due to these differences in the texts of Paragraph 2 and 4 that are considered grounds for different approaches for the evaluations of measures under the two Paragraphs.¹¹⁰ There are arguments that claim that the general provision under paragraph 1 should dictate the interpretations

¹⁰⁸ Paragraph 2 provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1;

and paragraph 4 provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

¹⁰⁹ The note Ad to Paragraph 2 of Article III states that:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

See also Julia Ya Qin, *Defining Nondiscrimination under the Law of the World Trade Organization*, 23(2) B. U. INT'L L. J. 215, 242-246 (2005).

¹¹⁰ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 96, 99, WT/DS135/AB/R (March 12, 2001). [hereinafter *EC — Asbestos Appellate Body Report*]

of both Paragraph 2 and 4 irrespective of the express mention of Paragraph 1 under Paragraph 2 and not Paragraph 4.¹¹¹ It is clear from the provision that the fundamental aim of Article III is to prevent member states from protecting domestic products by applying discriminatory internal measures.¹¹² Therefore, the various provisions under Article III should be interpreted against this general background as enunciated under Paragraph 1. The other point that should be noted in the discussion of Article III is that, its paragraph 2 regulates two categories of products under its two sentences; “like” product in the first sentence and “directly competitive or substitutable” products in the latter prong.¹¹³ Thus, it appears from the two parts that the goods addressed under paragraph 2 and the behavior to be regulated are different. While it prohibits member states to apply different taxes and taxations as regards “like” products, this requirement seems to apply only where there is a protectionist goal where it relates to “substitutable or directly competitive” goods.

In any case, it is informative to look at the implications of these provisions in the overall understanding of the relationship of internal measures and the rules of the multilateral trading system as they appear in the text as well as interpreted by the adjudicatory process. As it can be seen from the above discussions, the underlying balance between the rules of the multilateral trading system and the right of member states to regulate their markets in a way to address other societal demands rests on the understanding of the essence of the obligations incorporated under these two fundamental obligations of the multilateral trading system. The rights of member states are circumscribed by the boundaries of these obligations

¹¹¹ See Appellate Body Report, *Japan — Alcoholic Beverages*, at 151, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (Oct. 4, 1996) [hereinafter *Japan — Alcoholic Beverage II* Appellate Body Report]. See also Wang, *supra* note 97, at 151.

¹¹² Wang, *supra* note 97, at 151.

¹¹³ See the Note Ad for Article III.

elaborated and crystallized through the various disciplines and provisions of the multilateral rules. Therefore, members are free to manoeuvre within this boundary and adopt regulatory measures that would advance their various policy objectives in tandem with free international trade. The respective obligations of members' towards the multilateral trading system as incorporated under the basic obligations should be evaluated in terms of their treatment accorded to "like" or "substitutable or competitive" products as the case may be. Thus, it turns out that the basic obligation of members in relation to the national treatment rests on the determination of the 'likeness' of products and the treatment that follows. However, it should also be noted that, "no less favourable treatment does not necessarily mean the same treatment".¹¹⁴ Therefore, it is possible for members to treat them differently but still fulfill their obligation of non-discrimination.

The obligation of non-discrimination as illustrated by the Most Favored Nations Treatment obligation and the National Treatment obligation should be understood within the context of the goal of the multilateral trading system. The multilateral trading system was established with a view to promoting the well-being of consumers through free trade without compromising other non-economic interests of consumers.¹¹⁵ This aim was reflected in the multilateral trading rules since the inception of the multilateral system under the 1947 GATT rules. Various disciplines include a rule to reflect this concern and indicate the mechanism by which it can be accommodated within the obligations of the multilateral system. Therefore, the following part discusses some of those provisions in the covered agreements that set out rules that would address consumers' interests in the multilateral trading system. The discussion

¹¹⁴ Wang, *supra* note 97, at 152.

¹¹⁵ See the Preamble, to WTO Agreement.

focuses on the examination of the respective rules and their implication in the promotion of consumers' interests within the multilateral trading system platform.

3.1.2 The Implication of the Structure of the Rules on Consumers' Interests

In the previous section, we have seen that the rules of the multilateral trading system rest on the non-discrimination principle as elaborated under the two pillars; the Most Favored Nation Treatment and the National Treatment obligations. As discussed above these basic obligations are meant to ensure equal competitive opportunity to "like" goods and services in the markets of member states. Any measure that discriminates among "like" products and resulted in denial of competitive opportunity of imported goods and services is the one the basic obligations sought to tackle. Given the regulatory autonomy of member states what the rules of the multilateral trading system are interested in is not the measure itself, rather on the effect of the measure on the competitive position of imported goods and services. Measures are expected neither to discriminate among "like" products nor create unnecessary trade barriers. Any measure by member states must be judged against these basic obligations. Measures aimed at addressing consumers' interests likewise have to be weighed against these basic obligations. The bottom line is that any measure taken by a member state should be applied on "like" goods and services equally irrespective of the origin of the goods and services. In line with this underlying rationale, the discussion focuses on provisions in the covered agreements that are meant to address this balance. They tried to draw a line between acceptable and unacceptable interference in international trade in

the guise of promoting other non-trade concerns of member states and their consumers. As the theme of this study focuses on consumers' interests, therefore, those provisions that are meant to address consumer interests are discussed below with a view to highlighting how the multilateral trading system tried to maintain legitimate regulatory concerns within the ambit of the multilateral trade rules. Those provisions in the covered agreements that can illustrate the nexus between internal measures and the WTO disciplines will be highlighted. However, this does not mean that these are the only provision relevant to consumers nor that are the only provisions that address the balance between consumers' interests and free trade.

3.1.3 Consumers' Interests in the GATT

The first attempt to address non-economic interests of consumers while pursuing trade liberalization can be found under Article XX of the GATT 1947. This Article termed as the "General Exception" contains provisions that list down instances and conditions whereby member states can take measures that would otherwise contravene their obligations under the provisions of the GATT. The relevant provisions in relation to measures aimed at addressing consumers' interests are found under (a) and (b) of Article XX of GATT 1947 and state that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this

Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures;¹¹⁶

- a) necessary to protect public morals;
- b) necessary to protect human, animal or plant life or health

These provisions are meant to allow members to take regulatory measures to address the concerns of their consumers while trying to eliminate barriers to international trade. The provisions clearly limit the boundaries of such measures in relation to international trade. As stated in the chapeau, members are required to observe the general obligation of making sure that the measures so exempted are not applied discriminatorily nor be disguised restrictions on international trade.¹¹⁷ That is what the adjudicators are expected to evaluate while adjudicating cases involving supposed measures aimed at addressing health and public moral issues as incorporated under Article XX exceptions of GATT 1947. They are expected to interpret these provisions taking into account the general design of the multilateral trading system in relation to members' autonomy in taking measures to address other vital interests while observing their obligation towards the multilateral trading system. They have to make sure that members do not overstep their autonomy and impose unjustifiable barrier to international trade.

It should be noted that Article XX of GATT 1947 exception is applicable to measures that are otherwise inconsistent with the obligations of members under the agreement.¹¹⁸ Thus, adjudicators are expected to evaluate whether the measures meet the conditions set under the chapeau

¹¹⁶ See GATT 1947, art. XX, General Exceptions.

¹¹⁷ David A. Collins, *Health Protection at the WTO: The J-Value as a Universal Standard for Reasonableness of Regulatory Precautions*, 43(5) J. WORLD TRADE 1071, 1073 (2009).

¹¹⁸ Fu Jiangyuan & Joanne Blennerhassett, *Is Article 5.7 of the SPS Agreement an Application of the Precautionary Principle*, 10 FRONTIERS L. CHINA 268, 269 (2015).

of the exceptions. Other than that there were not many substantive provisions that would regulate the conditions in which the measures can be taken. To further the goals of these exceptions under the GATT with sufficient substantive provisions the WTO came up with more elaborate provisions that would address the interaction of the non-trade concerns of consumers and free trade in the Agreements on Technical Barriers to Trade and Agreement on the application of Sanitary and Phytosanitary Measures.¹¹⁹ The TBT and SPS Agreements contain rules that are aimed at regulating the relationship between international trade and the need for member states to take measures to address concerns of consumers that cannot be properly addressed with trade liberalization alone. They contain positive obligations that need to be fulfilled while taking measures to address consumers' interests within international trade that were not sufficiently covered under the GATT provisions.

Article XX of GATT is not the only relevant provision in relation to non-economic interests of consumers. There are also other provisions that have significant implication to secure consumers' interests while advancing the main objective of the multilateral trading system; that is trade liberalization as envisaged by the multilateral trading system. One of such provisions that have relevance to non-economic interests of consumers is Article IX which deals with an important aspect of consumers right to information by allowing members to take measure regarding the marks of origins of goods.¹²⁰ This provision is meant to incorporate the rights to information of consumers within the multilateral

¹¹⁹ TBT Agreement; Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493. [hereinafter SPS Agreement]

¹²⁰ See GATT 1947, art. IX

trading system.¹²¹ It is an important provision that tries to accommodate the rights of members to ensure that their consumers are provided with the necessary information regarding the origin of the goods offered for sale and the goal of the multilateral trading system that strives to ensure free international trade. The issue regarding Marks of Origin is discussed further under Chapter 4, Section 4.5.1.

3.1.4 Consumer Interests under the TBT Agreement

The WTO has tried to address non-economic concerns of its members in its various disciplines. Among these disciplines designed to address non-economic concerns of members, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)¹²² can be cited along with the General Exception Article XX of GATT and other provisions in the GATS and TRIPS.

The TBT Agreement is designed to make sure that technical regulations, standards and conformity assessments are not applied by a member state in a manner that would hinder international trade.¹²³ It aimed at striking a balance between trade liberalization and the autonomy of members to restrict trade in order to implement legitimate policy objectives

¹²¹ Ompthemtse S. Sibanda, *WTO Appellate Body Ruling in United States-Certain Country of Origin Labeling Requirements: Trading Away Consumer Rights and Protections, or Striking a Balance Between Competition-based Approach in Trade and Consumer Interests?*, 48(1) DE JURE 136, 139 (2015).

¹²² *Id.*

¹²³ See Luciana Silveira & Thomas Obersteiner, *The Scope of the TBT Agreement in Light of Recent WTO Case Law*, 8(4) GTCJ 112 (2013).

such as protection of human health and the environment.¹²⁴ The TBT Agreement contains provisions in relation to technical regulations, standards and conformity assessment as defined under Annex 1 of the Agreement.¹²⁵

The TBT Agreement is designed in a way to accommodate member states' desire to adopt measures to address non-economic concerns that might not be properly addressed through the market alone while promoting trade liberalization. This purpose is clearly stated by the multilateral trading system itself in the following words:

The Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. At the same time, it recognizes WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment. The TBT Agreement strongly encourages members to base their measures on international standards as a means to facilitate trade. Through its transparency provisions, it also aims to create a predictable trading environment.¹²⁶

The preamble to the TBT Agreement clearly specifies the desire to further the objectives of GATT, which in effect dictates us to take note of the purposes of GATT while interpreting the provisions of the rules in the Agreement.¹²⁷ It should be understood, however, that at the event of overlap the TBT Agreement shall be considered as *lex specialis* and be

¹²⁴ *Id.*

¹²⁵ TBT Agreement, art. 1.

¹²⁶ Understanding the WTO,

https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (Last visited November 8, 2016).

¹²⁷ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 91, WT/DS406/AB/R (April 4, 2012). [hereinafter *US — Clove Cigarettes Appellate Body Report*]

given effect accordingly without excluding the application of the GATT.¹²⁸ It should also be noted that the TBT Agreement provides the conditions under which the national treatment obligation, for instance, should be observed while members adopt technical regulations or standards.¹²⁹ There are arguments that claim that the introduction of the TBT Agreement is to further trade liberalization by tackling trade restrictive measures by members that could not be disciplined under the GATT.¹³⁰ They argue that the TBT and SPS Agreements provide an elaborate and stronger checking mechanism than envisaged under Article XX of the GATT.¹³¹ This argument presupposes a claim that since the introduction is to limit unfettered regulatory autonomy than would be warranted by the GATT exceptions the interpretations of the rules in the TBT Agreement should be based on this understanding. However, such assertion cannot be maintained easily without a closer look at the structure of the Agreement and its implication in the overall understanding of the measures targeted by it.

The major substantive obligations of the TBT Agreement are found under Article 2.1 and 2.2. Basically, Article 2.1 requires members adopting TBT measures not to accord less favourable treatment to “like” imported

¹²⁸ Fay Valinaki, ‘Repairing the Defects’ of Article 2.1 of the WTO Technical Barriers to Trade Agreement: An Amendment Proposal, 43(1) LEGAL ISSUES OF EUR. INTEGRATION 65, 66 (2016); See also Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 75, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea — Dairy Appellate Body Report*]; *EC — Asbestos Appellate Body Report*, *supra* note 110; Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 91, WT/DS406/R (Sept. 2, 2011) [hereinafter *United States — Clove Cigarettes Panel Report*]. (They explain the relationship among the covered agreements.)

¹²⁹ Craig Thorn & Marinn Carlson, *Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, *The*, 31 LAW & POLY INT’L BUS. 841 (1999).

¹³⁰ Baldwin, *supra* note 89, cited by Du, *supra* note 89, 270.

¹³¹ MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 142 (1995).

products, while Article 2.2 requires them to look for the least trade restrictive measure among available measures. Besides a most-favored-nation treatment obligation, the TBT Article 2.1 contains a national treatment obligation.¹³² Most importantly Article 2.2 provides illustrative grounds that can justify a measure that could restrict international trade.¹³³ The non-exhaustive list under this article is a key in the analysis of a TBT measure. The structure of the article is designed in such a general terms conducive for judicial exercise to consider other legitimate concerns in the determination of consistency of an alleged measure to the multilateral trading rules.¹³⁴ It allows adjudicators to entertain regulatory measures adopted to address legitimate concerns, such as product information. The provisions of Article 2.2 sufficiently address the parameters used in the maintenance of the balance between trade liberalization and internal measures aimed at addressing consumers' interests and other concerns of member states. Therefore, adjudicators are expected to analyze measures alleged to have violated WTO commitments by taking into account these illustrative lists. From the lists it is clear that adjudicators are allowed to consider other legitimate objectives to be reckoned in a case by case

¹³² TBT Agreement, art. 2.1 states that:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

¹³³ TBT Agreement, art 2.2 states that:

..... Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information related processing technology or intended end-uses of products.

¹³⁴ See Thorn & Carlson, *supra* note 129, at 842.

approach.¹³⁵ It is important to note that Article 2.2 contains very important provisions that would help address the various non-economic interests of consumers. If we look, at for instance, the right to information this provision is very important to show how regulatory measures aimed at ensuring the right to information and the obligation of members towards the multilateral trading system should be evaluated. This issue was addressed during the *US — COOL* Case. In this case the Appellate Body tried to show how the right to information should be evaluated against its impact on trade and vice versa. After comparing its utility to consumers' vis-à-vis its impact on international trade the Appellate Body ruled that the measures of the United States which cannot ensure the right of information to consumers properly are not justified.¹³⁶

In fact the TBT is meant to limit members' autonomy to regulate, but this limitation is a qualified limitation in that it only limits members not to discriminate against imported products and to adopt them only for compelling reasons with the least impact on free trade.¹³⁷ The TBT Agreement clearly sets the parameters in which internal regulation and the rules of the multilateral trading system should interact. Accordingly, to

¹³⁵ See TBT Agreement, art. 2.2.

¹³⁶ Appellate Body Report, *United States — Certain Country of Origin Labeling (COOL) Requirements*, ¶ 347, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter *US — COOL* Appellate Body Report]. It stated that:

That is, a large amount of information is tracked and transmitted by upstream producers for purposes of providing consumers with information on origin, but only a small amount of this information is actually communicated to consumers in an understandable manner, if it is communicated at all. Yet, nothing in the Panel's findings or on the Panel record explains or supplies a rational basis for this disconnect. Therefore, we consider the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable.

¹³⁷ See TBT Agreement, arts 2.1, 2.2; see also *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 93.

establish a violation of the national treatment obligation under the TBT, three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be “like” products; and (iii) the treatment accorded to imported products must be less favorable than that accorded to “like” domestic products.¹³⁸ The Appellate Body has set out criteria to determine whether a certain measure is a technical regulation for the purpose of the TBT Agreement. Accordingly, a technical regulation must fulfil the following criteria:¹³⁹

- a) It must be applicable to a product or group of products
- b) It must lay down product characteristics; and
- c) It must require mandatory compliance with its provisions

While trying to regulate measures that would restrict international trade, the TBT Agreement allows member states sufficient policy space in choosing the appropriate international standards they deem relevant in any given situation.¹⁴⁰ It also allows members to choose their own standards where the available international standard is not appropriate or does not respond to the legitimate objective in question.¹⁴¹ Thus the TBT Agreement clearly provides members with sufficient policy options to

¹³⁸ *US — Clove Cigarettes* Appellate Body Report, *supra* note 125, ¶ 87; *see also* Henry Hailong Jia, *Entangled Relationship between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions*, 12(4) CHIN. J. INT. L. 723, 728 (2013).

¹³⁹ *See* Silveira and Obersteiner, *supra* note 123, at 112; *see also* Appellate Body Report, *European Communities — Trade Description of Sardines*, ¶ 176, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC — Sardines* Appellate Body Report]; PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 806-813 (Cambridge University Press. 2008); MITSUO MATSUSHITA, et al., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* (Oxford University Press. 2015); *US — COOL* Appellate Body Report, *supra* note 136; Faisal Al-Nabhani, *The TBT Agreement: Examining the Line between Technical Regulations and Standards*, 7(9) GLOBAL TRADE AND CUSTOMS JOURNAL 355 (2012).

¹⁴⁰ Erik Wijkström & Devin McDaniels, *Improving regulatory Governance: International Standards and the WTO TBT Agreement*, 47(5) J. WORLD TRADE 1013, 1015 (2013).

¹⁴¹ TBT Agreement.

choose among international standards that best serve their objectives.¹⁴² Its underlying idea rests on the rights of members to adopt measures that serve various legitimate non-trade objectives such as consumer protection and the protection of the environment.¹⁴³ In effect, it strives to balance trade facilitation with domestic regulatory objectives of members. It is this balance that needs to be considered while analyzing the consistency of an alleged regulatory measure to the TBT Agreement. The discussion made so far shows that the TBT Agreement does not substantially changed the understanding of the multilateral trading rules and the measures that are subject to their scrutiny. It does not change the interaction between WTO commitments and members' regulatory autonomy either. Rather it sets the bench marks by which measures aimed at regulating trade related measures aimed at addressing non-trade concerns of members should be evaluated.

3.1.5 Consumers' Interests under the SPS Agreement

The Agreement on the Application of sanitary and Phytosanitary Measures (SPS) is one of the covered agreements to the WTO included under Annex 1A; Multilateral Agreements on Trade in Goods.¹⁴⁴ It sets out the basic rules for food safety and animal and plant health standards.¹⁴⁵ The notion of SPS measures includes all relevant 'laws, decrees, requirements and procedures, like for instance, end product criteria; processes and production methods; testing, inspection, certification and approval

¹⁴² Wijkström and McDaniels, *supra* note 140, at 1015.

¹⁴³ Jan McDonald, *Domestic Regulation, International Standards, and Technical Barriers to Trade*, 4(2) WORLD TRADE REV. 249, 252 (2005).

¹⁴⁴ See SPS Agreement.

¹⁴⁵ Understanding the WTO,

https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (Last visited November 8, 2016).

provisions'.¹⁴⁶ The SPS Agreement clearly affirms the sovereign rights of members to adopt and enforce measures aimed at protecting human, animal or plant life or health without the measures being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or is a disguised restriction on international trade.¹⁴⁷ The SPS Agreement incorporates positive obligation that would expand the application of Article XX exceptions and make them clearer. It provides more than the requirement of non-discrimination by specifying requirements that need to be fulfilled in taking SPS measures. Thus, it is possible for such measures to be found in violation of the rules of the agreement even though they are not discriminatory if they are not, for instance, backed by scientific justifications.¹⁴⁸ It should also be noted that SPS measures have the same objective as paragraph (b) of Article XX of GATT.¹⁴⁹ The SPS Agreement aimed at closing the potential loopholes that cannot be addressed by the provisions of previous SPS agreements aimed at addressing SPS measures by providing more clear and elaborate rights and obligations of members while taking SPS measures.¹⁵⁰ The ultimate function of the SPS Agreement is to make sure that every SPS measures are applied on the basis of scientific principles and are not maintained without sufficient scientific evidence.¹⁵¹ It can be said that the SPS Agreement has the objective of providing members a level of appropriate protection and avoid arbitrary

¹⁴⁶ Marco M Slotboom, *Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?*, 37(3) J. WORLD TRADE 553, 554 (2003).

¹⁴⁷ See Preamble to the SPS Agreement.

¹⁴⁸ Boris Rigod, *The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, 24(2) EUR. J. INT'L. L. 503, 504 (2013).

¹⁴⁹ Jiangyuan and Blennerhassett, *supra* note 118, at 269.

¹⁵⁰ *Id.* at 270. (They argue that the SPS Agreement is regarded as an elaboration and complement to the previous Agreement on Agriculture, Agreement on Technical Barriers to Trade and the related articles that regulate SPS measures.)

¹⁵¹ See the SPS Agreement, art.5, 3.3.

and disguised restrictions on trade.¹⁵² To achieve this the agreement encourages member states to use international standards and guidelines while maintaining the liberty of member states to use their own level of protection so far as it is backed by scientific justification.¹⁵³ This shows that like the TBT Agreement, the SPS Agreement maintains the autonomy of members to adopt measures without overstepping the boundary drawn by WTO commitment to further international trade. Thus, it clarifies the understanding of the interaction between trade liberalization and members' autonomy. The introduction of the SPS Agreement does not change the balance that should exist between the need for free trade and members' autonomy to adopt regulatory measures designed to address other vital interests, such as the protection of their consumers. Rather, it elaborates the parameters that should be used in the analysis of whether an alleged measure disrupts this balance.

The main substantive obligations of the SPS Agreement can be found under Articles 2, 3, and 5. Article 2 of the SPS Agreement gives members the right "to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health," as long as such measures are not inconsistent with the provisions of the SPS Agreement.¹⁵⁴ Most importantly under Article 2.2 the SPS Agreement obliges member states to make sure that any sanitary or phytosanitary measure is based on scientific principle and is not maintained without sufficient scientific justification.¹⁵⁵ In a clear acknowledgment of the autonomy of members in adopting measures that would address concerns of consumers, the SPS

¹⁵² Jiangyuan and Blennerhassett, *supra* note 118, at 270.

¹⁵³ *Id.* see also SPS Agreement, art. 3.3.

¹⁵⁴ Michele D. Carter, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy*, 6(2) MINN. J. GLOBAL TRADE 625, 630 (1997).

¹⁵⁵ Art. 3.3 SPS Agreement.

agreement under Article 3.3 allows members to adopt measures that can result in higher protection than those based on international standards as long as it is backed by a scientific evidence or the member conducted a risk assessment.¹⁵⁶ This provision is very significant for the understanding of the measures targeted by the SPS Agreement. It shows that the SPS Agreement aimed at tackling disguised restriction in the name of measures to protect human, plant, or animal. Thus, members are allowed to adopt SPS measures as long as the measure is intended to respond to a genuine concern and taken with the least trade restrictive manner possible.¹⁵⁷ Therefore, it allows members that might face SPS issues that cannot be addressed through SPS measures at the level set by the relevant international standard to take measures at their own standard if the given standard has sufficient scientific justification.

Article 5 on its part incorporates risk assessment and risk management issues.¹⁵⁸ It also contains an important provision that would allow members to take provisional SPS measures where the relevant scientific evidence is insufficient to decide.¹⁵⁹ The SPS Agreement mandates a greater reliance on international standards developed by relevant international organizations.¹⁶⁰ This helps to ensure that SPS measures do not serve to restrict international trade in the name of addressing SPS issues. It also gives members the opportunity to take precautionary measures where there is uncertainty about the risk associated with a given SPS issue. Arguments are forwarded as to the need for expanding the GATT control on regulatory measures for SPS measures.

¹⁵⁶ See SPS Agreement, art. 3.3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Art. 5.7 SPS Agreement.

¹⁶⁰ Regine Neugebauer, *Fine-tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case*, 31 LAW & POL'Y INT'L BUS. 1255, 1258 (1999).

For instance, Robert Howse argues that the economic gain that society would receive from trade liberalization that can be achieved through the introduction of the more expansive SPS Agreement than the GATT XX exception does not outweigh the democratic welfare expressed in the internal regulation.¹⁶¹ He further argues that the fact that societies' appreciations of risk are different, it should be left to be dealt by the internal regulatory mechanism than the multilateral trading system.¹⁶² However, he also claimed that the SPS Agreement's emphasis on scientific backing may be useful for rationalizing domestic regulatory processes and deliberations and thereby enhances trust in members' regulatory outcomes.¹⁶³ Thus, the SPS Agreement's science-based obligations are its salient features that distinguish it from other WTO disciplines that deal with internal regulations.¹⁶⁴ This would confer member states sufficient autonomy to take regulatory measures since it is easy to single out disguised protectionist measures, especially where there is a relevant international standard or the issue can be easily verified by the available scientific methods.

3.2 Obligation of a State towards its Consumers vis-à-vis the Multilateral Trading System

It might be difficult to spell out the specific obligations towards consumers as a separate group by a state. However, there is no doubt that a state has

¹⁶¹ Robert Howse, *Democracy, Science, and Free trade: Risk Regulation on Trial at the World Trade Organization*, 98(7) MICH. L. REV. 2329 (2000).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Rigod, *supra* note 148, at 505.

an obligation to protect its citizens from negative externalities and make sure that its citizens get what they deserve in the market. However, since every citizen is a consumer the obligation of a state towards its citizens is equivalent to its obligation towards its consumers, even though consumers are more than the citizens of a given country. Therefore, any measure aimed at safeguarding consumers applies equally to everyone irrespective of citizenship as far as they are consuming goods and services available in the market within a given jurisdiction. That is what the multilateral trading system is meant to promote; non-discrimination between products and services as well as persons, even though the rules focus on persons who provide the services in case of trade in service. In any case, states have legal obligations towards consumers within their jurisdiction. For instance, the International Covenant on Economic, Social and Cultural Rights lists the right to adequate standard of living as one of the rights that should be given effect by the contracting states.¹⁶⁵ Hence, a state is under obligation to make sure that its citizens have the means to attain an adequate standard of living depending on the means available to the state.

It is understandable that we cannot spell out a clear and concrete obligation on the part of a state towards its consumers. It all depends on the legal and institutional readiness of the states in question. However, there is no doubt that every state has an obligation to make sure that the well-being of its citizens is promoted. Therefore, the obligation of a state towards the multilateral trading system must be evaluated from this angle. It is a well-settled rule of international law that a state is independent to deal with its internal affairs and restrictions upon the independence of states cannot be presumed.¹⁶⁶ However, since membership to the international trading

¹⁶⁵ See International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 19, 1966, 993 U.N.T.S. 3(1966).

¹⁶⁶ The Lotus Case, PCIJ, Series A, No. 10, 1927, 18 (September 7).

system, and for that matter to any such arrangement, is a trade-off between limitation on the sovereignty of a state and the benefit that would accrue from the multilateral system, states are required to refrain from certain acts or may be required to undertake some acts they would not otherwise undertake.¹⁶⁷ Therefore, whenever a discussion about the rule of a multilateral institution or the obligation of a state under a multilateral arrangement is made, we need to look it vis-à-vis its freedom to regulate its internal affairs. Likewise, when we talk of the obligation of a state towards its consumers we need to evaluate it against its commitment towards the multilateral trading system. That is how the balance should be reckoned at all times. Adjudicators need to take this into account whenever they are called upon to analyze a regulatory measure by a member alleged to have violated WTO commitments. To understand the boundaries within which a member can exercise its retained autonomy is circumscribed by its obligation towards the multilateral trading system. Hence, it is proper to examine the obligation of a member towards the multilateral trading system before embarking into any analysis as to its autonomy in adopting a given regulatory measure. The basic obligation under the multilateral trading system can be clustered into four major components at least for the purpose of this study. They can be analyzed as follows:¹⁶⁸

- Obligation to accord the same treatment to goods and services of all members including domestic products regarding internal measures;
- Obligation to accord the same treatment to the goods and services originating from all member states regarding border measures;

¹⁶⁷ *See generally* HERBERT LA HART, *THE CONCEPT OF LAW*, (1961).

¹⁶⁸ The basic obligation of the multilateral trading system is non-discrimination and avoiding unnecessary trade barriers. *See* the discussions under section 3.1.1.1 and 3.1.1.2 above.

- Obligation to accord the same treatment to the goods and services of member states as it accords to goods and services of the most favoured nation, if there exists;
- Obligation to refrain from taking trade restrictive measures as far as possible.

From these obligations towards the multilateral trading system, we can understand how far a member state can go to regulate the market and safeguard the interests of its consumers. Thus, as far as a state does not fail to observe these obligations in the process, it can establish any measure that would safeguard the interests of its consumers. The multilateral trading system itself sheds some light on the understanding of the interaction of the obligation of a state towards its consumers and the multilateral trading system. It expressly spelt out the underlying principle that governs the system.¹⁶⁹ This clearly delimits the boundaries within which member states' autonomy can be exercised. The multilateral trading system tried to translate these general obligations into specific obligations throughout the covered agreements. Thus any analysis regarding the specific rules needs to take into account these underlying obligations that guide the multilateral trading system. Therefore, the main task of adjudicators is to align the interpretations of the rules in the covered agreements with the understanding of these general obligations. Therefore, as the rules exist, the obligation of members towards their consumers is conditional with their obligation towards the multilateral trading system. And this dictates the examination of the underlying balance that should

¹⁶⁹ The principles can be summarized under the following headings: Most Favored Nation Treatment: treating all trading partners equally; National Treatment: treating all goods and services in equal footing with domestic goods and services irrespective of their origin; Freer Trade through gradual reduction of barriers to trade; Predictability of international trade through binding concessions and transparency; Promoting fair competition; Encouraging development and economic reform. *See* Understanding the WTO: basics, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

exist between the obligations of a member to adopt internal regulation vis-à-vis its obligation under the multilateral trading system aimed at promoting free trade. This is further discussed under Section 3.4 below.

3.3 Multilateral vs. Unilateral Response for Consumer Interests

The issue of whether a unilateral response or multilateral response is appropriate to address the issue of consumers has to be seen in light of the preceding discussion in relation to the nature of consumers' interests and how the multilateral trading system works. We have seen in the preceding discussion that consumers' interest is a subject featuring intricate peculiarities across jurisdictions. We have also seen that the wave of globalization did not bring substantial change in the patterns so far. It is still believed that globalization does not diminish the room for diversity.¹⁷⁰ Therefore, it is difficult to address consumer interests in a similar fashion through a multilaterally agreed framework with elaborate rules as it does for goods and services. Equally, it is difficult to leave the matter to the national state alone, at least in the face of the wide-ranging commitments of the state towards the multilateral trading system. Leaving the matter to member states alone can lead to clash of regulatory measures that can hamper international trade. It requires a concerted effort from both the multilateral system and member states. Thus, it is important to look for the role of both sets of regulatory organs and determine their respective spheres. That would help both systems to exist harmoniously and work for the achievement of the common goal of ensuring improved well-being of

¹⁷⁰ Guillén, *supra* note 30 at, 246.

mankind. In the preceding discussions, we have seen that the multilateral trading system is good at setting the boundaries within which member states can regulate issues of consumer interests and other societal concerns within the framework of the existing rules of the multilateral trading system.¹⁷¹ It is the state that can properly address consumer interest issues taking into account the prevailing interest within the domestic sphere.¹⁷² Accordingly, both sets can effectively fulfil their role harmoniously with a well-regulated mandates. In this regard, the multilateral trading system is expected to establish its rules with the understanding that member states need to have a room for manoeuvre while implementing the rules of the multilateral system within the domestic regulatory framework.¹⁷³ Likewise, member states can fulfil their mandates by harmonizing domestic measures so as not to overstep their boundaries and result in undue restriction of international trade.¹⁷⁴ Therefore, promoting the interests of consumers is a joint undertaking equally shared by the multilateral system and member states.¹⁷⁵ It requires the understanding of both sets of actors their limitations and their respective roles in keeping this balance in check. The multilateral trading system needs to respect the obligation of member states towards their consumers and allow them to exercise certain measure of freedom in regulating their market to the extent of permitting some

¹⁷¹ The boundary is the balance between regulatory autonomy of members and the need to avoid barriers to international trade as far as practicable. *See* JOHN HOWARD JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1997).

¹⁷² This depends both on the nature of the market as well as the ability of the country concerned in designing a workable mechanism to deal with the least trade restrictive means.

¹⁷³ *See* Robert W. Staiger & Alan O. Sykes, *International Trade, National Treatment, and Domestic Regulation*, 40(1) *J. LEGAL STUD.* 149 (2011). (Discusses how the multilateral trading system can be utilized to avoid competing regulatory measures among members.)

¹⁷⁴ A typical instance to achieve this is to base their measures on available international standards and work for harmonization, if possible. *See for instance* Article 2.4 of TBT Agreement.

¹⁷⁵ Since the multilateral trading system is all about improving the wellbeing of mankind it is assumed that its rules are geared towards achieving this objective.

restriction on international trade on justifiable grounds as recognized by the multilateral trading system. That is what the exceptions in the GATT and the rules in the SPS and the TBT Agreements are expected to address.¹⁷⁶ The rules of the multilateral trading system should be understood in such a way that member states are left with sufficient regulatory breadth to accommodate the interests of their consumers while pursuing free international trade as championed by the multilateral trading system. The discussion as to the role of the adjudicatory process also should be seen from this angle. Where there are two sets of regulatory schemes in the hands of the multilateral trading system as well as within the hands of member states as regards internal measures, adjudicatory process is the best mechanism to determine whether each regulatory organ plays by the rules. It is possible for the adjudicatory process to check whether the state adopt internal measures within the limits allowed under the multilateral trading system. Since it is difficult to regulate consumers' interests with a single multilaterally negotiated agreement it is the adjudicatory process that can entertain consumers concerns within the multilateral trading system framework.

3.4 Regulatory Autonomy and the Multilateral Trading System

The WTO is a multilateral organization mandated with the regulation of international trade. It is believed that a proper regulation of international trade is a sine qua non for an efficient utilization of the available resources

¹⁷⁶ Gisele Kapterian, *A Critique of the WTO Jurisprudence on 'Necessity'*, 59(1) INT'L & COMP. L. Q. 94 (2010).

and thereby improves the wellbeing of mankind.¹⁷⁷ The underlying rationale for the establishment of the WTO as well as its predecessor multilateral trade agreement, GATT, can be said to promote the economic welfare of mankind.¹⁷⁸ According to John H. Jackson, the prominent goals of the multilateral trading system can be summarized as follows:

Keep the peace, promote world economic development and welfare, work towards sustainable development and environmental protection, reduce the poverty of the poorest part of the world, and manage economic crises that might erupt partly due to the circumstances of globalization and interdependence.¹⁷⁹

It is with these rationales that the multilateral trading system was established to promote free trade among nations. The rules of the multilateral trading system are designed to address unnecessary trade barriers that would hinder free trade while members exercise their autonomy in regulating their market.¹⁸⁰ It should also be understood that the underlying regulatory principle of the multilateral trading system starting from its inception under the GATT is to eliminate discrimination among members as reflected through its various provisions.¹⁸¹ We should also need to take into account the fact that the multilateral trading system was born out of a system that was characterized by competing regulatory regimes characterized by multiple trade barriers.¹⁸² Thus, the main undertaking of the multilateral trading in the process of trade liberalization

¹⁷⁷ See the Preamble to the WTO Agreement.

¹⁷⁸ JOHN H. JACKSON, *SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 85 § 18 (2006).

¹⁷⁹ *Id.*

¹⁸⁰ See THOMAS COTTIER, *et al.*, *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* § 2 (2000).

¹⁸¹ Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38(1) *J. WORLD TRADE* 1 (2004).

¹⁸² See Edward D Mansfield & Jon C Pevehouse, *Trade Blocs, Trade Flows, and International Conflict*, 54 (4) *INTERNATIONAL ORGANIZATION* 775 (2000).

was the elimination of as much trade barriers as possible. Therefore, it is not surprising to find many provisions in the covered agreements that specifically try to limit members' freedom in taking regulatory measures. This is expected since the rationale for establishing the multilateral trading system is to eliminate regulatory measures that restricts international trade. Therefore, if we subscribe to these principles, we can understand the spheres of member states within which they can adopt internal measures aimed at addressing consumers' interests. Having these underlying principles in mind members are free to follow any policy designed to achieve various societal goals. However, the substantive rules of the multilateral trading system do not have much to offer regarding the boundaries between the obligation of member states to the multilateral trading system and their right to adopt such regulatory measures. Thus, the only avenues that have the mandate to determine the boundaries are panels and the Appellate Body of the multilateral trading system.¹⁸³ One thing that should be kept in mind while discussing the limits of member states in adopting regulatory measures in favor of consumers interests, and other values for that matter, is how the multilateral trading system expects member states to implement the rules of the multilateral system within their respective jurisdictions. Unlike other systems such as the EU, which aspires to integrate its members through a continuous harmonization of domestic policies, the multilateral trading system allows its members to pursue their own policy choice as far as it does not result in discriminating between goods and services of member states.¹⁸⁴ Such intention can tell us many things about the relationship between members' internal regulation and the rules of the multilateral system. The multilateral trading system does not expect members to enact similar laws and establish similar

¹⁸³ Ilona Cheyne, *Risk and Precaution in World Trade Organization Law*, 40(5) J. WORLD TRADE 837, 838 (2006).

¹⁸⁴ See GARY P SAMPSON, THE WTO AND SUSTAINABLE DEVELOPMENT 78 (2005).

institutions in order to implement WTO obligations even though this is encouraged.¹⁸⁵ Rather, it leaves the choice to members as to how they can implement their respective obligation and what institutions they can employ. This is not contrary to the principles of free trade, since it is well understood that appropriate government regulations are inseparable components in a healthy free market.¹⁸⁶

It should also be understood that any multilateral institution is founded upon the will of sovereign states.¹⁸⁷ A respect for the sovereignty of member states while implementing the multilateral trading rules is the basic component of the multilateral trading system.¹⁸⁸ Member states also understand the need to limit their regulatory autonomy in order to allow the realization of the goals of the multilateral trading system. It is clear that members join the multilateral trading system knowing that they have to limit their sovereignty in favor of the multilateral system in exchange for the benefit of trade liberalization.¹⁸⁹ Hence, maintaining the right balance between regulatory autonomy of members and free trade is at the heart of the multilateral trading system.¹⁹⁰ As members retain their autonomy to regulate their internal affairs as well as the conduct of trade itself, it is common to encounter real and apparent conflicts with the rules and

¹⁸⁵ The multilateral trading system is founded on a clear understanding of regulatory diversity among its members. *See for instance* Cottier et al. *supra* note 180.

¹⁸⁶ Du, *supra* note 89.

¹⁸⁷ Generally sovereignty refers to the independence of a state from any other authority. *See for instance* HART, *supra* note 167.

¹⁸⁸ Meinhard Hilf, *Power, Rules and Principles-which Orientation for WTO/GATT Law?*, 4(1) J. INT'L ECON. L. 111, 118 (2001).

¹⁸⁹ Kent Jones, *The WTO Core Agreement, Non-trade Issues and Institutional Integrity*, 1 WORLD TRADE REV. 257 262 (2002).

¹⁹⁰ *See* Gabrielle Marceau & Joel P Trachtman, *A Map of the World Trade Organization Law of Domestic Regulation of Goods: the Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, 48(2) J. WORLD TRADE 51 (2014).

precepts of the multilateral trading system.¹⁹¹ The evaluation of the rules of the multilateral trading system reveals the struggle to maintain the balance between disguised protectionist measures and legitimate regulatory measures.¹⁹² It is believed that provisions in the GATT and other agreements like the TBT are meant to balance the objective of trade liberalization with the Members' right to regulate.¹⁹³

Establishing a system to promote the welfare of the world is one thing and designing the rules and institutions in line with such objective is another. Therefore, the multilateral trading system expected to take these into account in designing the rules of the multilateral trading system. It crafted its disciplines in a way that would ease the access to the goods and services of member states in the markets of other member states. In so doing, however, the multilateral trading system does not intend to create a single market that would be regulated by a single institution; rather the multilateral trading system assumes regulatory diversity among members.¹⁹⁴ Thus, member states retain their autonomy to regulate their internal markets without undermining the rules of the multilateral trading system. In effect the rules of the multilateral trading system are designed as control mechanism on the regulatory autonomy of member states.¹⁹⁵ The rules of the multilateral trading system and the regulatory measures of member states operate within an elaborate check and balance system. It is obvious even for traditional liberal trade theorists that there are competing

¹⁹¹ For the issue of delegation of some autonomy to multilateral organizations see Oona A Hathaway, *International Delegation and State Sovereignty*, 71(1) LAW & CONTEMP. PROBS. 115, 121 (2008).

¹⁹² The introduction of TBT and SPS Agreements are meant to address this. See Marceau and Trachtman, *supra* note 190, at 351-432.

¹⁹³ US — *Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 96.

¹⁹⁴ See Cottier, T., et al., *supra* note 180, at 4.

¹⁹⁵ See Sampson, *supra* note 184.

legitimate interests to free trade.¹⁹⁶ It should also be borne in mind that states have joined the multilateral trading system knowing that their regulatory autonomy will be limited in the interest of achieving certain goals envisaged by the system.¹⁹⁷ However, such undertaking cannot be extended to the extent of limiting the ability of a state in taking measures to regulate other vital interests.¹⁹⁸ Otherwise it would amount to defeat the underlying ethos of the system. However, the multilateral trading system clearly works on a clear understanding of delegation of regulatory power from member states.¹⁹⁹ A corollary of this delegation is that member states retain their autonomy to take measures to address vital interests without compromising the delegated regulatory autonomy by taking conflicting measures.

The development of the rules of the multilateral trading system so far clearly reflects this underlying balance.²⁰⁰ It should also be noted that the mechanism to maintain such balance changes over time requiring new rules to deal with.²⁰¹ The multilateral trading system contains rules that are specifically designed to limit the regulatory autonomy of members in order to accommodate the needs of free trade.²⁰² For instance, the balance between regulatory autonomy and free trade were meant to be addressed

¹⁹⁶ For competing interests with free trade *see* JACKSON, *supra* note 171, at 21-24.

¹⁹⁷ *Id.* at 78.

¹⁹⁸ *Id.*

¹⁹⁹ For regulatory delegation *see* Curtis A Bradley & Judith G Kelley, *The Concept of International Delegation*, 71(1) LAW & CONTEMP. PROBS. 1 (2008) (They discuss how state delegate their authority to multilateral institutions); Hathaway, *supra* note 191, at 115-149.

²⁰⁰ Adjudicators are expected to evaluate between the regulatory autonomy of a member and its obligation to the multilateral trading system.

²⁰¹ The TBT and SPS Agreements are introduced with this in mind *see* MICHAEL J TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 142-143 (2005).

²⁰² Marceau, and Trachtman, *supra* note 190, at 353. (They argue that, for instance, GATT Articles I, III, XI and XX, the TBT Agreement, and the SPS Agreement, all of which impose different regulatory constraints on government actions relating to standards, technical and sanitary regulations, and so forth.)

principally under Article XX of GATT 1947 exceptions and later expanded under the TBT and SPA Agreements. Basically all these rules are meant to address the needs of member states to regulate non-economic interests of their consumers while fulfilling their obligation under the multilateral trading system. However, it should be noted that the initial balance envisaged under the GATT Article XX exception is not abandoned except for the fact that the rules are elaborated under the TBT and SPS Agreements.²⁰³ Through the rules in the TBT and SPS Agreements the multilateral trading system came up with concrete positive obligations required from members that want to adopt TBT and SPS measures.²⁰⁴ It is also clear from these agreements that the underlying balance in the multilateral trading system which is the regulatory autonomy of member states and promotion of free trade remains intact.²⁰⁵ The Appellate Body in

²⁰³ Gabrielle Zoe Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33(5) J. WORLD TRADE 87, 89 (1999). Explains how the disciplines developed over the years and states that:

Article XX recognizes the tension that sometimes exists between, on the one hand, the multilateral trading system, which promotes a liberal economic order, and, on the other hand, the government's right to regulate other social, developmental and environmental policies. This tension finds expression in a number of WTO agreements, including the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Agriculture, the GATT, and in trade disputes involving health, environmental and developmental considerations. In each of these areas, key policy considerations are therefore, how to strike a balance between the need for open markets and the need to regulate markets to promote other legitimate objectives, and how to ensure some coherence between States' various policies.

²⁰⁴ See Brandon L Bowen, *The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement of Tariffs and Trade, in Light of Recent Developments*, 29(1) GA. J. INT'L & COMP. L. 181 (2014). (Argues that, for instance, the TBT Agreement provides WTO member countries with the powers to impose measures against technical barriers of trade, over and above other exception-based protections in Article XX of the GATT and other WTO agreements.)

²⁰⁵ See for instance the preamble to the SPS Agreement, which states that:

the *US — Clove Cigarettes* pointed out that the balance between trade liberalization and domestic regulatory autonomy to be set out in TBT Article 2.1 should be the same as the balance set out in the GATT 1994.²⁰⁶ But this does not mean that both sets of rules have the same structure. While the balance in the GATT is reflected through a “rule exception structure” the TBT follows a different structure to show the balance between free trade and regulatory autonomy.²⁰⁷ Thus, while a measure that violates Article III:4 of the GATT can be justified by invoking one of the justifications under Article XX of GATT, a violation under the TBT Agreement should be evaluated from the positive and negative obligations incorporated therein.²⁰⁸ Moreover, the TBT Agreement imposes obligations on WTO Members that “seem to be different from, and additional to, the obligations imposed on members under the GATT 1994”.²⁰⁹ Therefore, the balance to be maintained between regulatory autonomy and free trade may need to take into account all these developments in the multilateral trading system. It is expected that governments introduce regulatory measures to pursue legitimate purposes without jeopardizing the interests of free international trade.²¹⁰ The multilateral trading system needs to take into account these two interests

....No Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade.

²⁰⁶ *United States — Clove Cigarettes* Panel Report, *supra* note 128; Jia, *supra* note 138, at 740.

²⁰⁷ See Valinaki, *supra* note 128, at 70.

²⁰⁸ *Id.*

²⁰⁹ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 77; For a detail analysis of how the TBT Agreement is different from and additional to the GATT 1994 see Du, *supra* note 143, at 278.

²¹⁰ See for instance Du *supra* note 89. It is assumed that Governments intervene in the market through regulatory measures to address important social values without harming international trade.

throughout its disciplines. Further developments in the disciplines of the multilateral trading system also reflect this balance. A case in point can be the recognition of the TBT Agreement as to the need to maintain the existing balance between regulatory autonomy and free trade.²¹¹ The expression in the preamble indicates the guideline that needs to be followed in interpreting the substantive provisions contained therein.²¹² The Appellate Body confirmed this in the *US — Clove Cigarette* case and stated that:

The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.²¹³

A closer look at the TBT Agreement reveals the recognition of the multilateral trading system as to the autonomy of member states to take regulatory measures without imposing an unnecessary burden on international trade.²¹⁴ The threshold of this burden has to be reckoned on

²¹¹ See The Preamble to TBT Agreement which states:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

²¹² For the role of the preamble see *US — Shrimp* Appellate Body Report, *supra* note 48, ¶ 152-158.

²¹³ *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 96.

²¹⁴ See paragraph 6 of the preamble to the TBT Agreement.

the basis of the substantive provisions of the Agreement. Even though it might appear to extend the frontier of the multilateral trading system in disciplining domestic regulation, the system still keeps the balance in check.²¹⁵ It is clear that the basic concerns of the TBT Agreement are to eliminate regulatory measures that have a protective effect by setting parameters that needs to be observed in taking the measures while preserving the autonomy of members to take necessary regulatory measures.²¹⁶ It sets guidance by which members set the measures in conformity with international standards and with the utmost transparency in order to avoid trade barriers as much as possible. The TBT Agreement is not meant to eliminate diversity in members' internal regulation per se; rather it aims at tackling regulatory measures that create 'unfair' trade barriers.²¹⁷

It is possible that member states sometimes take measures against imported goods and services so as to protect domestic industries from international competition. However, it is not the only reason why governments take measures against imported goods and services. There are many compelling reasons that would necessitate measures against imported goods and services. As can be clearly inferred from the preamble, the objective of the system is to raise the standard of living, ensure full employment and increase real incomes through expanding production and trade in goods and services.²¹⁸ As an organization with a primary goal of raising the wellbeing of mankind, the WTO is expected to work on areas that would contribute to the attainment of its objectives. One can clearly

²¹⁵ For general discussion on the balance between the TBT and Regulatory autonomy *see supra* note 213.

²¹⁶ McDonald, *supra* note 143, at 251.

²¹⁷ *Id.* at 207

²¹⁸ *See* Preamble to the WTO Agreement; The Preambular statement reflects this understanding. *See* VAN DEN BOSSCHE, *supra* note 139, at 86.

see the links between free trade and the well-being of mankind. The preamble clearly spelt out how the system aims to use free trade to achieve its goal of raising the standard of living. Therefore, free trade is a means towards the general goal of raising the standard of living and increasing income. Thus, as a primary instrument to achieve the declared goals of the system, free trade needs to get due protection from unnecessary obstacles. However, in all cases, the primary consideration needs to be the attainment of the ultimate goal of increasing the well-being but not securing free trade alone. It is possible to prioritize other interest that would contribute to the attainment of an improved well-being of mankind. Thus, there could be times where measures required for free trade need to give way to other measures aimed at addressing other vital interests. All these need to understand the whole structure of the rules of the multilateral trading system and the goals sought to be achieved through it. This understanding will help in the analysis of regulatory measures against the commitments of a member under the multilateral trading system.

Chapter 4

Consumers' Interests and Likeness Analysis in the WTO Jurisprudence

4.1 Likeness Analysis in the WTO

In preceding discussions we have seen that the multilateral trading system rests on the understanding of the balance between the need to a free international trade and the autonomy of members to adopt measures meant to address other economic and non-economic concerns of their consumers and that the system is expected to operate within these two sets of regulatory regimes; the multilateral agreements and members' internal measures. Therefore, the judicial process needs to take into account this balance whenever it is called upon to interpret the rules of the multilateral trading system against an alleged measure by a member state. The issue of consumers' interests revolves around the determination of 'likeness' in relation to internal measures aimed at addressing consumers' interests as well as other non-trade concerns.²¹⁹

The core principle of the WTO is the free transfer of goods and services of members across national borders without any distinction as to the origins of the goods and services.²²⁰ It aimed at treating "like" goods and services of member states with the same treatment where they are offered for sale in the markets of a member state.²²¹ The underlying rationale of such treatment is that it would facilitate international trade and

²¹⁹ Jonell B. Goco, *Non-Discrimination, 'Likeness', and Market Definition in World Trade Organization Jurisprudence*, 40(2) J. WORLD TRADE 315, 316 (2006).

²²⁰ See Understanding the WTO: basics,

https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

²²¹ Goco, *supra* note 219.

thereby promote the optimal utilization of resources to the benefit of mankind. Accordingly, the rules of the WTO prohibit member states from imposing any measure on imported goods and services that would negatively affect the competitiveness of imported products from other member states and thereby give a better market for domestic products.

As discussed in the preceding chapter the multilateral trading system rests on the principle of non-discrimination. Non-discrimination is the fundamental principle of the multilateral trading rules from the perspective of both law and economics rationale.²²² The basic obligations of the WTO can be summed up under the National Treatment Obligation and the Most Favored Nation Treatment Obligations. According to the National Treatment obligation of the GATT, for instance, member states are required to treat domestic and imported products in the same manner as far as internal measures are concerned.²²³ Whereas the Most Favored Nation Treatment obligation requires member states to accord the same treatment to products originating from another member states the same treatment as provided to the most favoured nation in the eyes of the importing member.²²⁴ Therefore, adjudicators need to underline this while interpreting a measure claimed to have violated the rules of the multilateral trading system. Again the principle of non-discrimination requires the interpretation of ‘likeness’ of products and services as well as service providers.²²⁵ The term “like” is a common benchmark in most of the covered agreements of the multilateral trading system.²²⁶ Because what the

²²² Goco, *supra* note 219.

²²³ Wei Wang, *National Treatment in Financial Services in the Context of the GATS/WTO*, 6 *STUD. INT’L FIN. ECON. & TECH. L.* 149, 149-150 (2003).

²²⁴ *The Most-Favoured-Nation Principle in the EU*, 34(4) *LEGAL ISSUES OF EUR. INTEGRATION* 315, 316 (2007); *see also* Wang, *supra* note 223.

²²⁵ Wang, *supra* note 223.

²²⁶ “Like” products appears under, Article I, paragraph 1, Article III, paragraph 2, and Article III, paragraph 4 on MFN treatment and National Treatment; Article VI, paragraph

principle of non-discrimination requires is treating similarly situated situations in a similar fashion. Thus, whether there exists a similarity between comparable products needs to be verified before any conclusion as to the existence of discrimination is made. Therefore, the determination of ‘likeness’ of products and services occupy a central place in the WTO jurisprudence. Most of the time the WTO adjudicators are required to determine whether a product which is a subject of a measure in the respondent member is discriminated against “like” products of the respondent member or other members in the market of the respondent state. This is precisely because the WTO system requires the treatment of “like” products and service as well as service providers of members in a “like” manner.²²⁷ Even though the issue of ‘likeness’ is a common denominator for most of the discussions in the WTO discipline, the discussion in this part focuses more on the determination of ‘likeness’ under the national treatment obligation. Since the research focuses on the examination of the role of the adjudicators in striking the proper balance between regulatory autonomy and free trade, ‘likeness’ analysis that has an impact on the maintenance of this balance shall be considered. Relevant jurisprudence from the determination of ‘likeness’ in relation to other provisions as well will be taken into account whenever necessary to elucidate the discussion.

1 on anti-dumping; Article IX, paragraph 1 on marks of origin; Article XIII, paragraph 1 on quantitative restrictions; Article XVI, paragraph 4 on subsidies; and Article XIX, paragraph 1 on safeguards of GATT. Under Article 5, paragraph 5 of the TRIMs Agreement. Under Article 2, paragraphs 1, 2, and 6 and Article 4, paragraph 1 of the Antidumping Agreement. Under Article 6, paragraph 3, Article 11, paragraph 2, and Article 15, paragraph 1 the SCM Agreement. Under Article 2, paragraph 1 and Article 4, paragraph 1 of the Agreement on Safeguards. Under Article 2, paragraph 1 of the TBT Agreement. For further list and analysis of like products in the various covered agreements, *See Goco, supra* note 219; *see also* Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute*, THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283 (2001). (They indicated that The notion of "like" is used 16 times in the text of the GATT).

²²⁷ Goco, *supra* note 219, at 316.

Despite its significant place in the multilateral trading system, it is hardly possible to find a definition of “like” product in the covered agreements. This fact leaves the determination of ‘likeness’ on the adjudicatory body of the WTO whenever issues of discriminations surfaced in the dispute settlement system. However, there are some provisions in the covered agreements that attempted to supply a definition to “like” products and other similar concepts. Accordingly, the Agreement on Customs Valuation, for instance, tried to define “identical” and “similar” goods under Article 15²²⁸as follows:

“Identical goods” means goods which are the same in all respects, including physical characteristics, quality, and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical.²²⁹

"Similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar.²³⁰

Again Article 2(6) of the Agreement on the Implementation of Article VI of the GATT 1994 defined “like” products as:

Product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another

²²⁸ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), Apr. 15, 1994, Annex 1A, 1868 U.N.T.S. 279.

²²⁹ *Id.* art. 15(2)(a).

²³⁰ *Id.* art. 15(2)(b).

product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.²³¹

The issue of ‘likeness’ was the subject of interpretation in numerous cases brought before the adjudicators of the multilateral trading system.²³² The main tenet of the ‘likeness’ analysis rests on the non-discrimination principle which is the cornerstone of the multilateral trading system. Thus, the analysis should focus on identifying discriminatory measures that make a distinction on “like” products for the sake of trade measures. It should focus on spotting disguised distinction that would deprive “like” products equal treatment. It is accepted that the meaning of ‘likeness’ differs from provisions to provisions and should be decided on a case by case basis.²³³ It is a well-settled understanding that “like” products can mean different thing in different provisions of the multilateral agreements.²³⁴ This is also confirmed by the Appellate Body in the *EC — Asbestos* case in which it is stated that “like” means different thing even in Article III:2 first sentence and Article III:4.²³⁵ This is a clear indicator to the fact that the analysis of ‘likeness’ should be geared towards addressing disguised distinctions between otherwise “like” products just for the sake of internal measures.

The most commonly referred authority for the elasticity of the meaning of ‘likeness’ under the different provisions of the covered

²³¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, Annex 1A, 1868 U.N.T.S. 201.

²³² See for instance Panel Report, *United States — Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (June 17, 1987); Panel Report, *Japan — Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, L/6215 - 34S/83 (Nov. 10, 1987) [hereinafter *Japan — Customs Duties* Panel Report]; *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111; Panel Report, *Korea — Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (Sept. 17, 1998) [hereinafter *Korea — Alcoholic Beverages* Panel Report]

²³³ Cottier et al., *supra* note 180, at 1001.

²³⁴ Donald H. Regan, *Regulatory Purpose and Like Products' in Article III: 4 of the GATT (With Additional Remarks on Article II: 2)*, 36(3) J. WORLD TRADE 443, 444 (2002).

²³⁵ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶¶ 96,99.

agreements is found in the reasoning of the Appellate Body in the *Japan — Alcohol* case when it stated that:

The concept of `likeness' is a relative one that evokes the image of an accordion. The accordion of `likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term `like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.²³⁶

This does not mean that there is no guidance in the multilateral trading system for the determination of `likeness'. A case in point is the criteria indicated by the Working Party on Border Tax Adjustment. The Working Party on Border Tax Adjustment came up with a proposal that can serve as parameters in the determination of `likeness' of products and are used by the adjudicators of the multilateral trading system as a reference.²³⁷ And these criteria including the tariff classification which was later on added were used invariably by adjudicators of the multilateral trading system whenever the need arise to determine the `likeness' of

²³⁶ *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 21.

²³⁷ GATT, Report of the Working Party on Border Tax Adjustment, GATT Doc. 18d Supp. B.I.S.D. (1970) 102 [hereinafter GATT Working Party on Border Tax Adjustment], cited by JASON POTTS, THE LEGALITY OF PPMS UNDER THE GATT: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE TRADE POLICY 13 (2008), the Report of the Working Party on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting `like or similar products' generally in the various provisions of the GATT 1947: The working party report concluded that:

Problems arising from the interpretation of the terms [`like products'] should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a `similar' product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is similar: the product's end uses in a given market, consumers' tastes and habits, which change from country to country, the product's properties, nature and quality.

products subject to a measure.²³⁸ These criteria are meant to define what “like” mean and take product competitiveness as the basis for the determination of ‘likeness’.²³⁹ Despite these criteria, it seems a common understanding that the determination of ‘likeness’ rests on a case by case basis and adjudicators need to apply the illustrative criteria propounded so far as such.²⁴⁰

These illustrative criteria were used by the adjudicators under various approaches aimed at addressing the object and purpose of the multilateral trading system. The approaches used by the adjudicators in determining the ‘likeness’ of comparable products can be analyzed under the regulatory purpose-based approach and the market-based competitiveness approach.²⁴¹ The regulatory purpose-based analysis focuses on the regulatory distinction of the products, while the market-based analysis focuses on the competitive relations of the products in the market.²⁴² The regulatory purpose-based analysis calls the adjudicators to examine the regulatory objective behind the distinction together with the other objective criteria commonly used in the ‘likeness’ analysis.²⁴³ The regulatory purpose-based analysis or the ‘aim and effect’ method as it is usually called was used first in the *US — Malt Beverage* and later in the *US —*

²³⁸ Potts, *supra* note 237, at 13.

²³⁹ Emily Barrett Lydgate, *Consumer Preferences and the National Treatment Principle: Emerging Environmental Regulations Prompt a New Look at an Old Problem*, 10(2) WORLD TRADE REV.165 (2011).

²⁴⁰ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 20; see Henrik Horn & Petros C Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination*, 15(1) EUR. J. INT’L L. 39, 52 (2004). (Argues that the list of criteria is not exhaustive)

²⁴¹ The regulatory purpose based and the market based approach are used here to refer method of analysis used by the adjudicators in determining whether comparable products are like for the purpose of the provision invoked in the complaint without intending to imply any theoretical or conceptual boundaries.

²⁴² See Robert E Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an " Aim and Effects" Test*, 32(3) INT’L. LAW 14 (1998).

²⁴³ *Id.* at 12.

Taxes on Automobiles case.²⁴⁴ According to the aim and effect approach, the legitimacy of an internal measure should be determined primarily on the basis of the purpose and market effect, and therefore, a discriminatory domestic measure can be maintained under Article III if it is shown that it is not protectionist.²⁴⁵ This is because in this approach what is important is the rationale behind making the distinction rather than objective market criteria that would make the products in question “like”.

The ‘aim and effect’ approach advocates the need to consider the basic policy objective of the rule in question in addition to the various other factors used in the determination of ‘likeness’.²⁴⁶ According to proponents of the regulatory-based analysis, ‘likeness’ can be seen from two perspectives; from the perspective of competition and from the perspective of regulation.²⁴⁷ They argue that the regulatory purpose based analysis is a good approach that would allow adjudicators evaluate a measure taking into account the basic rationale, for instance, of Article III to protect non-protectionist regulatory measures while striking out protectionist regulatory measures.²⁴⁸ Hence the meaning of ‘likeness’, for instance, under Article III: 4 requires the evaluation of the regulatory purposes of a measure at issue.²⁴⁹ There are also arguments claiming that

²⁴⁴ Panel Report, *United States — Measures Affecting Alcoholic and Malt Beverages*, DS23/R-39S/206 (March 16, 1992) [hereinafter *US-Alcohol and Malt Panel Report*]; Panel Report, *United States — Taxes on Automobiles*, DS31/R (Oct. 11, 1994) [unadopted], cited by Julia Ya Qin, *supra* note 109, at 242.

²⁴⁵ Qin, *supra* note 109, at 243.

²⁴⁶ *Id.* at 242.

²⁴⁷ Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37(4) J. WORLD TRADE 783, 785 (2003).

²⁴⁸ *Id.* at 784; see also Weihuan Zhou, *The Role of Regulatory Purpose under Articles III: 2 and 4—Toward Consistency between Negotiating History and WTO Jurisprudence*, 11(1) WORLD TRADE REV. 81 (2012). (Argues that the preparatory work on the NT provide guideline to the interpretation of Article III and suggested that the adjudicators should apply regulatory purpose analysis for Article III:2 first sentence or limits its application to origin specific measures if they want to stick to the existing approach)

²⁴⁹ Regan, *supra* note 234, at 444.

GATT Article III is meant to address regulatory measures on the basis of a clear distinction between origin-specific and origin-neutral measures and the determination of ‘likeness’ should be built on the basis of this distinction.²⁵⁰

The aim and effect approach is abandoned in the *Japan — Alcoholic Beverage* and the *EC — Banana* cases.²⁵¹ In these Cases, the Appellate Body made a distinction between Article III:2 and Article III:4 but specifically rejected the ‘aim and effect’ approach to Article III:2 first sentence and Article III:4.²⁵² As a result, the criteria for defining “like” products under Article III were essentially limited to the traditional list of “objective” factors, such as physical characteristics of the products, and would not include the regulatory aim and market effects of the measure.²⁵³ However, it applied a similar approach to the ‘aim and effect’ in interpreting Article III:2-second sentence by examining the market effect and the protective application of the challenged measure in order to determine whether the measure was protective in nature.²⁵⁴ The Appellate Body also applied the same approach in the *US – Clove Cigarettes* case and *Philippines – Distilled Spirits* case and confirmed the competitive

²⁵⁰ Ole Kristian Fauchald, *Flexibility and Predictability Under the World Trade Organization’s Non-Discrimination Clauses*, 37(3) J. WORLD TRADE 443 (2003).

²⁵¹ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111; Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 243, 244, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC — Banana III* Appellate Body Report]; see also Qin, *supra* note 109, at 243-244.

²⁵² See Qin, *supra* note 109, at 244-245.

²⁵³ *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 20; see also Qin, *supra* note 109, at 245.

²⁵⁴ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 18; see also Qin, *supra* note 109, at 244.

relationship of products in the market as a basis for the determination of ‘likeness’.²⁵⁵

In the US– Clove Cigarette case, the Appellate Body again rejected the Panel’s approach in the determination of ‘likeness’ that focused on the regulatory objectives of the measures and held that the determination of ‘likeness’ should focus on the competitive relationship between the products at issue.²⁵⁶ However, it accepted that the regulatory purpose of the technical regulation might be relevant in so far as it may have had an impact on that competitive relationship.²⁵⁷ It is important to refer to the reasoning of the Appellate Body in regards intent of the regulating state. In rejecting any subjective intent under Article III, the Appellate Body has reasoned that:

It does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, applied to imported or domestic products so as to afford protection to domestic production. This is an issue of how the measure in question is applied.²⁵⁸

The market-based analysis of ‘likeness’ focuses on the competitive relationship between domestic and imported products in question.²⁵⁹ Even

²⁵⁵ See Marios C. Iacovides, *Marginal Consumers, Marginalized Economics: Whose Tastes and Habits Should the WTO Panels and Appellate Body Consider When Assessing ‘Likeness’?*, 48(2) J. WORLD TRADE 323 (2014).

²⁵⁶ US — Clove Cigarettes Appellate Body Report, *supra* note 127, ¶¶ 113,114

²⁵⁷ *Id.* ¶¶ 119-120

²⁵⁸ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 28.

²⁵⁹ For instance, WTO panels have based their likeness analysis on the basis of market analysis and hold that like services under Article XVII and Article II are those services that are in competitive relationship in the market; For Article XVII see Panel Report, *China — Certain Measures Affecting Electronic Payment Services*, ¶ 7.700, WT/DS413/R

though the market-based analysis is applied in different strands by panels and the Appellate Body, the common feature is its emphasis on market factors than the regulatory purpose as compared to the regulatory-based analysis. It is possible to make a general distinction between a general competitive-based approach and a functional competitiveness in the discussion of the market-based competitive analysis of ‘likeness’.²⁶⁰ While in the ‘general competitive’ approach the overall competitiveness of the products in question will be taken into account, the ‘functionality competitiveness’ variant focuses on the functional competitiveness of products by stressing on the issue of end use.²⁶¹ In general, the market-based approach tends to focus on factors of commercial interchangeability or substitutability of the products arguing that determination of ‘likeness’ is basically a determination of the competitive relationship of products.²⁶² In the *EC — Asbestos* case the Appellate Body explained the market-based analysis and reasoned that:

As products that are in a competitive relationship in the marketplace could be affected through treatment of imports ‘less favourable’ than the treatment accorded to domestic products, it follows that the word “like” in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the

(July 16, 2012); for Article II *see also* Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R (April 14, 2016).

²⁶⁰ As in the case of the distinction between regulatory based analysis and market-based analysis, the distinction of the functional competitiveness and general competitiveness is used here to inform the discussion in this study without implying any conceptual demarcations.

²⁶¹ For functionality analysis *see* Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.126, WT/DS135/R (September 18, 2000). [hereinafter *EC — Asbestos* Panel Report]

²⁶² Qin, *supra* note 109, at 242; *see also* *EC — Asbestos* Appellate Body Report, *supra* note 110, ¶ 99.

nature and extent of a competitive relationship between and among products.²⁶³

It should be noted here, however, that the Appellate Body does not tell us the parameters we need to focus on when comparing the market competitiveness of comparable products. Because it is possible that competitiveness in the market can still mean different things from the perspective of consumers and suppliers. In a notable departure from previous jurisprudence like in the *EC — Banana* case, the Appellate Body in the *EC — Asbestos* case, appeared to incorporate the ‘aim and effect’ approach at least in the determination of less favourable treatment.²⁶⁴ It acknowledged that a mere determination of ‘likeness’ is not dispositive of the case and mandates an identical treatment from the regulating state; rather the complaining state must demonstrate that the difference in regulation amounts to less favourable treatment as between “like” imported and domestic products each taken as a group.²⁶⁵ In fact, since this case involves an issue of human health the cautious approach of the Appellate Body can be observed. If we take the analysis of the Appellate Body of this case seriously, it seems that the Appellate Body is determined to introduce new jurisprudence establishing an ‘essentially deferential approach to domestic regulation that addresses vital health interests’.²⁶⁶ The other point that can be discerned from the jurisprudence in the *EC — Asbestos* case is that internal regulatory measures that are applied indiscriminately on domestic as well as imported goods fall outside the scope of Article III:4 if

²⁶³ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 99.

²⁶⁴ See *EC — Asbestos* Appellate Body Report, *supra* note, 110; Porges and Trachtman, *supra* note 247.

²⁶⁵ *EC — Asbestos* Appellate Body Report, *supra* note, 110; Howse and Tuerk, *supra* note 226.

²⁶⁶ Howse and Tuerk, *supra* note 226, at 289.

there exists a genuine health risk and such risk constitutes a defining aspect of the physical properties of the product at issue.²⁶⁷

As has been discussed above, it is possible that the competitive relation of comparable products can differ from the perspective of consumers and suppliers. The jurisprudence that is developing so far does not tell us exactly from which perspective the competitiveness analysis should be evaluated. There are differing opinions regarding the right basis in the market-based analysis itself.²⁶⁸ These points of view are indicative of the complexities involved in the determination of ‘likeness’ even within one approach. It shows that the approach alone is not dispositive of an outcome for or against consumers’ interests. It is still possible to address consumers’ interests even relying on the market-based analysis and focusing on the competitive relationship of the products in question, for instance if we maintain the demand side as our point of reference. The whole discussion in this part clearly portrayed the possibility of crafting a workable interpretive approach which can accommodate both the interests of consumers and traders. Given this possibility, the multilateral trading system adjudicators are expected to rely on the best scenario that would advance the good of the multilateral trading system.

The other point that should be taken into account in advancing a given method of analysis in relation to the determination of ‘likeness’ is the rationale behind according “like” treatment to “like” products. As rightly stated by GATT panels in various disputes that required the

²⁶⁷ See Jones, *supra* note 189, at 267.

²⁶⁸ For the supply side argument see WON-MOG CHOI, 'LIKE PRODUCTS' IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE 36 *et seq.* (Oxford University Press on Demand, 2003); Horn and Mavroidis, *supra* note 240, at 61; for the demand side argument see Adrian Emch, *Same Same But Different? Fiscal Discrimination in WTO Law and EU Law: What Are 'Like' Products?*, 32(4) LEGAL ISSUES OF EUR. INTEGRATION 369, 374 *et seq.* (2005).

interpretation of the various segments of Article III, the basic rationale of the protection under Article III of GATT is to provide equal competitive opportunity to domestic and imported products once they have entered the markets of a member state.²⁶⁹ In other words, what is involved in the application of Article III of GATT is determining whether the products in question are “like” products and if they are, whether there is a discriminatory application of internal measures or there is a protection towards the domestic product in the application of the internal measure in question.²⁷⁰ In particular, the application of Article III:2 requires the determination of whether the products in question are “like” or “directly substitutable or competitive” products and whether the measure in dispute is discriminatory or aimed at according protection to domestic products. If none of these issues are resolved in the affirmative, then the holding of the interpreter has to be non-violation of WTO commitments by the defendant state.

In general, the determination of ‘likeness’ is a delicate undertaking that needs to take into account all the interests at stake. It can be safely concluded that if selecting the demand side as a point of reference in the analysis of ‘likeness’ is not accepted as the right approach it is possible to say that both the demand and supply side should be taken into account.²⁷¹ And an approach that does not properly reflect the demand side consideration in the analysis of ‘likeness’ cannot yield satisfactory results that can do good both to consumers and international trade at large.

²⁶⁹ See Panel Report, *United States — Taxes on Petroleum and Certain Imported Substances*, ¶ 5.1.9, L/6175 - 34S/136 (June 17, 1987) [hereinafter *US — Petroleum Panel Report*]; Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 11, L/833 - 7S/60 (Oct. 23, 1958).

²⁷⁰ See PJ Kuyper, *Booze and Fast Cars: Tax Discrimination under GATT and the EC*, 23(1) LEGAL ISSUES OF EUR. INTEGRATION 129, 132 (1996).

²⁷¹ See Horn and Mavroidis, *supra* note 240, at 61.

4.2 The Role of Consumers' Taste and Preference in the Analysis of Likeness

Consumers' taste and preference as it is usually termed as "consumers' taste and habit", is one of the criteria set by the WTO jurisprudence in the determination of 'likeness' of products.²⁷² It is true that consumer taste and preference play a crucial role in trade be it domestic or international. One important role played by consumers' taste and preference is that it serves as an element in determining the 'likeness' of a product. The 'likeness' of a product is a key for evaluating whether measures by a member state regarding products are in violation of the WTO Agreements or not.²⁷³ However, this important term is not properly defined anywhere in the WTO Agreements in a way that would help its analysis. Attempts have been made to operationalize it for different discussions. For instance, according to McConnell, "taste is a favourable change in consumer tastes (preferences) for a product- a change that makes the product more desirable means more of it will be demanded at each price".²⁷⁴ On the other hand, Masood defines taste as, a "reaction to the prevalence of global brands".²⁷⁵ For Varian, consumer preference is a "ranking of consumption bundles based on their desirability".²⁷⁶ Various factors are developed to be taken as criteria in the determination of 'likeness', each of which has to be analyzed separately. This is confirmed by the Appellate Body in the *EC — Asbestos* case when it analyzed the effect of the lists in the Border Tax Adjustment Panel. In that case, it has reasoned that the lists under the

²⁷² See GATT Working Party on Border Tax Adjustment, *supra* note 237

²⁷³ See Goco, *supra* note 219.

²⁷⁴ McConnell, *supra* note 67.

²⁷⁵ Zeenat Ismail, *et al.*, *Factors Affecting Consumer Preference Of International Brands Over Local Brands* § 31(Second International Conference on Social Science and Humanity IPEDR 2012).

²⁷⁶ VARIAN, *supra* note 68.

Border Tax Adjustment Panel need to be evaluated separately in their own rights.²⁷⁷ Therefore, as one of the criteria, consumers' taste and preference needs to be analyzed separately in its own right in the determination of the 'likeness' of products regardless of the approach we are using for the analysis of 'likeness'.

Consumers' taste and preference refers to consumers purchasing behaviour as reflected in the choice they made among various products which may provide similar or substitutable functions. Consumers' taste and preference can be influenced by both economic and non-economic factors. The holding of the Appellate Body in the *EC — Asbestos* case confirms the role of non-economic concern in the taste and preference of consumers. In that case the Appellate Body concluded that "evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysolite asbestos fibres influence consumers' behavior with respect to the different fibres at issue".²⁷⁸ Therefore, it is important to understand how consumers' taste and preference is articulated in the determination of 'likeness' of products at issue for a better understanding of consumers' interests in the multilateral trading system. For this, the parameter set by the Appellate Body in the *Asbestos* case can be instrumental. In that case, the Appellate Body outlined how the 'likeness' analysis from the perspective of consumers' taste and preference should precede and stated that:

the test from the perspective of consumer tastes and habits is whether the products would be substitutable and in a competitive relationship in an idealized market-place, one where consumers have full

²⁷⁷ See *EC — Asbestos* Appellate Body Report, *supra* note, 110; see also Howse and Tuerk *supra* note 226, at 300.

²⁷⁸ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 122.

information, and where, at least through tort liability, negative externalities have already to some extent been internalized.²⁷⁹

From this, it is possible to discern the position of the Appellate Body in relation to the role of consumers' taste and preference in the determination of 'likeness'. According to this reasoning, it is consumers' taste and preference that responds to the demand side competitiveness. In fact, it does not tell us what should dictate consumers in making comparison between the products in question. Because it is also possible that consumers can make a distinction between two physically identical products depending on other non-economic factors such as environmental concerns and it could be possible to argue that imported and domestic products which have physical similarity can be found "unlike" and lawfully distinguished for regulatory purpose under Article III of GATT.²⁸⁰ Nevertheless, the reasoning, in this case, can tell us that at least the 'likeness' of the products has to be evaluated from the perspective of consumers, among other factors.

A discussion of the role of consumers' taste and preference cannot be meaningful if it is not possible to decide whose taste and preference shall be taken into consideration in the analysis. In other words, when we say we are to look into the consumers' taste and habits in relation to comparator products in order to determine whether consumers would treat them as "like" products or "unlike", we need to determine which consumers are we going to check. This will take us to the examination of markets; whether to look at all the potential consumers in the market or a certain group would suffice. Regarding the size of a market in order to examine consumers'

²⁷⁹ See *EC — Asbestos* Appellate Body Report, *supra* note, 110; see also Howse Tuerk, *supra* note 226, at 301.

²⁸⁰ Marco Bronckers & Natalie McNelis, *Rethinking the "Like Product" Definition in GATT 1994: Anti-Dumping and Environmental Protection*, 33(3) J. WORLD TRADE 73 (2000).

taste and preference there are arguments which claim that, for instance, for physically “like” products to be characterized as “unlike” on the basis of consumers taste and preference, it would be necessary for consumers as a whole rather than a specific interest group to distinguish the two products in question.²⁸¹ Contrary to this others argue that it is possible for competing firms to differentiate their products on the basis of a specific consumer groups and as such differentiation can change the competitive relationship in the market, so that the taste and preferences of such groups could suffice.²⁸² In the same line, the Appellate Body in the *US — Clove Cigarettes* case reasoned that if products are highly substitutable to some consumers that would suffice to hold the products as “like” products for the purpose of Article 2.1 of the TBT Agreement.²⁸³ The Panel in the *Chile — Alcoholic Beverage* case also indicated the relevant section of consumers and reasoned that for the purpose of establishing competitiveness it is sufficient that ‘there is a pattern that they may be substituted for some purposes at some times by some consumers’.²⁸⁴ Still others, by making a comparison of market segmentation for the analysis of competition law and WTO, argue that the scope of market for the purpose of WTO should be broader than for the analysis of antitrust law.²⁸⁵ This is also confirmed by the Panel in the *Korea — Alcoholic Beverages* case which stated that:

²⁸¹ *Id.*

²⁸² See *EC — Asbestos* Appellate Body Report, *supra* note, 110; see also Howse and Tuerk *supra* note 226, at 301.

²⁸³ *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 142.

²⁸⁴ Panel Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 7.43, WT/DS87/R, WT/DS110/R (June 15, 1999).

²⁸⁵ Goco, *supra* note 219, at 332. He argues that:

the relevant market in WTO law should be broader than that in antitrust law, so that the application of non-discrimination will be more extensive in WTO law and the discipline of market power more strict in antitrust law.

While the specifics of the interaction between trade and competition law are still being developed, we concur that the market definitions need not be the same. Trade law generally, and Article III in particular, focuses on the promotion of economic opportunities for importers through the elimination of discriminatory governmental measures which impair fair international trade. Thus, trade law addresses the issue of the potentiality to compete. Antitrust law generally focuses on firms' practices or structural modifications which may prevent or restrain or eliminate competition. It is not illogical that markets be defined more broadly when implementing laws primarily designed to protect competitive opportunities than when implementing laws designed to protect the actual mechanisms of competition. In our view, it can thus be appropriate to utilize a broader concept of markets with respect to Article III:2, second sentence, than is used in antitrust law.²⁸⁶

In the *US — Clove* cigarettes case the Appellate Body, in reversing the conclusion of the Panel that holds that the relevant consumers whose taste and preference should be that of only the young, said that the taste and preference of all the relevant consumers should be assessed.²⁸⁷ However, for the Panel since the measure is aimed at addressing the concern of youth smokers who are attracted by the flavour, the relevant consumers whose taste and preference should be considered is that of the youth rather than the general consumers of cigarettes.²⁸⁸ Given its premise on the regulatory purpose of the United States measure, the analysis of the Panel to define the boundary of consumers whose taste and preference should be taken into account in the determination of 'likeness' is consistent than the wider boundary of the Appellate Body.²⁸⁹ However given the

²⁸⁶ *Korea — Alcoholic Beverages* Panel Report, *supra* 232, ¶ 10.81.

²⁸⁷ *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 145.

²⁸⁸ *US — Clove Cigarettes* Panel Report, *supra* note 128, ¶ 7.206, 7.214.

²⁸⁹ Iacovides, *supra* note 255, at 340.

commitment of the Appellate Body to stick to the market-based analysis to the determination of ‘likeness’ it is understandable why it is reluctant to accept the holding of the Panel in relation to the size of the market that was predicated on the regulatory purpose of the measure.

In general, even though there are no settled parameters regarding the extent of the relevant consumers whose taste and preference should be taken into account in the determination of the ‘likeness’ of products, it is accepted that there must be delimitation in the analysis. It should also be noted that consumers’ taste and preference is one of the factors to be analyzed in the ‘likeness’ analysis and its probative value depends on the weight to be given to the other components at a given time depending on the circumstances and the provisions of a covered agreement invoked.

At this point, a distinction should be made between self-driven consumers’ taste and preference and regulatory induced taste and preference. It should be noted that the multilateral trading system does not take into account consumer’s taste and preference that is driven by regulatory intervention. This issue was taken up in the *EC — Sardines* case in which the Panel and the Appellate Body made it clear that regulatory interventions aimed at dictating consumers to make a certain choice is not permitted under the multilateral rules.²⁹⁰ It is also important to note that consumers’ taste and preference can be addressed objectively focusing on objective criteria such as product property, nature and quality; or subjectively focusing on subjective criteria such as consumption patterns.²⁹¹ However, it should be noted that consumers’ taste and preference constitutes one of the important, if not the basic, criteria for the determination of ‘likeness’ in the market-based analysis of ‘likeness’.

²⁹⁰ Panel Report, *European Communities — Trade Description of Sardines*, ¶ 7.127, WT/DS231/R (May 29, 2002). [hereinafter *EC — Sardines* Panel Report]

²⁹¹ Lydgate, *supra* note 239, at 168.

There also arguments that tend to give the exclusive role for consumers taste and preference in the determination of ‘likeness’ in the market-based analysis.²⁹² In fact, if it is meant to give equal competitive opportunity to domestic and imported products in the market what should be taken as a point of reference is the demand side as expressed in terms of consumers taste and preference. This is because what is at stake here is how the products are treated in the market rather than the suppliers. Thus, the best way to make sure that “like” products are treated in a like manner is to determine their ‘likeness’ by looking at the demand side. The argument that the ‘likeness’ analysis should focus on the supply side rests on the apparent choice of words used under Article III: 2, when it used both substitutable and competitive at the same times and this should be taken into account and substitutability should be seen from the perspective of consumers and competitiveness from the perspective of suppliers.²⁹³ However, the Appellate Body has affirmed that the terms substitutable and competitive do not imply any distinction in the assessment of competitive relationship.²⁹⁴ It further confirmed that any analysis of ‘likeness’ under Article III of GATT should focus on the product as a product and do not relate to the producers.²⁹⁵ Therefore, the best way to grasp the ‘likeness’ of products from the products angle is the position of consumers towards the products at issue. Thus, there is nothing against the adoption of ‘likeness’ analysis in the market-based method to focus on the demand side if at all it is not the exclusive reference. It should also be noted that there is no distinction as between paragraph 2 and 4 of Article III of GATT as far as

²⁹² Emch, *supra* note 268, at 369-415. (Argue that an interpreter of ‘likeness’ should focus on consumers’ tastes and habits.)

²⁹³ See CHOI, *supra* note 268, at 36 *et seq.*

²⁹⁴ Appellate Body Report, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 94, WT/DS192/AB/R (October 8, 2001).

²⁹⁵ Panel Report, *United States — Taxes on Automobiles*, ¶ 5.52, DS31/R (Oct. 11, 1994).

the choice of analysis in relation to the demand side or the supply side is concerned.²⁹⁶

4.3 Likeness Analysis in the Current Jurisprudence

As discussed above under section 4.1, the current jurisprudence is dominated by the market-based analysis focusing on the competitive relations of comparators. This does not, however, mean that WTO case laws are consistent and the jurisprudence has totally abandoned the regulatory based analysis altogether. There are cases that appear to incorporate the regulatory purpose-based analysis at least in the comparison of treatment.²⁹⁷ This does not mean that the same analysis will be made by panels and the Appellate Body in all cases or the same conclusion can be made by a panel and the Appellate Body applying the same approach in the determination of ‘likeness’. It is still possible to differ in the conclusion as to whether two products are “like” on the basis of the market-based analysis since the weight to be given to the various factors can still differ.²⁹⁸ Despite such possibilities, however, the choice to base the analysis on market-based criteria is one thing that appears to be guiding the current jurisprudence to a certain direction. However, as has been said repeatedly this does not mean that the same or similar results are expected from cases featuring similar measures and products. Because, we

²⁹⁶ See the reasoning of the Appellate Body in the *EC — Asbestos* case, *EC — Asbestos* Appellate Body Report, *supra* note 110.

²⁹⁷ Note that the regulatory purpose based analysis can be used in connection with a comparison of products that is whether they are like or not and in connection of the treatment of the products that is whether the imported product received less favorable treatment or not.

²⁹⁸ See *EC — Asbestos* Appellate Body Report, *supra* note 110. In this case, while both the Panel and Appellate Body based their analysis on market basis they reached on a different conclusion as to whether the products are like.

have seen that, even under the market-based approach itself it is possible to examine the various factors for the determination of ‘likeness’. It is possible to reckon competitiveness from different angles and arrive at a different conclusion. Therefore, it is possible to base the ‘likeness’ analysis on the market-based competitiveness approach and give due attention to consumers than it used to be in order to address consumers’ interests properly. When we look at the market-based jurisprudences so far we can say that the jurisprudence is developing towards a general competitiveness analysis as compared to functional competitiveness which focuses on the functional criteria by taking into account the end use of the products at issue.²⁹⁹ In this regard, the analysis of the Appellate Body in the Asbestos case appears to mark the departure from the previous jurisprudence.³⁰⁰ In that case, the Panel concluded that Asbestos and other fibers are “like” products in line with the implicit priority of functional criteria in previous cases.³⁰¹ Contrary to the holding of the Panel, however, the Appellate Body followed a different line of analysis and focused on the general competitive relationship between the products in question.³⁰² As compared to functional criteria, the general competitiveness approach seems to be more accommodative in addressing consumer interests. It appears to be the right approach to reflect market competitiveness. Given the rationale behind the WTO which is ensuring equal competitive opportunity, a general competitiveness criterion appears more in consonance with the rules of the multilateral trading system. Despite the fact that two products have a similar function, it is futile to talk about anti-competitive measure if the products in question are not competing in the market. Therefore, the shift

²⁹⁹ Functionality and actual competitiveness are different. Two products can be functionally identical and not competitive in the market. *See for instance* Potts *supra* note 237, at 14.

³⁰⁰ *Id.* at 16; *see also* EC — Asbestos Appellate Body Report, *supra* note, 110, ¶ 100.

³⁰¹ Potts, *supra* note 237, at 16.

³⁰² *Id.*

towards general competitiveness by the Appellate Body is something that should be welcomed by those who would want to see the WTO works better for consumers' interests. The analysis of the Appellate Body focuses on market responsiveness rather than on the functionality criteria which would allow looking into various determinants even where the products have identical functional use.³⁰³ This in effect will give a chance for other criteria to feature in the determination of 'likeness'; such as production method and process among others that can affect consumer choices and thereby the competitive position of products.

The analysis of 'likeness' of products so far indicated the possibility of incorporating various factors on the determination apart from those stated in the Border Tax Adjustment Report.³⁰⁴ Another point that should be considered in the discussion of the current jurisprudence is its stand in regards to the regulatory purpose approach. In preceding parts we have seen that the regulatory purpose can be used in both the determination of 'likeness' as well as in the determination of the treatment. The Appellate Body in the *EC — Asbestos* case indicated the possibility of utilizing the regulatory purpose in the determination of the treatment accorded to "like" imported products.³⁰⁵ Thus, the inclusion of the regulatory purpose-based approach will give room to member states to include legitimate non-economic factors in the determination of 'likeness' for the purpose of regulation.

The reasoning of the Appellate Body in the *EC — Asbestos* case regarding the possibility of applying regulatory purpose in the

³⁰³ *Id.*

³⁰⁴ For instance, different safety level in the production of a given product can be taken as a factor in the determination of the likeness of products. *See* Panel Report, *United States — Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (September 29, 2010) [hereinafter *US — Poultry (China)* Panel Report].

³⁰⁵ *See EC — Asbestos* Appellate Body Report, *supra* note 110.

determination of the treatment of “like products” can be seen as a demarcation of the transition of the current jurisprudence from previous jurisprudence towards more sympathetic positions towards the non-economic interests of consumers. At this point it could be informative if we have a look at how other similar adjudicatory bodies interpret similar provisions. In this regard the European Union is a good comparator to the WTO in relation to international trade, since both organizations are working on eliminating trade barriers among their members.³⁰⁶ The European Union has specific mandates in relation to inter-state trade as does the WTO. With the same token members of the union retain their regulatory autonomy as do WTO members. Member states do not lose their sovereignty in favor of the union; rather they retain their autonomy surrendering some autonomy in the interest of European integration as manifested through the internal market and other economic as well as socio-political integrations.³⁰⁷ This change can be clearly observed in how the EU laws and member states’ laws are interpreted by the judicial organs both in the states as well as at the union level.³⁰⁸

When we come to the judicial function within the union, the European Court of Justice (ECJ) is expected to interpret the EU laws by taking into account the regulatory autonomy reserved for member states in implementing and giving effect to EU laws. Exploring how the EU interprets similar terms and provisions can shade some light on the understanding of the interaction that should exist between rules of a

³⁰⁶ See Emch *supra* not 268 at 369-415. (Argued that despite the difference regarding level of integration both WTO and the EU work for trade liberalization and aimed at abolishing trade barriers as far as possible).

³⁰⁷ See Ingolf E. A. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15(3) COLUM. J. EUR. L. 349 (2009). (He discusses how the Lisbon treaty transformed the European Union and the understanding of multilevel governance in the context of European Union law and the laws of member states.)

³⁰⁸ See *also id.* (Argues that the mechanisms are best understood by reading the constitutions of the states together with the EU legislations.)

multilateral system and the regulatory measures of members operating within such system. As both systems are working towards a freer trade among their respective members on the basis of non-discrimination, interpretation of similar provisions by the adjudicatory process of one of them can inform the interpretation by the adjudicatory organs of the other. It should be noted that both systems aimed at creating a level playing field for domestic and imported goods and services.³⁰⁹ It is not unusual to find similar provisions in both systems as well. A case in point is Article III: 2 of GATT and Article 95 of the Treaty Establishing the European Community (the Treaty of Rome) which is Article 110 of the Treaty on the Functioning of the European Union.³¹⁰ It can be said that Article 110 of the TFEU is greatly influenced by the GATT provisions and meant to contain similar provision with Article III:2 of GATT 1947.³¹¹ Article 110 of the TFEU states that:

No Member State shall impose, directly or indirectly on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.³¹²

Therefore, the interpretation of such provisions in particular and other economic treaties in general by the relevant judicial bodies of the European Union can shade some light on the interpretations of, for instance,

³⁰⁹ See Emch, *supra* note 268.

³¹⁰ See Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 [hereinafter the Treaty of Rome]. Note that Article 95 is currently Article 110 of the Treaty on the Functioning of the European Union. See Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012 O. J (C326). [hereinafter TFEU]

³¹¹ For a comparison of GATT Article III:2 and Article 95 of the Treaty of Rome see Kuyper, *supra* note 270.

³¹² TFEU, art. 110.

Article III: 2 of GATT of the multilateral trading system. In this regard there are numerous cases in which the European Court of Justice has attempted to clarify the notion of similarity for the purpose of Article 110 of the TFEU.³¹³ When it comes to the specific analysis of similarity of products the Court has stated that for the purpose of Article 95 (the current Article 110 of the TFEU) comparable products can be said to be similar if the said products “have similar characteristics and meet the same needs from the point of view of consumers”.³¹⁴ In regards to the parameter to analyze the similarity of the products, the court has indicated that the focus should be in the economic relation of the comparable products.³¹⁵ These can tell us that the ECJ has tried to clarify the notion of similarity between products as it is central to the determination as to the existence of discrimination for the purpose of Article 110 of the Treaty on the Functioning of the European Union (the Previous Article 95 of the Treaty Establishing the European Community). We can also see that the court has tried to base its analysis on economic and market competitiveness in the determination of similarity of products.³¹⁶

However, caution must be made not to ignore the level of economic integration sought by the two institutions and thereby the need to allow different degree of flexibility in sanctioning members’ autonomy vis-à-vis the multilateral institutions’ rules. Interpretation that can further deeper economic integration may be more appropriate to the EU Treaty than the

³¹³ *Commission v. France*, no. 168/78 [1980] ECR 347, 27 February 1980 [hereinafter *Commission v. France*]; *H. Hansen jun. & O. C. Balle GmbH & Co. v Hauptzollamt Flensburg*, no. 148/77 [1978] ECR 1787, 10 October 1978; *Rewe-Zentrale Des Lebensmittel-Grosshandels EGmbH, Köln, v. Hauptzollamt Landau/Pfalz*, no.45/75 [1976] ECR 181, 17 February 1976. [hereinafter *Rewe Case*]

³¹⁴ *Rewe Case*, *supra* note 313, ¶ 12.

³¹⁵ *Commission v. France*, *supra* note 313, at ¶ 13.

³¹⁶ *Id.* ¶ 6.

WTO rules.³¹⁷ This was rightly reflected by the Panel in the *US — malt* case when it reasoned that Article III of GATT should not be understood as a means to harmonize the internal tax laws of member states.³¹⁸

4.4 Implications of the Current Analysis and the Way Forward

The interpretations of most of the provisions of the WTO Agreements that have bearings on discrimination rest on the determination of ‘likeness’ of products. Therefore, the method of analysis of ‘likeness’ can have a far reaching impact on consumers’ interests as well as the multilateral trading system in general. It should be noted that the task of the adjudicators is to interpret the rules of the covered agreements in line with the underlying balance. Thus, what the adjudicators need to decide is whether the domestic product and the imported product are “like” and if they are, whether the imported product are discriminated or received less favorable treatment than the “like” domestic product.³¹⁹ Therefore, the method of analysis chosen by an adjudicator and the factors incorporated in the analysis should be able to address these issues satisfactorily.

In the preceding section we have seen that the current jurisprudence of the multilateral trading system is dominated by the market-based

³¹⁷ See Kuyper, *supra* note 270, at 131 et seq.

³¹⁸ *US — Alcohol and Malt* Panel Report, *supra* note 244, ¶ 5.71. It stated that:

The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. In light of these considerations, the Panel was of the view that the particular level at which the distinction between high alcohol and low alcohol beer is made in the various states does not affect its reasoning and findings.

³¹⁹ Qin, *supra* note 109, at 242.

analysis of ‘likeness’ and focuses on the competitive relations of the products in the market. The alternative approach advocated by others as a suitable method of analysis to address the balance between regulatory autonomy and free trade is the regulatory purpose-based approach.³²⁰ It might appear that a market-based analysis with the Article XX exception in place can yield the same result with the regulatory purpose-based analysis. However, given the implication to the litigating state and to the process itself the two analyses serve quite different purposes. The regulatory purpose-based analysis can help the adjudicators examine the issue of justification and violation simultaneously. This in effect has a far reaching systemic impact for states whose measures are challenged, because justifying an illegal thing and doing a legal thing are not the same. It has significant systemic importance for a member state to ascertain that its measures are legitimate on a tangible normative basis rather than to be found discriminatory and later be justified under a different rationale.³²¹ This was what happened with the Panel’s decision in the *EC — Asbestos* case. In that case the Panel rejected the regulatory purpose in the determination of ‘likeness’ and considered the products to be “like” and found that the measure violated National treatment but hold that the measure can be justified under the Article XX exception.³²² It is also argued that the regulatory distinction cannot be reflected in the competitive analysis that focuses on market criteria.³²³ Therefore, since a regulatory purpose-based analysis serves a different purpose than a market-based analysis, it is important to consider it in order to address the concerns of

³²⁰ See Regan, *supra* note 234, at 444. (Argues that the ordinary meaning of “like products” in the context of Article III:4 of the GATT requires to consider the regulatory purpose of the measure under review.)

³²¹ See Henrik Horn & Joseph HH Weiler, *EC–Asbestos: European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, 2(1) WORLD TRADE REV. 14 (2003).

³²² See *EC — Asbestos* Panel Report, *supra* note 261.

³²³ Porges and Trachtman, *supra* note 247, at 785.

many stakeholders. Most importantly, a regulatory purpose-based analysis will help the adjudicators take into account the difference in regulatory schemes and apparatus among member states. This in turn will reflect the balance that should be maintained at all times between members' regulatory autonomy and the need to limit it in the interest of free international trade. A closer look at both approaches can tell us how the balance can be properly maintained with the appropriate method of analysis.³²⁴ In general it is possible to make a distinction between products that would otherwise be considered "like" products based on market criteria and regulate accordingly. In the Asbestos case, for instance, a regulatory purpose-based analysis would fit to the reasoning of the Appellate Body than its expressed analysis.³²⁵ The Appellate Body reasoning would be fitting to a regulatory purpose-based distinction rather than a market based analysis, since a health risk issue is more akin to government intervention than in the determination of competition. However, the Appellate Body followed the same line of analysis as the Panel except to hold that the products in question are not "like" products and therefore no violation of the National Treatment obligation.³²⁶ The Appellate Body could have reached the same conclusion had it followed a regulatory purpose-based analysis as well. The reluctance of the Appellate Body to apply regulatory purpose analysis appears to reflect the

³²⁴ Even though the same conclusion, sometimes, can be reached through both methods choosing the one over the other has a systemic impact more than the resolution of a particular dispute.

³²⁵ See *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 100. The Appellate Body states that:

A Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favorable treatment" than that accorded to the group of "like" domestic products.

³²⁶ See *EC — Asbestos* Appellate Body Report, *supra* note, 110.

uncertainty as to how regulatory measures should be addressed harmoniously.

Basically the market-based analysis and the regulatory purpose-based analysis can yield different outcomes as far as the issue of ‘likeness’ is concerned.³²⁷In the case of the market-based analysis, two products shall be compared for the purpose of regulation based on their interaction in the market rather than any meaningful distinction that can serve for regulatory purposes. On the other hand, what matters in the case of regulatory purpose-based analysis is the justification of the state concerned in showing that it has a rational basis in making the distinctions other than to afford protection to domestic products. The other point that should be noted is that the regulatory purpose-based analysis can be used both for the determination of the ‘likeness’ of the products as well as to compare the treatment of the domestic and imported products and also in the analysis of the Article XX exception.³²⁸Most importantly, the fact that the regulatory purpose-based analysis is suitable to address a claim of *defacto* discrimination at least in combination with the market-based analysis makes it fit to better serve in maintaining the balance in the multilateral trading system. It can also allow adjudicators to address non-economic interests of consumers like the issue of product/process distinction. It should also be noted that the aim and effect approach is meant to address the regulatory issue demanded by consumers’ interests which was supposed to be addressed through consumers’ taste and preference alone in

³²⁷ For a more detail analysis of the market based and Regulatory Purpose based analysis see for instance Horn and Weiler, *supra* note 321, at 129–151.

³²⁸ Porges and Trachtman, *supra* note 247, at 786.

an idealistic market place where all the necessary information are available to consumers.³²⁹

It is also possible for the regulatory purpose-based analysis to be used together with the market-based analysis. The Appellate Body has showed its willingness to apply the regulatory purpose-based analysis at least in the case of comparing the treatment.³³⁰ Thus, it is possible to blend the two approaches and come up with a more consumer-friendly jurisprudence that does not jeopardize free trade. In doing so the jurisprudence can serve both interests effectively; through the market-based analysis it can make sure that the economic basis of the multilateral trading system can be maintained and at the same time through the regulatory purpose-based analysis it can ensure that the balance between free trade and members' regulatory autonomy is maintained. The Appellate Body in the *US — Clove Cigarette* case expressed its concern in applying the regulatory purpose-based analysis in the determination of 'likeness' instead of the determination of the less favorable treatment issue. It argued that the regulatory purpose-based analysis best fits in the comparison of treatment once the products at issue are found to be "like" than in the determination of 'likeness'.³³¹ This is a clear affirmation of the willingness of the Appellate Body to entertain the regulatory purpose-based analysis in the national treatment analysis.

³²⁹ See *EC — Asbestos* Appellate Body Report, *supra* note, 110; See also Howse and Tuerk, *supra* note 226, 301.

³³⁰ *EC — Asbestos* Appellate Body Report, *supra* note, 110; Porges and Trachtman, *supra* note 247, at 786. (The AB seems to have moved, to some extent, toward an "aim and effects" evaluation not in the context of the determination of "like products" or "directly competitive or substitutable products", but in the comparison of the treatment of imported versus domestic products); see also Howse and Tuerk *supra* note 226, at 301. (They argued that the AB position in this case accommodates both the market based analysis of likeness and the regulatory based analysis of the determination of the treatment.)

³³¹ *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 115.

It may still be argued that the regulatory purpose of a measure should be seen within the context of Article XX of GATT exceptions instead of Article III and a conclusion otherwise would make it redundant. However, the examination of the regulatory objective under Article III will not make the analysis of the same under the GATT XX exceptions redundant and this holding is confirmed by the Appellate Body in the *US — Clove Cigarette* case.³³² Therefore, given the possibility of applying the regulatory purpose under both categories and the fact that the justifications under Article XX of GATT are limited and require a strong burden on the part of the respondent as compared to the Article III analysis, the system will be better served through a regulatory based analysis under Article III. Generally, the incorporation of the regulatory purpose-based analysis at least in the determination of the treatment of products would help address consumers' interests and increases the legitimacy of the multilateral trading system by countering some of the common criticisms against the system. In particular, it can help to defend the adjudicatory process of the multilateral trading system which is sometimes criticized for paying less attention to vital consumers' concerns in favor of predictability and security of the multilateral trading system.³³³ A blend of the market-based analysis with the regulatory purpose-based analysis will contribute for the maintenance of the balance in the system between producers and consumers in that, while the market based analysis will help in maintaining the competitive atmosphere among products, the regulatory purpose-based analysis will help in addressing the interests of consumers.

³³² See for instance Porges and Trachtman, *supra* note 247, at 798.

³³³ Howse and Tuerk *supra* note 226, at 284. (They argue that, alleged role in impeding national governments from granting adequate protection to the environment, or addressing consumer interests and national health and safety concerns, are among most common criticism of WTO)

The above discussion regarding the method of analysis clearly shows that the adjudicators have followed various techniques over the course of the multilateral trading system. This in itself is a concrete evidence to the understanding on the part of the adjudicators that they have the mandate to look for the appropriate method of analysis that can help them interpret the rules of the multilateral trading system properly. It should be with this understanding that any proposal regarding the appropriate method of interpretation should be forwarded. The discussion made so far also revealed the possibility to utilize the market based analysis to entertain consumers' interests. Since the market-based analysis does not dictate a specific threshold in assessing the competitive relationship between products in question it is possible to utilize it and give sufficient weight to the demand side equation in the analysis of 'likeness'.

4.5 Cases to Illustrate the Implication of the Current Interpretive Approaches

In this part the WTO cases that have implication on consumer interests shall be discussed with a view to showing how the multilateral trading system adjudicators respond to issues that would have implications on consumers' choices. The issues involved in the cases, the elements of the cases that have a direct or indirect bearing on consumer interests and how they were interpreted will be highlighted. An attempt will also be made to show how the interpretive approaches can affect the outcome of the case as well as the systemic implication on future cases. It will also try to highlight alternative approaches that would have led to a different outcome. As will be discussed in the next chapter, the case studies are believed to shed light

on the roles of adjudicators in shaping a regime through the interpretations of the rules. It is believed that the discussion in this part can shed light on the ability of the adjudicators in interpreting the existing rules in accordance with the underlying balance and help to address growing concerns of consumers without the need to introduce additional rules or amend the existing rules in the covered agreements.

4.5.1 US — COOL Case

4.5.1.1 The Case

Country of Origin Labeling (COOL) is a measure meant to inform consumers about the origin and contents of a product.³³⁴ Country of Origin Labeling is becoming a serious issue in the multilateral trading system these days. Among other factors, the internationalization of production and thereby the difficulty to locate the origin of a product simply from the product itself contributes to the controversy regarding the issue of Country of Origin Labeling.³³⁵ The origin of a product can be a factor that determines the purchasing decisions of consumers. Especially in food items origin of a food item can have an impact on the preference of consumers. Information as to the origin of a product is a crucial factor as product identity is one part of consumers' behavioral economics.³³⁶ Consumers have an interest to be provided with information as to the

³³⁴ Omphemetse S. Sibanda, *WTO Appellate Body Ruling in United States-Certain Country of Origin Labeling Requirements: Trading Away Consumer Rights and Protections, or Striking a Balance Between Competition-based Approach in Trade and Consumer Interests?*, 48(1) DE JURE 136, 139 (2015).

³³⁵ Harilal & Beena, *supra* note 56..

³³⁶ Michael A. Salinger, *Behavioral Economics, Consumer Protection, and Antitrust*, 6 COMPETITION POL'Y INT'L 65-86 (2010), cited by Sibanda, *supra* note 333, at 140.

origins of products offered in the market.³³⁷ In addition to this the desire to support local economy, nutritional and environmental concerns play vital role in the preference of consumers for locally produced food items.³³⁸

The consumer's consideration for other societal values can also affect their preference for food items that are produced close to them.³³⁹ This in turn may depend on the available information to consumers that would influence their attitude towards certain products or production methods. Social norms more than the individual attitudes can give raise to environmental-friendly behaviors of consumers and can affect the purchasing decision of individual consumers.³⁴⁰ It is also argued that consumers believe that they have a duty to encourage domestic production of goods and services and prefer to consume goods and services produced domestically.³⁴¹ Still other factors which seem totally unrelated to the quality of the product, safety of the production method, the transportation or marketing of the product may still affect the decision of a consumer to prefer a local product than imported product and regional product than products from a far. In contrast to this some may not take into account the origin of a good as an indicator of the quality of the good. Instead, such consumers may take the price of the goods and services as an indicator for the quality of the good.

The other variable that may need to be looked at here in relation to origin could be the education background of consumers. It is understood

³³⁷Alberto Alemanno, *Country of Origin Labelling: The Last Frontier of the Geographic Perceptions of Food*, 1 EUR. J. RISK REG. 266(2010).

³³⁸ Meike Henseleit, et al., *Determinants of Consumer Preferences for Regional Food*, INTERNATIONAL MARKETING AND INTERNATIONAL TRADE OF QUALITY FOOD PRODUCTS 55, 56 (2007).

³³⁹ See Keane, *supra* note 88, at 318.

³⁴⁰ Henseleit et al., *supra* note 338, at 56.

³⁴¹ Koert Van Ittersum, et al., *The Influence of the Image of a Product's Region of Origin on Product Evaluation*, 56(3) J. BUS. RES. 215(2003), cited by Henseleit et al. *Supra* note 338, at 57.

that the fact that whether a consumer is educated or not will have an impact on the capacity to appreciate the attributes of goods and services. It is clear that one of the important interests of consumers that needs to be addressed are access to information on the part of consumers and as such the fact that a consumer is educated will have a positive margin over the uneducated ones regarding accessing the available information as well as synthesizing the same. Thus, it is expected that educated consumers can evaluate products and services by their price and specific qualities without any reference to the brand or labels of origin.³⁴² On the other hand, education may affect consumers to consider the external factors rather than the mere origin of the goods and services. If we are to compare the appropriate alternatives to inform consumers on the basis of the origin of a product it may not sufficiently address the interests of both educated and uneducated consumers. Likewise, price of the goods may not be a sufficient indicator of the quality of a product. It has also been seen that factors unrelated to the quality of the product in question may be taken into account in making preference by consumers.³⁴³ Therefore, it is necessary to take into account such diversities when an attempt is made to address consumer interests. It may not be in the interest of consumers to use one channel of information to address all categories of consumers alike. If it is indeed difficult to address the interests of consumers in a given country across various social divides, how difficult it would be to address the interests of the global consumers through one set of rules and procedures based on the goods and services alone.

Indicating the Marks of Origin on products that are offered to consumers is not a recent phenomenon. It is a common business practice to

³⁴² See Henseleit et al., *supra* note 338, at58.

³⁴³ See Day & Aaker, *supra* note 59.

put Marks of Origin as well as other particulars that would inform consumers and authorities involved in the business. The issue of marks of origin is not as easy as it appears. Different issues are involved in it starting from the need for such marks to the essence of origin itself. Different countries and agreements utilize different parameters to trace the origin of a good. The debate that surrounds the issue of Marks of Origin dictates to look into the background of the issue itself. It has always been the issue of accommodating the competing interests involved in the subject. It is obvious that Marks of Origin can be used abusively to the detriment of consumers as well as competing producers. Thus, the regulation of it can serve both these competing interests positively or negatively. A regulation of Marks of Origin can be effectively used both to inform the consumers as well as discourage competitors vis-à-vis other producers. If we look at the background of a COOL regulation we can see how the competing interests in the subject were addressed throughout its developments.

Increased government adoption of mandatory marks of origin measures in the post-World War I era led to a series of international discussions focused on reaching a consensus on how to limit the impact of these measures on international trade. Recommendations resulting from these meetings form the first five provisions of GATT Article IX. These provisions reflect the understanding from these earlier discussions that member nations are permitted to establish marks of origin laws on consumer information grounds, but the measures should be implemented in a manner that minimizes their impact on international trade.³⁴⁴

³⁴⁴ Wendy A Johncheck, *Consumer Information, Marks of Origin and WTO Law: A Case Study of the United States–Certain Country of Origin Labeling Requirements 1, 22-23 (Dispute, Food Policy and Applied Nutrition Program Discussion Paper , 2010).*

Therefore, it is necessary to understand such context that surrounds the adoption of the rules of origin in order to understand the basic obligation regarding the subject. If we look at the relevant provisions of Article IX, we can see that these ideas are clearly incorporated in it. It is provided that:³⁴⁵

1. Each contracting party shall accord to the products of the territories of other contracting parties, treatment with regard to marking requirements no less favorable than the treatment accorded to “like” products of any third country.
2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

From these provisions we can clearly see that the rules of Marks of Origin try to accommodate the interests of both consumers and international trade. The purpose of the Marks of Origin as well as the requirements to be met in applying it is clearly spelt out. Measures by a member state to give effect to such rules need to take these into account.

When we come to the case at issue, the case was brought by Canada and Mexico against the United States involving a measure by the United States to regulate the use of marks of origin regarding meat products among others.³⁴⁶ The complaint involves many issues and items subject to the measure complained of. However, for the purpose of this study we

³⁴⁵ GATT 1947, art. IX.

³⁴⁶ See Panel Report, *United States — Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/R, WT/DS386/R (Nov. 18, 2011). [hereinafter *US — COOL* Panel Report]

shall limit the discussion on the measures relevant to meat. In this case both complaining parties claimed that the measures of the United States violated its commitment under the covered agreements of the WTO. Specifically Canada alleged that the COOL Measure of the United States is inconsistent with its obligation under Articles 2.1, 2.2 of the TBT Agreement and Articles III:4, X:3(a) and XXIII:1(b) of GATT 1994; Mexico on its part alleged that the COOL measures are in violation of Articles III:4 and X:3 and XXIII:1(b) of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement.³⁴⁷ It should be noted here that the complainants have also included a non-violation complaint under Article XXIII:1(b) of GATT 1994.

The measures at issue in this case were the various legislations enacted by the United States that regulate the labels that should be put on the meat products according to the origin of the cattle. The legislations established different sets of labels for the meat products according to where the cattle are born, raised and slaughtered. The products at issue were basically imported Canadian cattle and hogs and imported Mexican cattle, which were used to produce beef and pork in the United States and are subjected to the COOL measure.³⁴⁸

Specifically, Canada submits that its complaint concerns the application of the COOL measure to "beef and pork produced in the United States from cattle and hogs imported from Canada". ...Canada further defines the imported products at issue as cattle and hogs falling into one of the following categories: (i) born in Canada and raised in the United States; (ii) born and raised in Canada; or (iii) born in the United States and raised in Canada. Domestic cattle and hogs, argues Canada, are those born, raised and slaughtered in the

³⁴⁷ *Id.* ¶ 3.1, 3.3.

³⁴⁸ *Id.* ¶ 7.64.

United States. Mexico also specifies that its claims relate to exports of Mexican live feeder cattle (i.e. cattle born in Mexico, and then raised and slaughtered in the United States, including cattle partially fed in Mexico and subsequently raised and slaughtered in the United States).³⁴⁹

When we come to the arguments of the parties the complainants have alleged that the United States failed to fulfill its obligation under the TBT Agreement because 'complying with the COOL requirements result in higher segregation costs for livestock which in turn affects the competitive conditions of imported livestock in the market and therefore are inconsistent with Article 2.2 of the TBT Agreement'.³⁵⁰ They claimed that:

The true objective of the COOL requirements is to protect domestic industry, not to provide consumer information on origin as stated by the United States, and that, in the circumstances of this dispute, the provision of consumer information is not legitimate.³⁵¹

They further claimed that:

The complainants state that there are less trade restrictive alternatives and, in any event, the COOL requirements do not fulfill the objective of providing consumer information on origin because labels under the COOL requirements convey confusing and inaccurate information on the origin of meat products.³⁵²

After analyzing the arguments of the parties and third party participants the Panel concluded that the COOL measure of the United States in particular in relation to muscle cuts labels violate Article 2.1 of the TBT Agreement since it affords imported livestock treatment less

³⁴⁹ *Id.* ¶¶ 7.65, 7.66.

³⁵⁰ *Id.* ¶ 7.2.

³⁵¹ *Id.* ¶ 7.3.

³⁵² *Id.*

favorable than that accorded to “like” domestic products and Article 2.2 since its measure does not fulfill the objective of providing consumer information in relation to meat products.³⁵³ However, on appeal the Appellate Body reversed the finding of the Panel regarding Article 2.2.³⁵⁴ According to the Appellate Body what is required under Article 2.2 of the TBT is comparing alternative measures as to their impact on international trade with the measure at issue and decide whether the measure at issue is more trade restrictive than alternative measures.³⁵⁵ Hence, the Panel’s analysis that focused on the threshold of contribution by the measure at issue towards the stated objective was found to be erroneous by the Appellate Body. In effect the Appellate Body rejects any tendency to rely on the threshold in which a given measure contributes towards a set objective; rather it should be the degree against available less trade-restrictive measures that needs to be compared³⁵⁶

4.5.1.2 Concluding Remarks

From this we can deduce that the issue of whether a certain measure fulfills legitimate objective should be evaluated in comparison with other alternative measures as to their effect on international trade. Thus, as far as a certain measure contributes towards the fulfillment of such objectives and there is no other less trade restrictive alternative the magnitude in which the said measure contributes does not affect its validity. This case can be considered as an example to show how the balance between regulatory autonomy and free trade should be evaluated, especially in regards to the impact of a measure on trade. The Appellate Body is saying

³⁵³ *Id.* ¶ 8.3.

³⁵⁴ *US — COOL* Appellate Body Report, *supra* note 136, ¶ 496.

³⁵⁵ *Id.* ¶ 468.

³⁵⁶ *Id.*

in this case that a legitimate regulatory measure may not be considered in violation of the WTO discipline unless it is found to be more trade restrictive than other available alternatives. Otherwise, whether it has little contribution to the stated objective of the measure taken objectively cannot be taken into account as far as the requirement of less trade restrictive is concerned.

The other important aspect of this case can be the method of analysis of the adjudicators they followed in order to evaluate the legitimacy of the measure at issue. In this case the adjudicators focused on the segregation cost required to comply with the COOL requirement. By looking at the segregation cost and the preference by meat producers to rely on domestic livestock in order to avoid the complex segregation requirements, the Panel concluded that the COOL measure violates Article 2.1 of the TBT Agreement.³⁵⁷ The Appellate Body also confirmed the holding of the Panel albeit on a different reasoning.³⁵⁸ It argued that since the cost of segregation and the information to be provided to consumers are not proportional it cannot be said that the measure is in pursuance of a legitimate regulatory objective and thereby violates Article 2.1 of the TBT Agreement.³⁵⁹

A closer look at the analysis of the measure at issue followed by the adjudicators can shade light on the impact of focusing on either the demand or supply side in the analysis of the products and a measure at issue. Even though the Panel and the Appellate Body tried to show how the measure is ineffective in achieving its legitimate objective due to its complex regulatory requirements and associated costs, they also showed us the focus of their analysis. They focused on the segregation cost required to

³⁵⁷ *US — COOL* Panel Report, *supra* note 346 ¶ 7.317.

³⁵⁸ *US — COOL* Appellate Body Report, *supra* note 136, ¶ 350.

³⁵⁹ *Id.* ¶ 349.

meet the measure at issue. From the case, it can be easily inferred that despite the higher cost associated with it, it is not totally impossible to implement the measure without, of course, ignoring the other segments of the measure, the fact that there is a possibility to use mixed levels that can miss inform consumers, should not be overlooked.³⁶⁰

At this point it should also be noted that the adjudicators considered the information alleged to be provided pursuant to the measure and the ability of the procedures to deliver the actual information to consumers under the circumstances. Despite the decisions to find the measures in violation of the requirements of the TBT Agreement, this case indicates the position of the adjudicators regarding one vital consumer interest; the right to information. Thus, this case could be taken as an indicator for the recognition of the rights of consumers to information about the product offered in the market. Regarding the interpretive approach it cannot be said much in this case since the issue is not about the regulatory basis of the measure. Rather it is about whether the measure in fact serves its purpose within the conditions required under the relevant agreement. In conclusion the adjudicators found that the measure is not serving its purpose as expected and cannot be maintained in its current format.

4.5.2 *EC — Sardines Case*

4.5.2.1 The Case

The *EC — Sardines* case was between Peru and the European Union regarding the label on sardine.³⁶¹ The challenged measure involves the European Union's regulation establishing common marketing standard for

³⁶⁰ *Id.*

³⁶¹ See *EC — Sardines* Panel Report, *supra* note 290.

preserved sardines which require that only products from *Sardina Pichardus* could be labeled and marketed as preserved sardines.³⁶² The dispute concerns the distinction made by the regulation between *Sardina Pichardus* which is found mainly in European fishing areas and *Sardinops Sagax sagax* which is found in the fishing areas of Peru. Both fishes belong to the same sub-family but in different genus.³⁶³ The European Union Regulation prohibits the use of the label "Sardine" to the *Sardinops Sagax* of Peru.³⁶⁴

Regarding the labeling of sardines, there is a standard set by the Codex Alimentarius in which the different species featuring similar characteristics with *Sardina Pichardus* could be labeled and marketed.³⁶⁵ According to the Codex Standard, other sardines can be labeled by including the country, a geographical area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold in a manner that does not mislead consumers.³⁶⁶ The standard defines *Sardina Pilchardus Walbaum* and 20 other species including *Sardinops sagax sagax* as "sardines" provided that these 20 other species were further identified in the marketplace by country or region.³⁶⁷ Thus, Peru claimed that the Regulation of the European Union is inconsistent with Article 2.4 of the TBT Agreement in prohibiting the use of "sardines" combined with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines-*Sardinops sagax*"); or the

³⁶² *Id.*

³⁶³ *Id.* ¶ 2.1.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* ¶ 2.9.

³⁶⁷ Siwon Park and Chris Wold, *An Analysis of the WTO Appellate Body's Report in the Sardines Case: Implications for Ecolabels*, (Aug. 10, 2005) available at, <https://www.lclark.edu/live/files/169>, Last visited October 21, 2015.

common name of the species *Sardinops sagax* customarily used in the language of the European Communities in which the product is sold.³⁶⁸

After examining the arguments of the parties the Panel and Appellate Body concluded that the measure of the European Union is inconsistent with Article 2.4 of the TBT Agreement.³⁶⁹ In this case the Panel and the Appellate Body took note of a claim by the European Union regarding the Regulation and the impact on consumers in creating certain behavior through the Regulation. However, the Panel and the Appellate Body rejected the claim arguing that permitting regulatory intervention to create consumers expectation that would affect competitive conditions and thereafter find justification for the measure which created such expectation amounts to permitting a member to create a self-justifiable trade barriers.³⁷⁰ In other words, the Panel and Appellate Body made a distinction between regulatory interventions aimed at dictating consumers to make a certain choice and those aimed at providing consumers the relevant information to help meet the already established behavior. Accordingly, regulatory intervention aimed at providing consumers with relevant information to make choices is permitted. Apart from this, the Panel and Appellate Body seem to recognize the right of member states to establish a regulation even different from the one recognized by international standards, if the said international standard is found to be ineffective or inappropriate means to fulfill the legitimate objectives of market transparency, consumer protection, and fair competition.³⁷¹

³⁶⁸ *EC — Sardines* Panel Report, *supra* note 290, ¶ 3.1.

³⁶⁹ *Id.* ¶ 8.1; *EC — Sardines* Appellate Body Report, *supra* note 139, ¶ 315.

³⁷⁰ *EC — Sardines* Panel Report, *supra* note 290, ¶ 7.127.

³⁷¹ Park and Wold, *supra* note 367.

4.5.2.2 Concluding Remarks

In this case it appears that both the supply side analysis as well as the demand side analysis were considered. In fact, there would not be a meaningful difference in the outcome no matter which side was taken. This is precisely because there exists an international standard and the analysis focuses on the conformity of the measure to the said standard. In addition to that there is no much issue that would require taking into account the demand side consideration as an autonomous factor because the products can still be easily distinguished under the existing labels. It is also clear from the case the issue is not between European consumers and Peru suppliers; rather it is between Peru suppliers and European suppliers. Therefore, there is no need to argue for a demand side analysis or a different approach in the guise of consumers' interests.

The other point that should be taken from this case is the holding of the Appellate Body regarding Article 2.2 of the TBT Agreement. According to the Appellate Body it can be inferred from the wordings of Article 2.2 of the TBT Agreement that legitimate objectives can include other objectives which are not specified therein, as far as they are justifiable given the circumstance of the case and need to be determined as such by the relevant organs of the multilateral trading system.³⁷² In doing so, factual evidence of consumer practice could be an important factor in evaluating the legitimacy of domestic objectives of a regulation at issue.³⁷³ Thus, this case confirms the acknowledgement of the adjudicators as to the necessity to determine the legitimacy of an internal measure aimed at addressing consumers' interests on a case-by-case basis taking into account

³⁷² EC — *Sardines* Appellate Body Report, *supra* note 139, ¶ 286.

³⁷³ EC — *Sardines* Panel Report, *supra* note 290, ¶ 7.123-7.138; Park and Wold *supra* note 367.

the general balance that needs to exist at all times. This indicates that consumers' interest may expand and develop from time to time demanding various mechanisms to deal with.

4.5.3 *EC — Hormones Case*

4.5.3.1 The Case

The *EC — Hormones* case involves a dispute between the United States of America and Canada against the European Union regarding the European Union measure that prohibits the administration of certain hormones to farm animals and a prohibition of importation of meat product from such farm animals.³⁷⁴ This case is among the important cases that can raise issues regarding the extent of the WTO's intrusion on the regulatory sphere of member states in order to safeguard the interests of its citizens. It certainly shows how the multilateral trading system can affect the consumption behavior of individuals within its member states. It is an important case to evaluate the relationship between states sovereignty and international trade in relation to domestic regulation.³⁷⁵ It is a proof that the multilateral trading system can affect everyone involved in international trade no matter how such entity appears to be located far away from the direct hands of the system. This case clearly sheds light on the regulatory leverage of member states in the face of WTO disciplines on a very wide realm of free trade. Some even criticize the case as an illustration as to how the provisions in the SPS Agreement constrain 'democratic communities of

³⁷⁴ See Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (August 18, 1997). [hereinafter *EC — Hormones Panel Report*]

³⁷⁵ John H Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11(2) EUR.J. INT'L L. 303, 305 (2000).

sovereign regulatory choices'.³⁷⁶ Most importantly the fact that the US and Canada successfully challenged EU measure purportedly aimed at safeguarding the consumers from risk associated with the consumption of meat in which the said hormones are administered increases the frustration to those who are concerned about the increasing intrusion of the multilateral trading system on the regulatory autonomy of member states.³⁷⁷

It is accepted that there was a serious concern regarding the health risk associated with the consumption of those products from animals treated with the said hormones and the regulatory measure at issue had been adopted in response to these concerns from consumers.³⁷⁸ In this case the Panel took into account the context in which the measure was taken; that is the concern of EU citizens on the health risks associated with the use of hormones in farm animals. This is clearly taken up by the Panel and stated that:

European consumers' concern over the use of hormones for growth promotion purposes in livestock grew steadily throughout the 1970s as the result of the illegal use of dethylstilboestrol, commonly known as DES, in veal production in France and incidents, particularly in Italy, where adolescents had been reported to be suffering from hormonal irregularities and veal had come under suspicion as a possible cause. European consumer organizations called for a boycott of veal, and the market for veal was severely affected. On 20 September 1980, the EC Council of (Agriculture) Ministers adopted

³⁷⁶ Howse, *supra* note 161.

³⁷⁷ *See id.* at 2. Argue that:

The ban directly responded to widespread fears of citizens about the risks presented by such hormones, particularly if they might be present in foodstuffs at levels beyond those that would occur if the hormones had been administered in accordance with good veterinary practice.

³⁷⁸ Howse and Tuerk, *supra* note 226, at 284.

a declaration in favor of a ban on the use of oestrogen and endorsed the principle of greater harmonization of legislation on veterinary medicines and of greater control on animal rearing, both at the production and slaughtering stages.³⁷⁹

In addition to the incident regarding the adolescents in Italy, there were reports from other places that DES was found in baby food made from veal and cases of children born with defects as a result of exposure to DES.³⁸⁰ This case can illustrate the difference in risk evaluation by consumers and the authorities in different jurisdiction. It is argued that the European Union is believed to have a higher level of protections to its consumers as compared to others and the ban on those hormones is in line with such higher standard and does not violate the SPS agreement.³⁸¹ Contrary to the position held by the European Union the United States dismisses consumer concerns and argue that it should not play a significant role in permitting a country to impose a ban without a scientific justification that results in restriction of international trade.³⁸²

After evaluating the arguments of the parties, the Panel and Appellate Body decided that the measure of the European Union is inconsistent with the SPS Agreement since it is not based on a risk assessment as required, and thereby violates its commitment to the multilateral trading system.³⁸³ However, the decision provided a good relief to those who are concerned on the implication of the case on the

³⁷⁹ *EC — Hormones* Panel Report, *supra* note 374, ¶ 2.26.

³⁸⁰ Carter, *supra* note 154, at 625; Janice Castro, *Why the Beef over Hormones?*, 16 *TIME*, JAN (1989), cited by Tim Josling, et al., *The Beef-Hormone Dispute and Its Implications for Trade Policy* 1, 3-4 (Working Paper, 1999).

³⁸¹ Josling et al. *Supra* note 380, at 14.

³⁸² *Id.*

³⁸³ *EC — Hormones* Panel Report, *supra* note 374, ¶ 9.1; Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R/, ¶ 253, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC — Hormones* Appellate Body Report].

ability of states to take measures to safeguard consumer interests in respect to hormones and similar issues that have some appreciable risk to health. The decision affirmed the rights of members to establish a level of consumer protection higher than the level recognized by the relevant international standard so far as the states can show an objective risk assessment.³⁸⁴

4.5.3.2 Concluding Remarks

Four factors can be discerned that contributed to the complexity of the *EU — Hormone* dispute; the administrative difference and the impact of different systems of law in those countries involved, the different political circumstances which may allow some issues to control the policy environment, the difference in culture and tradition as illustrated in the difference between the consumers reaction to risks, and the difference on commercial interests.³⁸⁵ Again this case illustrates the delicate balance required between regulatory autonomy and trade liberalization. It can also show how the alternative interpretive approaches would result in a more harmonized conclusion than this more controversial one from the perspective of consumers' interests. It is also an important case that can show the importance of normative integration at the level of the adjudicatory process. This is because as the case reveals the issue at hand almost boiled down to whether the EC can take a precautionary measure and the extent of a precautionary measure as understood under international law.³⁸⁶ Thus, even though the adjudicators arrive at a different conclusion regarding the precautionary principle and declined from

³⁸⁴ Josling et al., *supra* note, 380 at 24.

³⁸⁵ *Id.* at 23-24.

³⁸⁶ *EC — Hormones* Appellate Body Report, *supra* note 383.

analyzing the principle from the perspective of general international law, it clearly left a lesson to the multilateral system that normative integration would do more good to the interpretations of the rules of the multilateral trading system.

4.5.4 *EC — Asbestos Case*

4.5.4.1 The Case

The *EC — Asbestos* case involves a measure by France banning the importation of materials containing asbestos which is claimed to be carcinogen.³⁸⁷ This case can be a good example to show how the adjudicatory bodies tried to maintain consistency in their interpretation of the rules of the multilateral trading system. It can show how the multilateral trading system jurisprudence developed so far and its importance to the understanding of the multilateral trading System.

In this case the Appellate Body also made a good point in showing the mere fact that two products are “like” does not necessarily warrant similar treatments from the regulatory organ of a member state.³⁸⁸ Therefore, member states are not required to treat “like” products identically in relation to domestic regulations as far as there are justifications that warrant different treatment. The Appellate Body also indicated that in case of regulatory measures, the complaining member must show that the differences in regulation amount to ‘less favorable treatment’ as between domestic and imported “like” products.³⁸⁹ While

³⁸⁷ *EC — Asbestos* Panel Report, *supra* note 261.

³⁸⁸ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 100; *see also* the discussion by Howse and Tuerk, *supra* note 226, at 288.

³⁸⁹ *EC — Asbestos* Appellate Body Report, *supra* note, 110, ¶ 100.

addressing the issue of ‘likeness’ the Panel relied on the test of ‘likeness’ made by the 1970 GATT Working Party Report on Border Tax Adjustment which took the properties, nature, and quality of the products; end uses of the products; consumers’ perceptions and behavior; and tariff classification of the products and found that asbestos and alternatives to it are “like” products.³⁹⁰ The Appellate Body reversed the standard, even though it accepted the tests to determine ‘likeness’, and emphasized on the examination of all the evidences including the physical characteristics and concluded that asbestos containing materials and those substitutes that do not contain asbestos are not “like” products.³⁹¹

The other important point that needs to be taken into account here is the treatment of health issue by the Appellate Body. In this case, the Appellate Body appeared to give less weight to health concerns in determining ‘likeness’ even though it expressly acknowledge it to be one factor that needs to be evaluated in the determination of ‘likeness’ under Article III:4 of GATT 1994.³⁹² That is why it is claimed that the decision of the adjudicators in this case, despite the result of upholding the French measure, are threatening to those concerned on the impact of the WTO on human health and other social issues.³⁹³

³⁹⁰ *EC — Asbestos Panel Report*, *supra* note 261, ¶ 8.144; *see* the discussion by, David A Wirth, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, 96(2) AM. J. INT’L L.435, 436 (2002).

³⁹¹ *EC — Asbestos Appellate Body Report*, *supra* note, 110, ¶ 100.

³⁹² *See EC — Asbestos Appellate Body Report*, *supra* note, 110, ¶ 113.

³⁹³ *See* Howse and Tuerk, *supra* note 226, at 287-288. Argued that:

The notion that health considerations should be irrelevant in determining whether products are ‘like’ for purposes of assessing domestic regulations appeared to speak volumes about the obtuseness of the WTO in regard to basic human interests.

4.5.4.2 Concluding Remarks

As discussed above, this case shows how interpretive approaches can have a decisive role in the administration of the multilateral trading system despite the particular conclusion of the adjudicators regarding a particular measure. We can also see from the discussion that the approaches of adjudicators are somehow tilted in favor of the supply side rather than the demand side. Had they focused on the demand side the issue might have been a little bit softer than it appeared. In fact, it is difficult to argue that the Appellate Body totally disregards health risks in the determination of ‘likeness’. Instead it avoided evaluating the health risks associated with asbestos as a separate factor from the physical factor and consumer tastes. It stated that:

We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibers need to be examined under a separate criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers' tastes and habits.³⁹⁴

At this point it is important to note this and to consider it together with the previous discussion regarding the desire of the adjudicators to maintain consistency in their interpretations. Thus, it is expected to maintain a similar line of argument to dispose the case at least as far as the issue of ‘likeness’ is concerned. If there are means to address the health issue, the holding of a given product as a “like” product might not jeopardize the interests of consumers. However, what we note here is the

³⁹⁴ *EC — Asbestos Appellate Body Report*, *supra* note, 110, ¶ 113.

struggle of the adjudicators to maintain the previous interpretation of ‘likeness’ and to keep substitutable items within the domain of “like” goods. This may appear to be a threatening jurisprudence to consumers’ interests that would like to make distinction between substitutable goods and services on the basis of various factors, at times which are far from the criteria of substitutability. However, this might not be the case if the adjudicators, for instance, included the regulatory purpose-based approach at least in the determination of the treatment which would allow differentiation for the purpose of regulatory measure even between “like” products. Or as indicated above follow the demand side in the analysis of ‘likeness’ and found the two products unlike. In any case, in this particular case the Appellate Body appeared to introduce new jurisprudence in the direction of according sufficient deference to domestic regulatory measures that address vital health interest.³⁹⁵

4.5.5 *US — Tuna Case*

4.5.5.1 The Case

The *US — Tuna* case was brought by Mexico against the United States concerning measures relating to the label of tuna.³⁹⁶ In this case one important issue that was addressed by the Panel was whether regulatory measure on the basis of the process or production method is GATT

³⁹⁵ Howse and Tuerk, *supra* note 226, at 288.

³⁹⁶ For a full understanding of the issues involved see *US — Tuna I* Panel Report, *supra* note 3; Panel Report, *United States — Restrictions on Imports of Tuna*, DS29/R (June 16, 1994); Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) [hereinafter *US — Tuna II* Panel Report].

illegal.³⁹⁷ Mexico brought the tuna case to the attention of the multilateral trading system both in the GATT era as well as the WTO. Even though the report of the Panel was not adopted during the GATT period,³⁹⁸ it has its own implication on the understanding of the analysis of the measures taken on the basis of production method and process. The development of the disciplines of the multilateral trading system changes the subsequent dispute both in regards to the analysis of the measure at issue as well as the outcome of the dispute. The dispute also gave the dispute settlement body of the WTO the chance to clarify the rules of the TBT Agreement as the dispute concerns technical regulation as regulated under the Agreement. Unlike the report of the Panel in the GATT period, the reports of the Panel and Appellate Body were adopted by the Dispute Settlement Body of the WTO.³⁹⁹

The case involves a measure by the United States that prescribes certain requirements for tuna harvested in the Eastern Tropical Pacific Ocean to be labeled as ‘Dolphin-Safe’ and marketed in the United States.⁴⁰⁰ Mexico claimed that the measure at issue is discriminatory and thereby inconsistent with Articles I:1, III:4 of GATT 1994 and Articles 2.1, 2.2, and 2.4 of The TBT Agreement by establishing conditions for the use of “Dolphin-Safe” label on the basis of the area where the tuna is harvested

³⁹⁷ See Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37(1) AM. BUS. LAW J.73, 101 (1999); Keane, *supra* note 88, at 314; *United States — Restriction on imports of Tuna*, 30 ILM (1991) 1594; *United States — Restriction on Imports of Tuna*, 33 ILM (1994) 936, cited by Robert Howse & Donald Regan, *The Product/Process Distinction-an Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11(2) EUR.J. INT’L L.249(2000).

³⁹⁸ The Report was discussed by the council but has not been formally presented with a view to adopt it.

³⁹⁹ At its meeting on 13 June 2012, the DSB adopted the Appellate Body report and the Panel Report, as modified by the Appellate Body report. See *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381.

⁴⁰⁰ See *US — Tuna II* Panel Report, *supra* note 396.

and on the method of harvesting.⁴⁰¹ Mexico's argument apparently focuses on the fact that the measure relates to the area of the harvest and the method of harvesting rather than the product itself and thereby makes a discriminatory application as compared to the "like" US products. It argued that the labeling regime is inconsistent with Article 2.1 of the TBT Agreement since it affords treatment less favorable to Mexico tuna products as compared to US tuna products and tuna products originating from other countries.⁴⁰²

After analyzing the case, the Panel concluded that the tuna products produced in Mexico are "like" products with tuna products produced in the US and other countries⁴⁰³ but held that tuna products originated from Mexico were not afforded less favorable treatment than tuna products of the US and other origins and thereby not inconsistent with Article 2.1 of the TBT Agreement.⁴⁰⁴ Regarding the claim of Article 2.2 of the TBT, the Panel concluded that the measures are more trade restrictive than necessary to fulfill their legitimate objectives and thereby inconsistent with Article 2.2.⁴⁰⁵ And regarding the claim under Article 2.4 of the TBT Agreement the Panel rejected Mexico's argument regarding the availability of international standard to base the measures and held that the said standard would not be appropriate or effective to achieve the US objective.⁴⁰⁶ On appeal the Appellate Body reversed the holding of the Panel even though it maintained the overall conclusion of violation of its commitment against the US. The Appellate Body concluded that the measures are not

⁴⁰¹ *Id.*

⁴⁰² *See id.*, ¶ 7.190.

⁴⁰³ *Id.*, ¶ 7.251.

⁴⁰⁴ *Id.*, ¶ 7.374.

⁴⁰⁵ *Id.*, ¶ 7.620.

⁴⁰⁶ *Id.*, ¶ 7.739.

inconsistent with Article 2.2 but violates Article 2.1 of the TBT Agreement in a complete opposite conclusion.⁴⁰⁷

4.5.5.2 Concluding remarks

As discussed before, this case was brought both during the GATT period and during the WTO system. Both sets of dispute mechanisms can tell us more to understand the rhythm in the dispute settlement mechanism and the implications of the different analysis made by the respective dispute settlement bodies involved in the two leg disputes.⁴⁰⁸ Most importantly, in the first leg, the attention given to the distinction between the product on the one hand and production method and process on the other hand can tell us much about the implications of various analyses by the adjudicators in interpreting the rules of the multilateral trading system. A different analysis can lead to a completely different conclusion that can have far-reaching implication on the understanding of the rules of the system. It is here where the adjudicators can play a pivotal role in the clarification of the rules of the multilateral trading system. A certain choice in the analysis of the rules of the covered agreements can change the shape of the system for good or worse. In the second leg again we got the opportunity to analyze the systemic implication of the interpretations of the substantive rules of the TBT Agreement in regards to regulatory measures by member states.⁴⁰⁹ It

⁴⁰⁷ Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) [hereinafter *US — Tuna II* Appellate Body Report]; see also Gregory Shaffer, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 107(1) AM. J. INT'L L. 192 (2013).

⁴⁰⁸ There are good lessons to be drawn from the analysis of the GATT Panel as well as the WTO Panel and Appellate Body holdings.

⁴⁰⁹ This dispute is among the first disputes where the WTO dispute Settlement Body was called upon to interpret the substantive provisions of the TBT Agreement for the first

is also a dispute that highlighted the question of production method and process as a basis for regulatory purpose as well as the relationship between the rules of the WTO and other rules of international law.⁴¹⁰ Even though the Panel and the Appellate Body concur in the outcome, their analyses of the measure at issue were diametrically opposite. Regarding the legitimacy of product/ process-based labeling, the Appellate Body accepted as a legitimate basis without clearly analyzing the issue in the context of process that took place outside the jurisdiction of the state taking the measure and accepted the US measure as a legitimate measure taken in pursuing a legitimate objective.⁴¹¹ This is a clear affirmation as to the legitimacy of a regulatory measure on the basis of production method irrespective of the ‘likeness’ of a product as a product. This seems a great departure from the holding of the Panel in the first leg that was not willing to make a distinction between products based on factors that do not have an impact on the physical characteristics of a product as a product.⁴¹²

The other point that can be taken from the tuna dispute is the analysis of the Appellate Body regarding the question of less favorable treatment and thereby a violation of Article 2.1 of the TBT Agreement. The Appellate Body holds that for a violation of Article 2.1 to occur the adjudicators should determine whether the technical regulation at issue modifies the competitive position of the product in the market in question

time. The others are the *US — Clove Cigarette* and the *US — COOL* Case, *see* Shaffer, *supra* note 407, at 193.

⁴¹⁰ Shaffer, *supra* note 407.

⁴¹¹ *See US — Tuna II* Appellate Body Report, *supra* note 407, ¶¶ 341, 342; *see also* *US — Shrimp* Appellate Body Report, *supra* note 48.

⁴¹² *See* Howse and Regan, *supra* note 397, at 251. They stated that:

The Panel held that regulatory measures based on the process or production method, rather than inherent or physical characteristics of the product itself, fell outside of Article III, and thus that such process-based measures, where applied to imports, constituted a violation of Article XI of the GATT.

See also Potts, *supra* note 237, at 12.

to the detriment of “like” products.⁴¹³ This is not surprising given the development of the jurisprudence towards a competitive based analysis. Here again we can see how the ‘likeness’ analysis appeared to tilt in favor of the supply side. The adjudicators found the products to be “like” from the perspective of the producers, otherwise they are “unlike” from the perspective of consumers. The Panel also recognized this fact even though it followed a different line of analysis in determining whether they are “like” or not.

4.6 Implications of the Conclusions on Consumers’ Interests

Appraising the implication of the jurisprudence is imperative for a clear understanding of the multilateral trading system. After all, the rules of the multilateral trading system encompass the interpretation of the adjudicators as well. The interpretation of a rule by the adjudicators can determine future courses of action of the multilateral trading system.⁴¹⁴ Therefore, understanding the jurisprudence helps us to understand the extent of the impact of the rules of the multilateral trading system on consumer interests. It also helps us to understand how the system responds to acts of consumers that would have an adverse impact on international trade. As legal rules are dynamic, adjudicators are expected to take such facts into account. Thus, examining the jurisprudence can tell us to what extent the WTO dispute settlement mechanism is responsive to the legal dynamism.

⁴¹³ *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 180; *see also US — Tuna II* Appellate Body Report, *supra* note 407, ¶ 215.

⁴¹⁴ *See* Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001). [hereinafter *US — Shrimp Recourse to Article 21.5* Appellate Body Report]

It is sometimes argued that the multilateral trading system is giving more emphasis to security that may undermine the focus for dynamism.⁴¹⁵

The analysis of the implication of the jurisprudence as reflected in these cases should base itself on the basic premises of the multilateral trading system itself. The underlying rationale for establishing the multilateral trading system is to bring about an improved wellbeing of mankind through free trade.⁴¹⁶ Therefore, free trade should be understood as one area through which the wellbeing of mankind can be improved.⁴¹⁷ This in effect tells us that there are other equally important aspects that need to be balanced whenever a measure to promote free trade is taken and vice versa. Member states are equally responsible in addressing these other values while implementing the multilateral trade rules. In general, the conclusions in the cases discussed above can serve to draw some lessons as to the role of the adjudicatory process in addressing consumers' interests as well as the impact of the approaches used to analyze 'likeness' and other relevant issues. Even though it is very difficult to draw an appropriate pattern from these cases,⁴¹⁸ it is possible to draw a general lesson that would highlight the implication on consumers' interests and direct future courses of actions.

4.6.1 The Approaches Used in the Analysis of Likeness

As discussed in more detail under the preceding sections, the determination of "like" products has played and is playing significant role in the WTO

⁴¹⁵ Howse and Tuerk *supra* note 226, at 284.

⁴¹⁶ See preamble to the WTO Agreement.

⁴¹⁷ See Emily Reid & Jenny Steele, *Free Trade: What is it Good For? Globalization, Deregulation, and 'Public Opinion'*, 36(1) J. LAW SOC. 11, 19 (2009).

⁴¹⁸ We have seen in the sample cases that different approaches are used without following strict consistency in the jurisprudence.

disciplines.⁴¹⁹ For the most part the disputes under the multilateral trading system revolve around the determination of ‘likeness’ of products.⁴²⁰ The issue of ‘likeness’ was a subject of interpretation in numerous cases brought before the adjudicators of the multilateral trading system.⁴²¹ The main tenet of the ‘likeness’ analysis rests on the non-discrimination principle which is the cornerstone of the multilateral trading system. Therefore, the analysis should focus on rooting out discriminatory measures that make distinction on “like” products for trade measures. It should focus on spotting disguised distinction that would deprive “like” products equal treatments. A *contrario* reading of the rationale of the determination of ‘likeness’ can tell us the possibility to introduce factors in the analysis of ‘likeness’ that are not random and are not meant only to justify a discriminatory scheme. Therefore, a mere distinction in tariff schedule, naming or any other classification that try to make a distinction between two “like” products just to cover a discriminatory measure cannot escape the disciplining of the multilateral rules.⁴²² Conversely, if there are tangible differences that can make a difference in the eyes of consumers, for instance, it is possible to make a distinction for the purpose of regulatory measures without attracting the disciplining of the multilateral trading system.

The adjudicatory bodies through the case laws as well as the members of the multilateral trading system tried to set parameters that

⁴¹⁹ Goco, *supra* note 219.

⁴²⁰ *Id.*

⁴²¹ See for instance *US — Petroleum* Panel Report, *supra* note 269; *Japan — Customs Duties* Panel Report, *supra* note 232; Panel Report, *Japan — Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, (July 11, 1996).

⁴²² See for instance Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (May 22, 1997). [hereinafter *EC — Banana III* Panel Report]

would help in analyzing the ‘likeness’ of products.⁴²³ Such criteria are used invariably by adjudicators of the multilateral trading system.⁴²⁴ It seems a common understanding that the determination of ‘likeness’ rests on a case by case basis and adjudicators need to apply the illustrative criteria propounded so far in the determination.⁴²⁵ The other most notable feature of the determination of ‘likeness’ in the jurisprudence of the multilateral trading systems seems to be the market-based analysis. However, we already have seen that this does not mean that the same analysis will be made by panels and the Appellate Body in all cases that involve the determination of ‘likeness’. It is still possible to differ in the conclusion as to whether two products are “like” on the basis of the market-based analysis since the weight to be given to the various factors can still differ.⁴²⁶ Despite such possibilities, however, the choice to base the analysis on market-based criteria is one thing that can guide the jurisprudence to a certain direction. If we look at the market-based jurisprudences so far we can see that the jurisprudence tend to tilt in favor of functional criteria in determining ‘likeness’ as compared to actual

⁴²³ GATT Working Party on Border Tax Adjustment, cited by Potts, *supra* note 237, at 13. The Report set out the basic approach for interpreting ‘like or similar products’ generally in the various provisions of the GATT 1947. The working party report concluded that:

Problems arising from the interpretation of the terms [‘like products’] should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is similar: the product’s end uses in a given market, consumers’ tastes and habits, which change from country to country, the product’s properties, nature and quality.

⁴²⁴ Potts, *supra* note 237, at 13.

⁴²⁵ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 20.

⁴²⁶ See for instance *EC — Asbestos* Appellate Body Report, *supra* note, 110. In this case, while both the Panel and Appellate Body based their analysis on market basis they reached on a different conclusion as to whether the products are like.

competitiveness of the products in a given market.⁴²⁷ In this regard the analysis of the Appellate Body in the Asbestos case is a great departure from the previous jurisprudence. In that case the Panel concluded that Asbestos and other fibers are “like” products in line with the implicit priority of functional criteria in previous cases.⁴²⁸ Contrary to the holding of the Panel, however, the Appellate Body followed a different line of analysis and focuses on the general competitive relationship between the products in question.⁴²⁹ This in effect will give a chance for other criteria to feature in the determination of ‘likeness’ such as production method and process among others that can affect consumer choices and thereby the competitive position of products. The analysis of the Appellate Body focuses on market responsiveness rather than functionality criteria which would allow looking into various determinants even where the products have identical functional use.⁴³⁰ The analysis of ‘likeness’ of products so far indicated the possibility of incorporating various factors on the determination apart from those stated in the Border Tax Adjustment Report.⁴³¹

We have seen that the other method of analysis that can help to address consumers’ interests as well as other regulatory concerns of member states is the regulatory purpose-based analysis. We have discussed that the market-based analysis and the regulatory purpose-based analysis can yield different outcomes as far as the issue of ‘likeness’ is

⁴²⁷ Functionality and actual competitiveness are different. Two products can be functionally identical and not competitive in the market. *See for instance* Potts, *supra* note 237, at 14.

⁴²⁸ *Id.* at 16.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ For instance, different safety level in the production of a given product can be taken as a factor in the determination of the likeness of products. *See US — Poultry (China)* Panel Report, *supra* note 303.

concerned.⁴³²In the case of market-based analysis, two products shall be compared for purpose of regulation based on their interaction in the market rather than any meaningful distinction that can serve for regulatory purposes. What matters in the case of regulatory purpose-based analysis is the argument of the state concerned in showing that it has a rational basis in making the distinctions other than to afford protection to domestic products. This has significant systemic importance for a member state to ascertain that its measures are legitimate on a tangible normative basis rather than to be found discriminatory and later on justified under a different rationale.⁴³³ If we look at the analysis made in the Asbestos case we can see the difference in the implication despite the same conclusion regarding discrimination. In that case the Panel rejected the regulatory purpose in the determination of ‘likeness’ and considered the products to be “like” and hold that the measure violated National Treatment but at the same time hold that the measure can be justified under the Article XX exception.⁴³⁴

It might appear that a market-based analysis with the Article XX exception in place can yield the same result with the purpose-based analysis. However, given the implication to the litigating state and to the process itself, the two analyses serve quite different purposes. Justifying an illegal thing is one thing and doing a legal thing is another. Therefore, since a regulatory purpose-based analysis serves a different purpose than the market based analysis it is important to consider it in order to address the concerns of many stakeholders. Most importantly, a regulatory purpose-based analysis will help the adjudicators take into account the

⁴³² For a more detail analysis of the market based and Regulatory Purpose based analysis, *See for instance* Horn and Weiler, *supra* note 321, at 129–151.

⁴³³ *See id.* at 140.

⁴³⁴ *See EC — Asbestos* Panel Report, *supra* note 261.

difference in regulatory schemes and apparatus among member states. This in turn will reflect the balance that should be maintained at all times between members' regulatory autonomy and the need to limit it in the interest of free international trade. A closer look at both methods can tell how the balance can be properly maintained with the appropriate method of analysis.⁴³⁵ In general it is possible to make a distinction between products that would otherwise be considered "like" products based on market criteria and regulate accordingly. We have seen that, in the *EC — Asbestos* case for instance, a regulatory purpose-based analysis would be more appropriate to the reasoning of the Appellate Body rather than the competitive analysis.⁴³⁶ This case, and the reasoning in particular, has significant implication in the discussion of the role of the adjudicatory process in addressing non-economic interests of consumers.⁴³⁷ The Appellate Body could have reached to the same conclusion had it followed a regulatory purpose-based analysis as well. Even within the market-based analysis the emphasis on the demand side or the supply side can make a difference on the determination of 'likeness'. Thus, by focusing on the demand side, as it is the better criteria for a market based analysis, it is possible to reach a more balanced and consumers' friendly conclusion.

4.6.2 Process/Product Distinction

Another important point that can be inferred from the cases discussed so far is the issue of product/process distinction. The analysis in the previous

⁴³⁵ Even though the same conclusion, sometimes, can be reached through both methods choosing the one over the other has a systemic impact more than the resolution of a particular dispute.

⁴³⁶ See *supra* note 325 and 326.

⁴³⁷ See *EC — Asbestos* Panel Report, *supra* note 261.

cases especially in the tuna case in relation to the determination of ‘likeness’ focus on the distinction between product and production process.⁴³⁸ The question as to whether a state legitimately make a distinction between products on the basis of production process or method takes significant place in the analysis of ‘likeness’ of products. It appears to be a widely held position within past case laws and commentators that measures that make a distinction on the basis of production process are in violation of the multilateral disciplines.⁴³⁹ On the other hand, others firmly argue that there is nothing wrong in making distinction on the basis of production process for the purpose of trade measures.⁴⁴⁰

The product/process distinction was a subject under close scrutiny during the first leg of the Tuna/Dolphin case between the United States and

⁴³⁸ For the product/process distinction *see generally* Kysar, *supra* note 3; Howse and Regan, *supra* note 397.

⁴³⁹ *See* Alicia Morris Groos, *International Trade Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34 TEX. INT’L LJ 379(1999). (Arguing that products cannot be deferenciated for regulatory purpose on the basis of a difference in production process); Steve Charnovitz, *Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 76-77 (2002). (Gathering quotations from commentators indicating widespread belief in the view that “WTO rules do not permit importing governments to make distinctions based on the production process”); Tanyarat Mungkalarungsi, *Trade and Environment Debate*, 10 TUL. J. INT’L & COMP. L. 361 (2002); *US — Tuna I* Panel Report, *supra* note 3. (Claims that product distinctions based on characteristics of the production process or of the producer that are not determinants of product characteristics are viewed as illegitimate); Howse and Regan, *supra* note 397. (Noted that it is widely thought that all process-based measures not directly related to physical characteristics of the product itself are prima facie violations of GATT)

⁴⁴⁰ *See* Howse and Regan, *supra* note 397. Argue that:

If we assign ‘like’ its ordinary meaning in context, ‘not differing in any respect relevant to an actual non-protectionist regulatory policy’, then physically identical products that differ only in their processing histories may be ‘unlike’, because the processing differences may be relevant to such a policy.

See also Sanford E Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-based Trade Measures*, 27(2) COLUM. J. ENVTL. L. 383, 405 (2002). (Arguing that: the distinction between product and process is an accurate statement of current WTO practice and sentiment even if not an accurate statement of WTO law)

Mexico.⁴⁴¹ In that case the Panel took the distinction to be vital in analyzing the rules of the GATT and hold that measures on the basis of the process that do not have an impact on a product as a product cannot be entertained under the GATT and should be rejected out rightly.⁴⁴² According to the understanding of the Panel, process based measures are out of the discussion in the analysis of ‘likeness’ and as such in violation of GATT rules.⁴⁴³ Such analysis which rejects production method and production process in the analysis of the ‘likeness’ of a product can have serious implications to consumer interests. As discussed in preceding parts, consumers taste and preference can be determined by various factors and production method and production process are areas on which consumers can base their preferences. For consumers that prescribe stricter production method, for instance in case of meat products, a product which undergoes the required process and a product that does not undergo the same process cannot be considered as “like” products irrespective of their physical characteristics as a product.⁴⁴⁴ ‘Likeness’ analysis that takes into account production method and production process is in a better position to respond to consumers’ taste and preferences without unnecessary intrusion into free trade. This can be easily witnessed from the marked increase in the demand for eco-labeled products that are based on production process or production methods.⁴⁴⁵ The logic behind the Report on Border Tax Adjustment is that production method and production process can be basis for the determination of ‘likeness’ and the possibility of taking measures on the basis of production method and production process without violation of the

⁴⁴¹ See *US — Tuna I* Panel Report, *supra* note 3.

⁴⁴² See Howse and Regan, *supra* note 397.

⁴⁴³ Kysar, *supra* note 3, at 543.

⁴⁴⁴ For instance, for Ethiopian consumers there is segregated slaughter houses for Muslims and Christians supervised by the respective religious representatives for observance of religious procedures.

⁴⁴⁵ Potts, *supra* note 237, at 14.

rules of the covered agreements.⁴⁴⁶ Commentators agree that no panel or Appellate Body decision so far expressly rejected the legality of measures on the basis of production method or production process.⁴⁴⁷ However, the confusion will continue unabated unless a jurisprudence that addresses the issue properly taking into account the underlying balance develops. A jurisprudence that recognizes the value of the production method and production process in the analysis of the ‘likeness’ of a product will be able to respond to the interests of consumers and lessen their resentment on the multilateral trading system. Production method or process is a well-fitting factor like any other factors in the determination of ‘likeness’.⁴⁴⁸ This in turn can help to increase the legitimacy of the multilateral trading system as a true forum to promote the wellbeing of mankind. Such analysis is in consonance with the structure of the multilateral trading system and its members. Given the different threshold maintained by various nations to health and other social factors, the adjudicators are expected to give due attention to factors that can really make a difference in the ‘likeness’ of a product even within the market-based approach.

It is important to note, for instance, that the basic tenet of Article III:4 of GATT is the prohibition of discriminatory and protectionist internal measures.⁴⁴⁹ If we subscribe to the contents of the provision itself, we cannot read any distinction as to the scope of coverage of the rules. It does not tell us whether only the product itself instead of production process that needs to be taken into account in regulating the market for such products.

⁴⁴⁶ See generally *id.* at 14.

⁴⁴⁷ See *id.* See also Howse and Regan, *supra* note 397 at 249; Charnovitz, *supra* note 439, at 61-62.

⁴⁴⁸ See Christopher A Cherry, *Environmental Regulation within the GATT Regime: A New Definition of Product*, 40 UCLA L. REV. 1061 (1992). (Argue that the notion of “product” in Article III should encompass the entire history of a product’s manufacture, consumption, and disposal. And it includes the production method and the production process as well); Kysar, *supra* note 3, at 580.

⁴⁴⁹ Howse and Regan, *supra* note 397, at (2000).

Contrary to this, however, the jurisprudence appears to ignore a valid distinction that can serve to distinguish one product from another, at least where there is no issue of protectionism. That is why most eco-labeling efforts by member states are becoming controversial despite the fact that their fairness to trade is not questionable.⁴⁵⁰ It is not the case, however, that all case laws are gloomy in the prospect of the WTO jurisprudence for those who seek to see the WTO being sympathetic to legitimate domestic regulations despite the long held position of the multilateral trading system jurisprudence.⁴⁵¹ In the Asbestos case the Appellate Body appeared to be setting a new jurisprudence establishing a deferential approach to domestic regulations aimed at addressing vital health interests of member states.⁴⁵² This gives hope that in the future adjudicators can interpret the TBT Agreement in such a way that would strike a balance between trade liberalization and regulatory autonomy.⁴⁵³

4.6.3 Striking Balance between Regulatory Autonomy and Trade Liberalization

The balance between regulatory autonomy and free international trade is an area where the adjudicatory process of the multilateral trading system is

⁴⁵⁰ See Howse and Regan, *supra* note 397; see also Jackson, *supra* note 375, at 303-307. Argued that the problem is not whether it is permitted or not; rather it is on how to tackle a disguised protectionist measure.

⁴⁵¹ See Steve Charnovitz, *Environmental Harmonization and Trade Policy*, 282 TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 267(1993). (Observing that it is a dogma in trade policy circles that unilateral import standards should relate to products only, not processes”)

⁴⁵² Howse and Tuerk, *supra* note 226, at 287-288; see also *US — Shrimp* Appellate Body Report, *supra* note 48.. The AB in this case recognizes the right of a member to take measures based on the production method. For the impact of the *EC — Asbestos* Case see Horn and Weiler, *supra* note 321.

⁴⁵³ Howse and Tuerk, *supra* note 226, at 287-288.

expected to play a significant role.⁴⁵⁴ This is more so in the WTO as compared to other multilateral regimes engaged on promoting market access among their members. Unlike multilateral organizations like the EU which works on securing free flow of goods, services and persons as well as creating harmonized regulatory measures the WTO is established with a clear understanding of diverse regulatory schemes within the domestic preview of its members.⁴⁵⁵ The depth of integration required under the systems can dictate the balance that needs to exist between domestic regulatory autonomy of members and the multilateral rules. Therefore, adjudicators need to take into account the organizational structure and the rationale for the rules of the system whenever they are called upon to interpret the rules in line with the balance between competing interests.⁴⁵⁶

From the perspective of maintaining a balance between members' regulatory autonomy and free trade within the multilateral trading system framework, allocation of regulatory powers is an important point that adjudicatory bodies need to take into account. The multilateral trading system should respect the sovereignty of its members and their autonomy in terms of their domestic regulatory power to the extent of the limits recognized by the multilateral rules and the foundation of the system. The exception provision in the GATT and other provisions aimed at accommodating members' autonomy in the multilateral rules are the

⁴⁵⁴ Trebilcock and Howse, *supra* note 301, at 83.

⁴⁵⁵ *Id.* (They argue that since such arrangement of the WTO allows members to have their own policies that can potentially undermine their commitment under the multilateral rules.)

⁴⁵⁶ Emily Reid, *Regulatory Autonomy in the EU and WTO: Defining and Defending its Limits*, 44(4) J. WORLD TRADE 877, 878 (2010). (Argued that the balance between economic liberalization and national regulatory autonomy in each context must reflect the objectives of that legal order and the nature of integration pursued, as well as the institutional structure.)

reflection of such understanding.⁴⁵⁷ At the same time it needs to take into account the regulatory allocation that could exist as between importing and exporting countries as far as it is plausible. Striking a balance between regulatory autonomy and free international trade is at the heart of the debate since the inception of the multilateral trading system. As aptly pointed out by a commentator that:

The various actions taken by Members choosing to promote national policy objectives purportedly aimed at addressing non-trade issues such as environmental protection, labor rights, human health and consumer protection (often in response to the demands of the domestic constituency) have reignited the ongoing battle.⁴⁵⁸

The multilateral trading system is trying to tackle all measures by a member state that would have a repercussion on free trade while maintaining the multifaceted exceptions aimed at giving members a breadth of policy space so as to address other legitimate concerns that should be promoted even at the expense of free trade.⁴⁵⁹ Therefore, it is important to address to what extent the adjudicators try to maintain the balance between regulatory autonomy and free trade. At this point it is important to note that there could be a possible argument questioning the need to ensure a balance in the first place. Equally important is to note that there could be an argument that would call to tilt the balance in favor of free trade if at all there is a need to weigh the balance. However, the researcher does not believe that such arguments are tenable in the face of many provisions that show the intention of the multilateral trading system to put these two apparently conflicting interests in balance. The core

⁴⁵⁷See Christoph T Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX (a) and Conventional Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 77-78(1998).

⁴⁵⁸ Kapterian, *supra* note 176, at 89.

⁴⁵⁹ *See id.*

principle of the WTO; non-discrimination also reveals the clear intention of the system as a forum that aimed at maintaining as diverse regulation of internal affairs as possible as long as they do not discriminate among members and impose unnecessary trade barriers.⁴⁶⁰ It is clear that the multilateral trading system does not require member states to adopt identical or similar policies and measures; rather what it requires is similar or identical treatment of “like” goods and services originating from member states with those diverse measures and policies. This is a substantial proof for the respect of the regulatory autonomy of members by the multilateral trading system. Therefore, the adjudicators are expected to recognize this balance and give effect to it in administering justice. The adjudicators of the multilateral trading system mandated with the interpretation of the rules sometimes need to look beyond the letters of the rules and trace the principle underlying the system.⁴⁶¹

The structure of the multilateral trading system recognizes both allocation of regulatory authority as well as recognition of regulatory authority. It is clear that pursuant to the multilateral rules a state is required to accord imported products the same treatment as domestic products once they crossed the border. Thus, the importing country is empowered to exercise territorial authority over the imported products and subject them to the same regulatory treatment as domestic products disregarding the domestic measures they might have been subjected to in the home state.⁴⁶² Hence, the jurisprudence of the multilateral trading system needs to be evaluated from this angle as well. More specifically it is important to evaluate the jurisprudence as to whether it recognizes regulatory autonomy of member states or regulatory allocation whenever necessary. From the

⁴⁶⁰ See generally Cottier et al., *supra* note 180.

⁴⁶¹ Hilf, *supra* note 188, at, 112.

⁴⁶² WILLIAM J DAVEY & JOHN HOWARD JACKSON, *THE FUTURE OF INTERNATIONAL ECONOMIC LAW* 196 (2008).

case analysis it is easy to identify the struggle on the part of the adjudicators to find the right balance between the right of members to adopt regulatory measures and their obligation under the multilateral rules for trade liberalization. A typical case where this struggle is vivid is the asbestos case between France and Canada. The asbestos case is a good example for this scenario, as it can show how the regulatory allocation and the need to recognition work. In this, case if we were to allow regulatory allocation, subjecting the products imported from Canada to the same regulatory measures with products produced in France would have been legitimate and exempted from scrutiny. Even though the ultimate conclusion accepts the measure, the analysis followed by both the Panel and the Appellate Body reveal the reluctance of the adjudicators to weigh the regulatory autonomy of members' vis-à-vis free trade.⁴⁶³

The *EC — Asbestos Case* is not the only case where the struggle of the adjudicatory process is reflected. There are cases which show the inconsistent positions of the adjudicators regarding regulatory autonomy. For instance, in the *US — Gambling* case the holding of the Appellate Body appeared to reject unilateral definition of public moral by the regulating state if it does not conform to international resonance.⁴⁶⁴ On the other hand, it also holds that members' characterization and objectives are relevant without being binding on the panel.⁴⁶⁵ In contrast, the holding of the Appellate Body in the *Australian Salmon Case* appeared to be in favor of the regulatory autonomy of members.⁴⁶⁶ This continued uncertainty on

⁴⁶³ In this case the same conclusion can be achieved through a regulatory based analysis of the likeness of the products in question.

⁴⁶⁴ See Kapterian, *supra* note 176, at 111.

⁴⁶⁵ See Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 304, WT/DS285/AB/R (April 7, 2005).

⁴⁶⁶ See Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, ¶ 199, WT/DS18/AB/R (Oct. 20, 1998). It stated that:

the right balance between regulatory autonomy and free trade may seriously affect the interests of consumers and the integrity of the system. It will also compromise its legitimacy as a consistent and coherent application of a rule determines its legitimacy as an international adjudicator.⁴⁶⁷

The structure of the multilateral trading system rules requires a holistic interpretation of all the rules in the covered agreements. This is clearly meant by the concept of 'single undertaking' as incorporated in the Uruguay Round.⁴⁶⁸ If we adhere to that, it is not difficult to understand that regulatory purpose is a factor that should dictate the analysis of the rules of the multilateral trading system including the determination of the 'likeness' of products as well as the determination of treatment of products.⁴⁶⁹

One aspect of the problem regarding the regulatory autonomy, for instance, is the appreciation of the adjudicators regarding the issue of 'likeness' of a product where they refuse to consider production process as a factor in the determination of 'likeness' of products.⁴⁷⁰ As discussed in the preceding part, production method and production process is a valid factor for the determination of the 'likeness' of products.⁴⁷¹ Even though the adjudicators appeared to be in favor of maintaining the regulatory autonomy of members the rejection of production process from the determinants of 'likeness' in the current jurisprudence may put the exercise

...The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as "the level of protection deemed appropriate by the Member establishing a sanitary ... measure", is a prerogative of the Member concerned and not of a Panel or of the Appellate Body.

⁴⁶⁷ CHOI, *supra* note 268.

⁴⁶⁸ Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12(4) J. INT'L ECON L. 835, 843 (2009).

⁴⁶⁹ For detail analysis of the relevance of regulatory purpose in the determination of the likeness of products *see* Regan, *supra* note 234.

⁴⁷⁰ Reid & Steele, *supra* note 417, at 21.

⁴⁷¹ *See* Howse and Regan, *supra* note 397.

of regulatory autonomy in question. The other point which should be addressed is the impact of SPS Agreement and TBT Agreement on the balance between regulatory autonomy and free trade. Some may tend to argue that the introduction of SPS and TBT Agreements is an indicator for the balance in favor of free trade. The argument proceeds in line with the fact that the SPS and TBT Agreements were introduced to the multilateral trading system after it was proved that once tariffs were reduced non-tariff barriers were the major obstacles to free trade.⁴⁷² Thus, since members were imposing non-tariff trade barriers the need to tackle them arose and the SPS and TBT Agreements are introduced to tackle them. Therefore, the argument is that since these agreements were introduced to overcome the abuse of regulatory autonomy their introduction was meant to control it so that it gives way to a freer trade.⁴⁷³ In fact, they are in a way agreements meant to elaborate the existing exceptions in the multilateral trading system.⁴⁷⁴ However, this argument does not look tenable in the face of the single undertaking obligation introduced during the Uruguay Round. Therefore, even though these agreements were introduced after the GATT, the introduction of the single undertaking in the Uruguay Round would make them a single treaty and subjected them to a single interpretation.⁴⁷⁵

The other point that needs to be noted is the difference in the level of institutional and legal developments among member states to address various societal issues as well as their ability to implement the rules of the

⁴⁷² Baldwin, *supra* note 89, cited by Du, *supra* note 89, at 270. He stated that:

The lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away.

⁴⁷³ Baldwin, *supra* note 89, cited by Du, *supra* note 89, at 270.

⁴⁷⁴ MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, 142 (1995).

⁴⁷⁵ Kapterian, *supra* note 176, at 94.

multilateral trading system.⁴⁷⁶ Given this, the adjudicators need to look into relevant factors and analyze the balance accordingly. For instance, given wider difference to domestic evaluation in case of health risks as the assessment and acceptable risk levels are quite different from country to country, adjudicators are expected to take this into account in evaluating the legitimacy and necessity of a given regulatory intervention by member states. This holding is in line with the underlying rationale of the multilateral trading system itself.⁴⁷⁷ It is argued that ignoring a *bona fide* regulatory measure aimed at addressing vital consumers' concerns may threaten the multilateral trading system itself, since losing members in a complaint against health measures could face strong pressure from their people to resist compliance as it would affect their well-being leading to a continuous dispute and standoff.⁴⁷⁸ This in effect exacerbates the situation rather than solving the problem between the complaining member and the member that took the measure. If the standoff continues it may lead to duplication of disputes. In such cases, instead of the original dispute we will have two trade restrictive measures; on the one hand the one which was the subject of the complaint and on the other hand a retaliatory measure by the winning state. Thus, the multilateral trading system which was meant to avoid trade barriers may end up in bilateral trade barriers which were in the first place the *raison d'être* to establish the multilateral trading system. This is a real concern to the multilateral trading system that requires designing a solution that can make sure that protectionist measures are discouraged while encouraging free trade and respect national

⁴⁷⁶ Wolfe, *supra* note 468.

⁴⁷⁷ As a system primarily established to safeguard the wellbeing of consumers, an interpretation of the rules of the system that limits the achievement of these goals runs counter to its declared goals. *See* the preamble to the WTO Agreement.

⁴⁷⁸ Andrew T Guzman, *Food Fears: Health and Safety at the WTO*, 45 VA. J. INT'L L. 1 (2004).

preference and values.⁴⁷⁹ Therefore, the adjudicators are expected to look into the regulatory objective carefully in order to identify and root out measures which are intended to accord protection to domestic producers.⁴⁸⁰ Any analysis that involves regulatory autonomy should take into account the autonomy of member states in choosing a certain policy as well as the instrument to implement that policy. The only task of the adjudicators in such cases is to evaluate whether the state, in choosing the policy opted for a clearly protectionist purpose or its implementation resulted in an indirect protectionism or is more trade restrictive than other alternatives. This may appear to be difficult in the short run since the current jurisprudence does not seem to recognize regulatory purposes as relevant factors in the determination of the ‘likeness’ of products.⁴⁸¹ However, the tendency of the Appellate Body to entertain the regulatory objective at least in the determination of the treatment of the imported products as compared to the group of domestic products shades some light in the right direction. Incorporating the regulatory purpose-based approach in the analysis of the national treatment obligation even within the market-based analysis can upgrade the effort to maintain the balance between regulatory autonomy and free trade.

⁴⁷⁹ *Id.*

⁴⁸⁰ See Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 72, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) [hereinafter *Chile — Alcoholic Beverages* Appellate Body Report]. In this case the AB stated that:

...It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production.

See also Panel Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 7.148, WT/DS87/R, WT/DS110/R (June 15, 1999), which states:

If a rational relationship between the stated objective and the measure is lacking, this may provide evidence of protective application, which we will take into consideration along with other factors.

⁴⁸¹ Regan, *supra* note 234, at 444.

Chapter 5

The Role of WTO Adjudicators in Addressing Consumers' Interests

5.1 The Role of Adjudicators in the Multilateral System

The WTO is a multilateral trading system with its own well organized dispute settlement mechanism. A system such as the WTO cannot be evaluated without a closer look at its dispute settlement mechanism and a discussion of the roles of such mechanism in developing the rules of the system. In the preceding chapters an attempt has been made to show the relationship between internal regulation of members and the rules of the multilateral trading system as well as the relationship between consumers' interests and the multilateral trading system from the perspective of the substantive rules. In the discussions we have seen that the multilateral trading system is established to promote international trade with a view to improving the wellbeing of mankind through the optimal utilization of the available resources.⁴⁸² It is also discussed that the multilateral trading system is founded on a conscious balance between regulatory autonomy of member states and the need to limit this autonomy to the extent required to give effect to the rules of the multilateral trading system meant to promote free international trade.⁴⁸³

The discussion so far indicates that the multilateral trading system has rules that could address the growing concerns of consumers, if such

⁴⁸² See the Preamble to the WTO Agreement.

⁴⁸³ SAMPSON, *supra* note 184, at 78; For detailed discussion see the discussion under Chapter 3, Section 3.4 above.

provisions are interpreted with the appropriate technique and the right approach that takes into account the underlying balance of the multilateral trading system. The implication of the different interpretive approaches by an adjudicator has been discussed with a view to show how a difference in the interpretive approach can impact consumers' interests positively or negatively.⁴⁸⁴ In this part, therefore, an attempt will be made to examine the role of the adjudicators of the multilateral trading system in shaping the rules of the multilateral trading system through the adjudicatory process and their role in addressing the concerns of consumers within the existing rules of the multilateral trading system. The discussion focuses on evaluating whether the adjudicatory process allows the adjudicators to adopt different interpretive approaches to address consumer concerns in line with the rules of the multilateral trading system. Accordingly, the role of the adjudicators of the multilateral trading system in light of the substantive rules of the system as well as international law will be discussed with a view to evaluating their potential role in bringing the desired balance in the system.

The multilateral trading system is often accused of marginalizing consumers' interests and other non-economic concerns of member states in the pursuit of a freer international trade.⁴⁸⁵ It is argued that WTO is encroaching on the regulatory autonomy of members and limits them from taking measures that would address other vital interests.⁴⁸⁶ The argument focuses on WTO disciplines that appear to limit members' autonomy in adopting regulatory measures aimed at safeguarding consumers' interests. Such criticism focuses on the lack of adequate provisions that address

⁴⁸⁴ See the discussion on the *EC — Asbestos* case above.

⁴⁸⁵ See for instance William J Davey, *Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its use of Issue-Avoidance Techniques*, 4 J. INT'L ECON. L. 79, 80 (2001).

⁴⁸⁶ See for instance Howse and Tuerk *supra* note 226, at 284.

those interests as compared to the rules on goods and services. Thus, some would suggest the inclusion of those issues in ongoing trade negotiations aimed at supplementing the multilateral system. However, any criticism that focuses on the rules alone cannot reveal the real nature of the multilateral trading system. Multilateral Organizations like WTO should be evaluated both in terms of the law making process as well as the adjudicatory process. It is possible to consider consumers' interests within the framework of the multilateral trading system by utilizing the appropriate interpretive tools that can help the interpreter arrive at a sound conclusion taking into account the spirit of the multilateral system. The multilateral trading system has tried to lay the foundation by which trade and non-trade concerns of members can be entertained. It crafted the various covered agreements in a way that would allow member states to address their legitimate concerns while furthering free trade.⁴⁸⁷ Therefore, any criticism directed against the multilateral trading system should not be based on the rules alone. Rather, it should examine how the rules are interpreted and applied. It is with this understanding that the adjudicatory process of the multilateral trading system will be discussed with a view to evaluating its role in addressing the interests of the multilateral trading system. The discussion on the role of the adjudicatory process focuses on the examination of the function of the adjudicatory process as well as its mandate within the multilateral trading system. It evaluates whether the adjudicators have judicial function or not. It also focuses on the impact of their interpretive role in the understanding of the rules of the multilateral trading system. The discussion relies on the rules of the multilateral trading system as well as international law and precedents.

⁴⁸⁷ *See for instance* the discussion on the TBT Agreement at section 3.1.4 above. *See also* Silveira and Obersteiner, *supra* note 123.

The discussion rests on the assumption that the adjudicatory process is expected to interpret and clarify the rules in the covered agreements taking into account the designs of the relevant agreements and their relation to members' autonomy. Once the covered agreements set the parameters in which the multilateral obligations and members' regulatory autonomy operate, it is up to the adjudicatory process to interpret the rules on the basis of the balance that should exist between them. It all depends on whether the adjudicatory process of the multilateral trading system is undertaken by a judicial organ mandated with the legal interpretation of the rules of the multilateral trading system. Thus, if it is proved that the adjudicatory process assumes a judicial function within the multilateral trading system, the remaining issue will be whether the adjudicatory process fulfils its obligation expected from it as a judicial organ. However, the discussion in this study is limited to the examination of the role of the adjudicatory process in addressing non-economic concerns of consumers under the current rules of the multilateral trading system without taking any position regarding its performances so far. Nevertheless, some evaluation will be made to illustrate the inherent ability of the process despite the actual performances.

An adjudicatory process is evaluated, therefore, regarding its ability to base its analysis on the right approach that can help it apply the various factors that would help it arrive at the right conclusion taking into account the object and purpose of the system within which it is operating. Apart from basing their decision on the spirit of the rules in the relevant agreements, adjudicatory processes need to have the mandate to select the appropriate interpretive approach to arrive at a sound conclusion in light of the overall structure of a system. Thus, an adjudicatory process can only be criticized for choosing a given interpretive approach rather than alternative

approaches that could have helped it arrived at a sound conclusion than the one it has made in a given case. However, this is not a simple undertaking as it may appear. It requires the examination of the power of the adjudicatory process based on the system it operates. It also needs to see whether international adjudicators have this mandate under international law. Thus, the role of international tribunals in shaping the understanding of the rules they are called up on to interpret as well as the practices of similar process should be examined. Therefore, the following sections are devoted for such discussions to be followed by the evaluation of the adjudicatory process of the multilateral trading system.

The discussion focuses on the examination of the judicial functions of the dispute settlement mechanism of the multilateral trading system in light of international law as well as the dispute settlement understanding of the multilateral trading system itself. An examination shall be made as to the functions of the dispute settlement organs with a view to ascertaining whether they have judicial functions or not. The mandates and functions of the dispute settlement mechanism shall be examined from the perspectives of the legal instruments that created it as well as from the perspective of international law and precedents.

5.2 The Role of Adjudicators in Shaping a Regime in International Law

Judicial organs play a significant role in the crystallization of rules in a given legal system. This is strongly the case in the common law legal system where courts play a vital role in the development of rules. Even in the continental legal system where the role of courts in the rule-making

process is said to be minimal, courts play a great role in the development of rules. As rules geared towards the regulation of a dynamic social phenomenon, legal rules need to be interpreted in a way that would respond to the social dynamics. Judicial organs play a vital role in applying rules over the years taking into account the social developments at a particular time. The role of judicial organs is even more important in the international plane, where the law-making process is highly decentralized. International tribunals are more than mere adjudicators in a particular dispute; rather they play a vital role in pronouncing the rule in a particular area.⁴⁸⁸ International tribunals are credited with shaping a regime by properly playing their role of clarifying and expounding applicable rules of law for the regime in question.⁴⁸⁹ However, whether a certain international tribunal has a power to shape a system or not depends on the nature of the system in which the tribunal is functioning and the specific power conferred up on the tribunal in question. The power given to a tribunal needs to be scrutinized again on the basis of international law and international precedents. In this regard, it is good to look at various international tribunals as to how they transformed the system in which they are operating. To this end it would be instructive to look at the workings of other international judicial organs which are engaged in similar missions. Even though the mandates of various international tribunals differ depending on the enabling instrument, they share basic tenets that can serve as a bench mark. There are features that are shared by all international tribunals in addition to their own peculiar features. It is with this role in mind that Article 38 Paragraph 1(d) of the statute of the

⁴⁸⁸ See HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 21 (1982).

⁴⁸⁹ For the role of adjudicators for a multilateral system see JOHN H JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000).

International Court of Justice listed decision of courts as subsidiary sources of international law. It should be noted here that the reference is a general reference to relevant decisions of tribunals without any particular reference as to the nature of the tribunal. Therefore, it is a settled understanding that the reference under Article 38 Paragraph 1(d) includes decisions of other international and quasi-international tribunals and even national courts involved in the interpretation of international law or rules with an international law element.⁴⁹⁰ Caution should be taken, however, not to overlook the special status of the multilateral trading system and its adjudicatory process. Thus, any analysis as to international law should be made under this background.

5.2.1 The Role of Adjudicators in Creating Norms in International law

It is a widely held position that adjudicators are not supposed to create laws. However, contrary to the common view judges contribute to the creation of rules of law while interpreting them.⁴⁹¹ Adjudicators play an important role in the rule making process in any system. International tribunals alike play significant role in the rule-making process of the system for which they are established as well as general international law. For stronger reason international tribunals are expected to contribute to the rule-making process while interpreting and applying the existing rules to

⁴⁹⁰ MALCOLM N SHAW, INTERNATIONAL LAW 112 (2008).

⁴⁹¹ A von Bogdandy & I Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, 505-507(2013), cited By Eric De Brabandere, *The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea*, 15(1) LAW & PRAC. INT'L CTS. & TRIBUNALS 24, 28 (2016).

existing disputes. In the decentralized system of international law-making process tribunals are expected to fill the gap in the law making-process due to the absence of a centralized law making organ. However, this might not necessarily be true to all international tribunals and international organizations, where there are well-organized and centralized law making organs and procedures. These days we are witnessing the proliferation of various regimes whereby states are creating mechanisms to continually create rules to regulate their relations. In spite of all these developments, international tribunals are still playing important roles as a law making organs in the international plane in addition to the established law making-process to a given regime. Therefore, in addition to their role in settling a specific disputes adjudicators play a significant role in developing rules. The significance of international tribunals in the development of rules of international law can be discerned from the practice in international litigations themselves. Legal counsels in international litigations cite judicial decisions more often than they cite the writings of publicists. They did so with a conscious understanding that international tribunals pay due attention for their previous decisions and thereby build on the jurisprudence.⁴⁹² Thus, the interpretation provided by adjudicators in their judicial exercise helps in the clarification of a given rule and its further development. Through their interpretive role they are in effect creating rules that would guide the future course of action of the contesting parties as well as other members of the system. There are many international tribunals that can be cited for their achievements in this regard. For this study, however, we will briefly look at the contribution of the international court of justice and the European Court of Justice.

⁴⁹² Robert Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45(1) INT'L & COMP. L. Q. 1, 9 (1996).

5.2.1.1 The Role of the International Court of Justice in Creating Norms of International Law

The International Court of Justice (ICJ) is a good starting point to examine the role of international tribunals in the law-making process in international law. The International Court of Justice together with its predecessor, the Permanent Court of International Justice (PCIJ), play significant role in the development of international law.⁴⁹³ The Statute of the Court expressly listed out the law-making process to which the Court itself should make reference. Under Article 38 of the Statute of the Court the sources are listed as follows:⁴⁹⁴

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 59 of the Statute to which Article 38(1) (d) make reference states on its part that “the decision of the Court has no binding force except between the parties and in respect of that particular case”.⁴⁹⁵ By looking at

⁴⁹³ See LAUTERPACHT, *supra* note 488, 2).

⁴⁹⁴ Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945 Stat. 1031 [the Charter], 1055 [ICJ Statute]. [together hereinafter UN Charter and Statute of ICJ]

⁴⁹⁵ *Id.*

this provision one may tend to conclude that the decisions of the international court do not have any impact on the future course of action of the international community and even the parties themselves except as far as the issue in dispute is concerned. However, to understand the impact of the decision of the international court on the future courses of action to the international community as well as the parties themselves, we need to go further and analyze the essences of both Article 59 and 38(1)(d) of the Statute of the International Court of Justice. It is clear that the operative part of the decision binds only the parties to the disputes and on the particular subject matter. However, the decision of the Court contains more than the operative parts disposing an issue in a dispute. It contains the reasoning of the Court that expounds the rules of international law as well. A close reading of Article 38(1)(d) and Article 59 tell us more than the effect of the operative part of a decision of the Court. As rightly argued by Lauterpacht that,

the limiting terms of Article 59 refers to the actual ‘decisions’ of the Court, i.e., to the operative part as distinguished from the reasoning underlying the decision and containing the legal principles on which it is based.⁴⁹⁶

From this we can understand that the underlying reasoning in the decision is the part we need to look for evidence as to the content of a given rule of international law. That is why the Statute of the Court included decision of the court within the sources of international law. Therefore, it is safe to conclude that the International Court of Justice as well as its predecessor have played a great role in the development of norms of international law. In fact the court itself as well as commentators emphatically argue that the role of the International Court of Justice is

⁴⁹⁶ LAUTERPACHT, *supra* note 488, at 8.

limited to interpreting the existing rules of international law and is thereby precluded from engaging in legislating a rule to the parties in dispute.⁴⁹⁷ Despite this assertion by the court, however, it is clear that at times the distinction is somehow blurred when it comes to the role of the court as an interpreter and legislator at least as far as the progressive development of international law is concerned.⁴⁹⁸ The court often relies on its previous decisions in disposing subsequent cases.⁴⁹⁹ This shows that the court is actively involved in the development of new rules through its decisions. Therefore, it should be noted that as courts in the common law do create rules through the determination of a case at hand the International Court of Justice sometimes do a little more than merely determining it.⁵⁰⁰

5.2.1.2 The Role of the European Court of Justice in the Development of European Union Norms

The European Court of Justice is one of the international tribunals that can be cited for its remarkable role in the development of the laws of the regime for which it was established.⁵⁰¹ The mandate of the Court is

⁴⁹⁷ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I. C. J. 226 (July 8). It Stated that:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.

See also *LaGrand (Germany v. United States of America)*, Judgment, 2001 I. C. J. 466 (June 27). [hereinafter *LaGrand Case*]

⁴⁹⁸ See Laurence Boisson de Chazournes, et al., *The Role of the New International Adjudicator* 95 ASIL 129 (Proceedings of the Annual Meeting April 4-7 2001) (American Society of International Law)).

⁴⁹⁹ For the role of precedent in the ICJ, see the discussion under Section 5.2.3 below.

⁵⁰⁰ SHAW, *supra* note 490, at 110.

⁵⁰¹ Geoffrey Garrett, et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52(1) INTERNATIONAL ORGANIZATION 149 (1998); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European court of justice*, 52(1) INTERNATIONAL ORGANIZATION 177 (1998).

emphatically provided in the basic document; that is to ensure that the law is observed in the interpretation and application of the treaties of the community.⁵⁰² It is recognized that the jurisdictions of the Court are extensive and includes more than the adjudication of interstate disputes on the basis of international law.⁵⁰³ Even though the mandates of the Court is very wide as compared to other international tribunals, understanding its role in the development of the community norms can contribute immensely to the understanding of the role of adjudicators in the development of norms of a regime in which they are operating.

Authorities argue that the European Court of Justice contributed to the development of the community law through its well-articulated ‘judicial creativity or law making’ exercises in its role as the principal judicial organ of the European Union.⁵⁰⁴ It is maintained that the ECJ has played a key role in the integration process of the European Union through the interpretation of the basic documents of the union.⁵⁰⁵ Its decisions serve as precedents and as a source of the EU law and thereby significantly contributed to the development of EU norms.⁵⁰⁶ It might be argued that the structure of the court within the system in relation to the state courts as well as the European institution gives the Court a special opportunity to exert sufficient influence in the development of the union law.⁵⁰⁷ However,

⁵⁰² See art. 164 of the Treaty of Rome.

⁵⁰³ See *id.* Art. 117; see also Yvonne N Gierczyk, *Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws*, 12 ILSA J. INT'L & COMP. L. 153 (2005).

⁵⁰⁴ For a detail discussion of the role of the ECJ in the development of EU Law see Gabriel A Moens & Ted Tzovaras, *Judicial Law-Making in the European Court of Justice*, 17 U. QUEENSLAND L. J. 76 (1992).

⁵⁰⁵ Gierczyk, *supra* note 503, at 155. (A case in point is the interpretation of Article 117 of the Treaty of Rome.)

⁵⁰⁶ Mattias Derlén & Johan Lindholm, *Characteristics of Precedent: the Case Law of the European Court of Justice in Three Dimensions*, 16 GERMAN L. J. 1073, 1074 (2015).

⁵⁰⁷ For a discussion of the relationship between ECJ and national courts of member states see Henry G Schermers, *The European Court of Justice: Promoter of European Integration*, AM. J. COMP. L. 444, 446 *et seq.* (1974).

despite its position vis-à-vis national courts and the union institutions its contribution to the development of the union law through its interpretive role cannot be overlooked as a contribution of an international tribunal. It is in fact an international tribunal operating within the general international law framework despite its additional roles within the union that emanates from its constitutional set up.

5.2.2 Precedent in International Law

The other important aspect in any discussion about the role of adjudicatory process is the place of precedent within the legal system. Since the adjudicatory process contributes to the development of norms through its interpretations, the understanding of the place of case laws within the system is very important. Precedent plays a central role in any discussion as to the law-making process by adjudicators. The value given to precedent differs from jurisdiction to jurisdiction as well as from system to system. Nevertheless, the discussion of precedent is one of the important aspects in the discussions of judicial functions irrespective of the relative value given to it within a given jurisdiction. Before proceeding to the discussion of precedent and its place in international law, it is appropriate to see some definition supplied to the concept. Blacks Law defines precedent as:

The making of law by a court in recognizing and applying new rules while administering justice. A decided case that furnishes a basis for determining later cases involving similar facts or issues.⁵⁰⁸

⁵⁰⁸ HENRY CAMPBELL BLACK, *et al.*, *BLACK'S LAW DICTIONARY* § 196, 312 1195 (1999).

If we look at the definition in the Oxford Dictionary, it uses a similar description and defines precedent as:

A previous instance or case which is or may be taken as an example or rule for subsequent cases, or by which some similar act or circumstance may be supported or justified.⁵⁰⁹

From these definitions we can see that precedent is a judge-made rule that developed through the interpretation of the existing rules. Accordingly, a given decision will furnish additional rules for similar cases involving similar sets of facts in the future. Thus, a precedent is not a backward looking rather a forward looking concept as well.⁵¹⁰ In effect the exercise of precedent is a commitment made today on the future course of action.⁵¹¹ At this point it is necessary to define the related concept of *Stare Decisis* as well. Again if we look at the definition supplied by the Black's Law Dictionary that defines *Stare Decisis* as:

The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigations.⁵¹²

In the same line William M. Lile et al. define *stare decisis* as:

⁵⁰⁹ A. I. Goodhart, *Precedent in English and Continental Law*, 50 L. Q. REV. 40, 41 (1934); see also JOHN SALMOND, JURISPRUDENCE 191 (JSTOR 1920), cited by BLACK, *supra* note 508, at 1195. It is defined as:

A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.

⁵¹⁰ Frederick Schauer, *Precedent*, 39(3) STAN. L. REV. 571, 572 (1987).

⁵¹¹ *Id.*, at 573.

⁵¹² BLACK *et al.*, *supra* note 508, at 1414.

The rule of adherence to judicial precedents finds its expansion in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly, and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.⁵¹³

From the definitions provided above one can easily discern the essence of precedent from its narrow sense to its wider sense. While the narrow sense of precedent requires courts to dispose similar cases in a similar fashion as previously decided cases, the wider sense of precedent allow courts to follow similar justifications in disposing related cases. Thus, in its wider sense it is safe to say that all legal system apply precedent irrespective of whether they follow the continental or the common law legal system as it is commonly referred. There is nothing strange in such assertion because it is a natural practice for human beings to follow similar patterns for similar cases.⁵¹⁴ With the same token, it is not uncommon for courts and tribunals to look back to their decision when they are faced with questions involving similar set of facts and laws. As has been said above, precedent also has a prospective effect in that courts make decision knowing that their conclusion will impact future course of actions. Thus, if they are not to follow precedents at least in its wider sense it is difficult to create certainty in the administration of justice since it is difficult to predict an outcome of future proceedings from the disposition of a case today. In countries that follow the common law legal tradition, it is common to adhere to the narrow sense of precedent and thereby the doctrine of *stare*

⁵¹³ ROGER WILLIAM COOLEY, *et al.*, BRIEF MAKING AND THE USE OF LAW BOOKS 288 § 2 (West. 1914)., cited by BLACK, *supra* note 508, at 1414.

⁵¹⁴ Goodhart, *supra* note 509, at 41.

decisis applies.⁵¹⁵ Therefore, previously decided cases serve as a point of reference for subsequent cases. Similar cases are expected to be disposed in a similar manner unless exceptional circumstances arise that would change the reasoning of the court. This does not mean, however, that there is no possibility to come up with a different decision for similar cases in jurisdictions that adhere to binding precedents. Otherwise it would be counter to the utility of precedent itself.⁵¹⁶

When we come to the discussion of the place of precedent at the international plane it is important to examine its proper place within the judicial process in the international sphere. It is necessary to analyze the place of precedent together with the law making process of a given jurisdiction. Thus, the place of precedent within the domestic legal order where there is a centralized law making process may not be the same with its place within the international legal order. The international legal order is quite different from the domestic legal order. It should also be noted that in the international plane there is no centralized judicial system as it exists within the municipal legal order. Therefore, it is difficult to conceive of precedent in the same wave length as it is understood within the domestic law jurisprudence. Thus, International law does not recognize the principle of *stare decisis* as we know it in municipal legal system.⁵¹⁷ However, this does not mean that international tribunals do not look into past decisions to find solution for current cases or past decision does not impact the outcome of a current case. Case laws play a significant role in the resolution of disputes before international tribunals.⁵¹⁸ In fact international tribunals

⁵¹⁵ See Thomas R Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645(1999).

⁵¹⁶ *Id.* at 653-654.

⁵¹⁷ See SHAW, *supra* note, 490, at 706.

⁵¹⁸ For the role of precedent before international tribunals see De Brabandere, *supra* note 413, at 24-55. (Argues that international tribunals often relay on settled jurisprudences

very much rely on past decision to resolve current disputes and publicists also heavily rely on the pronouncement of international tribunals in their writings as authoritative sources.⁵¹⁹ That is why the statute of the ICJ explicitly included judicial decisions as one of the subsidiary sources of international law to which international tribunals may look for an advice.

International courts invariably refer to their previously decided cases and parties to a dispute substantiate their arguments citing previous cases. However, some still question the impact of previous decisions by looking at the provision of Article 59 of the Statute of the International Court of Justice. Even more, some may question the impact of previous decisions as a source of law for future course of action in the face of Article 38(1)(d) which apparently assimilates judicial decision to that of the teaching of publicists.⁵²⁰ However, this is not a good reference to reflect on the persuasive values of previous decisions. Authorities do not give equal weights to judicial decisions and the teachings of publicists as sources of international law. As rightly pointed out by one commentator that:

When an advocate before an international tribunal cites juridical opinion, he does so because it supports his argument, or for its illustrative value, or because it contains a particularly felicitous or apposite statement of the point involved, and so on. When he cites an arbitral or judicial decision he does so for these reasons also, but there is a difference-for, additionally, he cites it as something which the tribunal cannot ignore, which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong, or

unless there is a reason not to follow previous cases for various factual circumstances involved in the cases).

⁵¹⁹ SHAW, *supra* note 490, at 110.

⁵²⁰ The UN Charter and the Statute of ICJ, *supra* note 494.

distinguishable from the extant case, or in some way legally or factually inapplicable.⁵²¹

This comment rightly sums up the place of judicial decision in international law. It is not a mere decision binding on the parties regarding the particular dispute alone. It is in effect an authoritative confirmation of a given rule of law that would serve at least as a point of reference for future course of action for the parties as well as the international community in general. Hence, even though the international court is not bound by precedents it is hard to ignore them in future cases. It has in fact relied on the reasoning of its previous cases in making decisions on similar issues involving similar points of law.⁵²² In the words of Lauterpatcht:

The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice.⁵²³

This observation from the eminent authority in international law tells more than what is going on in the International Court of Justice. The statement is equally applicable to other tribunals including national courts. Irrespective of the legal system in which a tribunal operates past decisions play significant role in the determination of rules of law in subsequent cases. In line with this understanding the Court always tried to follow its previous decisions and strived to insert a measure of certainty within the

⁵²¹Jennings, *supra* note 492, at 9.

⁵²² See LAUTERPACHT, *supra* note 488, at 8.

⁵²³ *Id.*

process.⁵²⁴ In the same manner other tribunals are expected to rely on their past reasoning in disposing current and future cases as appropriate.

5.3 WTO Jurisprudence

5.3.1 Dispute Settlement in the WTO

Pacific settlement of international disputes is one of the principles of the Charter of the United Nations.⁵²⁵ As a multilateral institution founded on the basis of international law; the WTO members are expected to settle their dispute peacefully as envisaged under international law. Disputes among states can be settled through various peaceful mechanisms including a judicial body having compulsory or optional jurisdictions. WTO is one of the international organizations to come up with its own organized dispute settlement system.⁵²⁶ It has a dispute settlement mechanism comparable to the most successful tribunals like the ECJ.⁵²⁷ An appraisal of a multilateral trading system cannot be complete without a thorough discussion of its dispute settlement mechanism, because it is not only the rules but also how the rules are interpreted and enforced that explains the functioning of a system. It is with this view in mind that this research focuses on the examination of the jurisprudence of the multilateral trading system.

⁵²⁴ SHAW, *supra* note 490, at 110.

⁵²⁵ See Article 2(3) of the Charter of the United Nations.

⁵²⁶ It established a permanent dispute settlement body with ad hoc panels and a permanent appellate body. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. [hereinafter DSU]

⁵²⁷ See for instance Eric A Posner & John C Yoo, *Judicial Independence in International Tribunals*, 93(1) CAL. L. REV. 1 (2005).

Examining the jurisprudence of any system is important to understand how the system really works. It is important to see how the WTO agreements are interpreted by panels and the Appellate Body. The WTO through its Dispute Settlement Mechanism is trying to build a jurisprudence that would make the multilateral trading system more predictable. As observed by one commentator that:

International trade relations have become much more legalized under the WTO than under the former international trade system created pursuant to the General Agreement on Tariffs and Trade (GATT).⁵²⁸

It is true that “the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system”.⁵²⁹ Panels and the Appellate Body of the WTO are trying to build a jurisprudence that would guide members in the understanding of how the multilateral trading system is working. The establishment of a dispute settlement system with a compulsory jurisdiction to settle trade disputes among its members was one of the major outcomes of the Uruguay Round of Trade Negotiation.⁵³⁰ The Uruguay Round formally established a new dispute settlement organ departing from the existing dispute settlement mechanism as practiced under the GATT.⁵³¹ As part of the dispute settlement mechanism, the WTO established a Dispute Settlement Body (DSB) to handle trade disputes under the multilateral trade rules and mandated the DSB to establish a standing Appellate Body to hear cases on

⁵²⁸ GREGORY CHARLES SHAFFER, *HOW TO MAKE THE WTO DISPUTE SETTLEMENT SYSTEM WORK FOR DEVELOPING COUNTRIES: SOME PROACTIVE DEVELOPING COUNTRY STRATEGIES* 9 (2003).

⁵²⁹ DSU, art. 3(2).

⁵³⁰ Prabhash Ranjan, *Applicable Law in the Dispute Settlement Body of the WTO*, 44(15) *ECON. POLIT. WEEKLY* 23 (2009).

⁵³¹ Alberto Alvarez, *The WTO Appellate Body's Autonomy to Transform the WTO Dispute Settlement System: Insights from Theory and A Comparative Analysis of the International Court of Justice and the US Supreme Court*, 306 (Faculty of Law, University of Ottawa, 2008)

appeal from panel conclusions.⁵³² In this regard, it can be said that the WTO has moved from its ‘more power-oriented diplomatic approach and embraced rule-oriented approaches and impartial dispute settlements’.⁵³³ The fact that the multilateral trading system established a standing Appellate Body confirms the commitment of the system to an impartial tribunal that would adjudicate trade disputes on the basis of international law.⁵³⁴

The WTO is a permanent institution mandated with the regulation of international trade on the basis of the multilateral treaties known as the covered agreements. Therefore, it is important to study its jurisprudence in order to fully understand how the system works. Examining the contents of the covered agreements alone cannot tell us everything about the position of the multilateral trading system about issues of interest for consumers. Most importantly the fact that the WTO has a dispute settlement system mandated with the interpretation of the covered agreements on the basis of international law, it is important to examine how the rules of the multilateral trading system are interpreted. This is because not only the existence of a certain rule but also its interpretation can affect the rights of parties. In addition to this, as a permanent organ there is a possibility to develop a case law irrespective of whether the multilateral trading system specifically envisage it or not. Irrespective of their binding force it is not wise to ignore the persuasive power of a single panel report or Appellate Body rulings let alone the whole body of the case laws developed throughout the process.

⁵³² See art. IV(3) of the WTO Agreement; art. 17 of DSU.

⁵³³ ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 64 § 23 (1997), cited by James Cameron & Kevin R Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50(2) INT’L & COMP. L. Q. 248 (2001).

⁵³⁴ See for instance *id.* at 249.

The institutions that came up with the establishment of the World Trade Organization were not the only changes that were seen as a great departure from the practice in the GATT era. Rather, it is the systemic change introduced with the creation of these institutions that is believed to contribute to the betterment of the multilateral trading system. One of the most important changes was the legalization of the dispute settlement system thereby requiring the adjudicators to rely on a textual and rule-oriented system in place of the political and diplomatic dispute settlement tradition of the GATT.⁵³⁵ The dispute settlement system of the multilateral trading system is one of the ‘most actively growing subject areas in international economics as well as in international law’.⁵³⁶ Therefore, the adjudicators are expected to make sure that their decisions are in consonance with the rules of the multilateral trading system. Because in a rule-based dispute settlement system the main task is to come up with a rule-consistent result that would contribute to the stability and predictability of the system in question.⁵³⁷

The other point that should be addressed regarding the WTO jurisprudence is how the system develops in light of the general international law. This is important because we need to evaluate how the system addresses obligations of member states that arise from other international obligations other than the covered agreements. It is also important to resolve, if possible, the place of the WTO rules within the general international law. It is true that as an international organization the WTO is subject to the rules of international law. It is clear that the WTO

⁵³⁵ John H. Jackson, *Fragmentation or Unification Among International Institutions: the World Trade Organization*, 31 N.Y.U.J. INT’L L. & POL. 823, 826-827 (1998), cited by Carrie Wofford, *Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 564 (2000).

⁵³⁶ Dukgeun Ahn, et al., *Understanding Non-litigated Disputes in the WTO Dispute Settlement System*, 47 J. WORLD TRADE 1 (2013).

⁵³⁷ Jackson, *supra* note 535, at 827, cited by Wofford, *supra* note 535.

Agreement as an international agreement fully incorporates the WTO to the realm of international law.⁵³⁸ This is acknowledged by the Appellate Body itself saying that “the WTO Agreement could not be read in clinical isolation from public international law”.⁵³⁹ As a result, it is obvious that the WTO adjudicators may be required to take a look at other sources of international law while examining compliance by such member state towards its commitment under the WTO Agreements.

Other statements of the Appellate Body indicate a similar understanding on the part of the WTO adjudicators regarding the nexus between the WTO agreements and other international obligations assumed by member states. Even though it is not a direct reference to the relationship of other international obligations, the holding of the Appellate Body in the *US — Shrimp* case indicates how the WTO obligations are similarly interpreted as other general international obligations. In that case the Appellate Body stated that:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.⁵⁴⁰

The reference in this case presumably calls to look into the evolution of the term in the development of other parts of international law that have relevance to the subject. The other reference that can be taken as an acknowledgement of the incorporation of international law within the multilateral trading system is made by the Appellate Body of the

⁵³⁸ Gabrielle Zoe Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: the Relationship between the WTO Agreement and MEAs and other Treaties*, 35(6) J. WORLD TRADE 1081, 1081 (2001).

⁵³⁹ *Id.*

⁵⁴⁰ *US — Shrimp* Appellate Body Report, *supra* note 48, ¶ 130.

multilateral trading system in the *EC — Hormone* case. In that case the Appellate Body in upholding the conclusion of the Panel stated that:

The precautionary principle would not override the explicit wording of Articles 5.1 and 5.2, and that the precautionary principle has been incorporated in, inter alia, Article 5.7 of the SPS Agreement.⁵⁴¹

From this we can clearly infer that had the precautionary principle not been incorporated within Article 5 of the SPS Agreement, as it was concluded, there would have been the possibility to apply the principle as a separate principle. However, since it is already incorporated under Article 5.7 and applied there is no need to apply it again.⁵⁴²

5.3.2 The Role of WTO Adjudicators

It can safely be said that one of the impressive achievement of the WTO is the establishment of a dispute settlement system that radically changed the dispute settlement mechanism of the multilateral trading system. According to the observation of the then Director General of the multilateral trading system, the new development has brought about a great improvement that would assure the security and enforceability of the commitment contained in the multilateral agreements.⁵⁴³

To understand the role of the adjudicators of the multilateral trading system, it is important to see the respective powers of those involved in the

⁵⁴¹ *EC — Hormones* Appellate Body Report, *supra* note 383, ¶ 253.

⁵⁴² This in effect reflects the recognition of the Appellate Body as to its mandate to apply principles of international law while interpreting the rules of the covered agreements.

⁵⁴³ Eoin Gubbins, *Precedent in the WTO: Advantages of De Jure Stare Decesis*, 9 TRINITY C. L. REV. 70, 70 (2006).

dispute settlement mechanism. Article IX:2 of the WTO Agreement provides that:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.⁵⁴⁴

Article 3.9 of the DSU also reiterates the right of a member to seek authoritative interpretation of the covered agreements irrespective of any proceeding under the dispute settlement mechanism. Given this it may appear that the adjudicators have not much power in interpreting the covered agreements as do the Ministerial Conference and the General Council.⁵⁴⁵ However, a closer look at the structure and functioning of the dispute settlement mechanism reveals that they have sufficient interpretive power on the multilateral rules enough to shape the system. In fact the WTO adjudicators; panels and the Appellate Body function in “an entirely independent and law-based fashion” that would qualify them as judicial organs under international law.⁵⁴⁶ In this regard the adjudicatory process in the WTO can be compared with that of the International Court Justice.⁵⁴⁷ This in effect affords the dispute settlement system the status of a ‘regular judicial tribunal with compulsory jurisdiction for relevant claims’.⁵⁴⁸ The fact that the reports of panels and the Appellate Body need to be adopted by the DSB to be binding may be cited as a counter argument on the

⁵⁴⁴ See WTO Agreement, art. IX: 2.

⁵⁴⁵ Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53(4) INT’L & COMP. L. Q. 861, 861 (2004).

⁵⁴⁶ Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) AM. J. INT’L L. 535, 553 (2001).

⁵⁴⁷ Andreas Sennekamp & Isabelle Van Damme, *Practical Perspective on Treaty Interpretation: The Court of Justice of the European Union and the WTO Dispute Settlement System*, 3 CAMBRIDGE J. INT’L & COMP. L. 489, 491 (2014). (Argues that: Both the Court of Justice and WTO panels and Appellate Body are engaged in the exercise of a judicial function)

⁵⁴⁸ Anja Lindroos & Michael Mehling, *Dispelling the Chimera of ‘Self-contained Regimes’ International Law and the WTO*, 16(5) EUR. J. INT’L L. 857, 860 (2005).

judicial capacity of panels and the Appellate Body. However, such argument cannot be sustained in the face of the rules and practices of the multilateral trading system. Given the fact that panel and Appellate Body reports are almost automatically adopted and given the fact that panels and the Appellate Body base their decisions on the basis of legal rules, the existence of an additional organ involved in the decision-making process cannot take away their status.⁵⁴⁹ The most that can be said of the DSB in such case could be to consider it as part of the judicial organ of the multilateral trading system.⁵⁵⁰

As the judicial organ of the multilateral trading system the adjudicators of WTO have “interpretive autonomy”.⁵⁵¹ That can help them develop a jurisprudence that can transform the system. Contrary to this, however, the Appellate Body appeared to accept a limitation imposed by the WTO agreement on the power of adjudicators. This can be seen from its holding in the *Japan — Alcoholic Beverage* case when it concluded that:

Article IX: 2 of the WTO Agreement provides: ‘The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements’....The fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.⁵⁵²

⁵⁴⁹ Pauwelyn, *supra* note 546, at 553.

⁵⁵⁰ *Id.*

⁵⁵¹ NEIL WALKER, *THE EU AND THE WTO: CONSTITUTIONALISM IN A NEW KEY*, 31-57 (2001).

⁵⁵² *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 13; *see also* Adrian TL Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT’L L. 171, 174 (1998).

Despite such arguments, the adjudicators have sufficient power comparable to powers that a given international adjudicator can have. In fact the DSU itself confirmed this when it confer up on the system the task of providing security and predictability of the multilateral trading system.⁵⁵³ Such goal cannot be achieved by an organ that does not have sufficient authority to interpret the rules autonomously. It is understandable that due to the legislative process in the WTO, which makes amendment of the rules very difficult, it is through the judicial process that rules of the WTO are clarified and even sometimes crystallized. Therefore, it can be said that “WTO members delegate significant de facto power to the dispute settlement system to interpret and effectively make WTO law”.⁵⁵⁴ In the WTO dispute settlement system cases involve more than the judicial resolution of an individual dispute. WTO panels and the Appellate Body decisions on a given case also produce systemic effects for future course of actions.⁵⁵⁵

It is important to examine the roles of the adjudicators in order to understand the impact of their rulings on the rules of the multilateral trading system. Adjudicators have different rules depending on the legal system in which they operate. Most importantly the rules of the multilateral trading system expressly stated the respective roles of the organs involved in the system as far as determination of the rules of the system is concerned. One important aspect in this regard that needs to be noted in relation to the role of the adjudicators is the power reserved to the Ministerial Conference in connection with the interpretation of the rules of the multilateral trading system. As indicated above, the WTO Agreement specifically reserved the power to give binding interpretation to the rules of the multilateral trading

⁵⁵³ See DSU, art. 3.2.

⁵⁵⁴ Shaffer, *supra* note 528, at 11.

⁵⁵⁵ *Id.*

system to the Ministerial Conference.⁵⁵⁶ Thus, in the face of such express provision it might be difficult to expect a bigger role in the determination of the rules of the multilateral trading system by an ad hoc panel or the standing Appellate Body. However, it should also be noted that determination of a rule through adjudication and through a political organ serve different purposes and at times lead to different outcomes. The adjudicator is given the power to interpret the rules of the multilateral trading system according to customary rules of international law and binds the disputing parties.⁵⁵⁷

It is also important to evaluate the nature of the adjudicators involved in the dispute settlement process. As it is clearly spelt out in the DSU the dispute settlement system employs ad hoc panels and a permanent Appellate Body, among others, mandated with the settlement of trade disputes among its members. If we singled out the Appellate Body as the permanent body mandated with the clarification of the legal interpretation of the covered agreements, we can clearly see the status of the dispute settlement system of the multilateral trading system. It can be argued that the Appellate Body has a dual nature in that it is a judicial organ with a quasi-legislative nature as do the International Court of Justice and the United States Supreme Court, for instance.⁵⁵⁸ Thus, the Appellate Body is expected to determine by itself which one of its natures prevail in a decision.⁵⁵⁹

⁵⁵⁶ See WTO Agreement, art. IX (2).

⁵⁵⁷ BRADLY J. CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW 9 § 6 (2006). As compared to the power of the Ministerial Conference, the task of the WTO Judiciary is to clarify the provisions of WTO Agreements in accordance with the customary rules of interpretation of public international law.

⁵⁵⁸ Alvarez, *supra* note 531, at 315.

⁵⁵⁹ *Id.*

There are provisions in the DSU that would reveal the judicial nature of the Appellate Body. For instance, Article 19.2 of the DSU seems to emphasize the judicial characteristics of panels and the Appellate Body when it provides that:

In accordance with paragraph 2 of Article 3, in their findings and recommendations, the Panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.⁵⁶⁰

This provision has also got support from the members of the Appellate Body. In this regard it is worth mentioning the statement made by one of its members regarding the role of the Appellate Body, even though he did not deny the other nature of the Appellate Body. The then member of the Appellate Body said that “the function entrusted to the panels and Appellate Body is, without any doubt, that of judging”.⁵⁶¹ Thus, the function of the adjudicators is to clarify the rules of the multilateral trading system in a purely judicial and politically neutral approach.⁵⁶²

When we come to the specific role of the adjudicators in particular, the starting point for any discussion on the role of the WTO adjudicators seems to be the provisions of Article 3.2 of the DSU. It is this same Article that is cross-referred under Article 19.2 which is deemed to highlight the judicial role of the adjudicators. However, in this part instead of focusing on whether the adjudicators’ role is adjudicative or also legislative, an attempt will be made to examine the scope of their role in applying the rules while exercising their judicial functions. In other words, this part will

⁵⁶⁰ See DSU, art.19.2.

⁵⁶¹ Giorgio Sacerdoti, *The Dispute Settlement System of the WTO in Action: a Perspective on the First Ten Years*, 35 *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* (GIORGIO SACERDOTI, ALAN YANOVICH, AND JAN BOHANES EDS., 2006) 52 (2006).

⁵⁶² Jackson, *supra* note 535, cited by Wofford, *supra* note 535.

be devoted to the examination of the extent to which the reference under Article 3.2 limits the power of the adjudicators to dispose disputes by applying rules of general international law in addition to those rules found under the covered agreements. The arguments regarding the role of the adjudicators focus on the implication of the provisions of this article. However, the reference under this article is limited to the jurisdiction of the dispute settlement mechanism rather than the scope of the applicable law. Therefore, it is very important to clarify the difference between jurisdiction and applicable law in order to understand the scope of the apparent limitations imposed by the DSU on the adjudicators. The DSU specifically regulates the jurisdictional aspect.⁵⁶³ Pursuant to Articles 1.1, 3.2, 7.1 and 11 of the DSU the jurisdiction of the adjudicators is to adjudicate disputes that arise under the covered agreements.⁵⁶⁴ It is common for most international tribunals to limit their jurisdiction to the adjudication of certain disputes that arise under a particular agreement irrespective of the applicable laws that would be utilized in interpreting the treaty in question.⁵⁶⁵ The absence of an expressed provision that distinguishes the issue of jurisdiction and applicable law in the DSU complicates the matter.⁵⁶⁶ In effect the DSU limits the jurisdiction of the adjudicators to adjudicate trade disputes that involves trade issues under the covered agreements. This is completely different from deciding the applicable laws

⁵⁶³ Bartels, *supra* note 545, at 501-502; David Palmeter & Petros C Mavroidis, *WTO Legal System: Sources of Law, The*, 92 AM. J. INT'L L. 398, 398-399 (1998); Pauwelyn, *supra* note 546, at 554-566; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) EUR.J. INT'L L.757 (2002); Lindroos and Mehling, *supra* note 548, at 860-866.

⁵⁶⁴ *See* the DSU.

⁵⁶⁵ Rep. of the Study Group of the Int'l Law Comm'n on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Sess., May 1- June 9, July 3- Aug. 11, 2006, ¶ 45, U.N. Doc. A/CN. 4/L. 682 (Apr.13, 2006) [hereinafter ILC Study].

⁵⁶⁶ *Id.* (Argues that the absence of similar provisions like in the UNCLOS that expressly indicates the jurisdictional and applicable law aspect makes the matter problematic in the case of WTO)

that can help resolve the disputes that are submitted to the adjudication of the dispute settlement mechanism.⁵⁶⁷ The question of jurisdiction will not be a problem since the adjudicators, as judicial organs can determine their jurisdiction, but this will not help us much in answering the issue of applicable law.⁵⁶⁸ It is obvious that unlike municipal courts, the jurisdictions of international tribunals are limited to the adjudication of certain disputes that would arise on the basis of a particular treaty or treaties.⁵⁶⁹ However, the limitation of the jurisdiction of international tribunals to adjudicate cases that arise on the basis of a particular treaty does not mean a limitation on the applicable law to resolve the dispute.⁵⁷⁰ Thus, the determination of the jurisdiction of the adjudicators of the multilateral trading system does not necessarily tell us anything about the applicable law to resolve the disputes within their jurisdictions. In fact, the rules of the covered agreements are the ones that will be consulted primarily. But that cannot solve the whole issue of applicable law.

To make matters worse, there is no rule in the multilateral rules that addresses the issue of applicable law, but it is a widely held view that the multilateral trading system ‘was born into the wider body of international law’ so that its rules have to be governed by the rules of international law.⁵⁷¹ This may appear to be a wild assertion, though, especially in the face of a common claim attributing to the multilateral trading system the

⁵⁶⁷ For a general discussion of applicable law see also MITSUO MATSUSHITA, *et al.*, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY, 19-102 (2006).

⁵⁶⁸ Seung Wha Chang, *WTO for Trade and Development Post-Doha*, 10(3) J. INT’L ECON. L. 553, 554 (2007); The ICJ has decided that the establishment of jurisdiction is a matter to be decided by the court. See *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, 1998 I. C.J. 432, ¶ 37 (Dec. 18), *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, 1988 I.C.J. 69 ¶ 16 (Dec.20), *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, *Preliminary Objections, Judgment*, 2004 I.C.J. 1307 ¶ 33 (Dec. 15).

⁵⁶⁹ ILC Study, *supra* note 565.

⁵⁷⁰ *Id.*

⁵⁷¹ Lindroos and Mehling, *supra* note 548, at 860.

status of self-contained regime apparently excluding the applications of other rules of international law other than the rules of the covered agreements. However, a closer look at how international law works can shade a light on such claims. Article 38 (1) of the Statute of the International Court of Justice, which is considered as an authoritative indication of the sources of international law⁵⁷², listed the sources of international law that should be applied by the Court. For instance under 38(1)(a) it is stated that, “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states” to be the first to be consulted in resolving a dispute submitted to the court.⁵⁷³ Thus, the reference to international law as applicable law in WTO disputes does not disturb the primacy of the rules of the covered agreements.⁵⁷⁴

However, it is clear that despite the fact that WTO Agreements were concluded at a specific point in time, the respective rights of members pursuant to these agreements varies from time to time depending on various circumstances. Most importantly since the factual circumstances under which the agreements operate change over time, the application of such rules needs to reflect such changes. The requirement of the provision of Article 3.2 of the DSU regarding the limits as set by the covered agreements need to be understood as to mean the rights and obligations of members pursuant to the interpretation of those agreements at that particular time within the bounds of international law.⁵⁷⁵ Thus, the

⁵⁷² See SHAW, *supra* note 490, at 112.

⁵⁷³ See The UN Charter and the Statute of ICJ, *supra* note 494.

⁵⁷⁴ As inferred from Article 38 of the Statute of the ICJ the covered Agreements are the one to be applied.

⁵⁷⁵ See Panel Report, *Korea — Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) [hereinafter *Korea — Procurement Panel Report*] The Panel explained the limit of Article 3.2 of the DSU in the following words:

indication as to the boundary within which the DSB operate is in fact not limited by the reference as to the covered agreements; rather the important boundary is drawn by the reference to the customary rules of interpretation of public international law. It is this reference that would determine the breadth of the covered agreements at a particular time. It is important to understand the limits imposed on panels and the Appellate Body regarding the application of international law in determining the rights and obligations of members under the covered agreements and this will take us to the discussion of the rules of treaty interpretation as understood under international law.

5.3.3 The Role of International Law in the Adjudicatory Process

The reference under Article 3.2 of the DSU regarding the method of determination of the rights and obligations of members needs to be understood well before any exposition of the roles of the adjudicators in shaping the multilateral rules. The relevant part of this article provides that:

The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify

However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

See also DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 65-79 (2004).

the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.⁵⁷⁶

To understand the limit imposed by this provision on the power of panels and the Appellate Body, we need to examine the contents of customary rules of treaty interpretation. The best place where we can start to look for the content of the rules on treaty interpretation is the 1969 Vienna Convention on the Law of Treaties.⁵⁷⁷ The rules on treaty interpretation in this convention are considered to be codifications of customary rules of international law.⁵⁷⁸ Therefore, the reference as to customary rules of interpretation referred under the DSU is those rules of interpretation indicated under Article 31-33 of the Vienna Convention on the Law of Treaties. What is important here is not to indicate which rules are referred pursuant to Article 3.2 of the DSU, rather it is the content of this provision that needs to be discussed to have a grasp of what is intended by the multilateral trading system when it expressly subjected the interpretations of the rules of the covered agreements to customary rules of interpretation. In effect the reference to customary rules of interpretation requires the adjudicators to consider the wider body of international law.⁵⁷⁹ It also amplifies the range of interpretive techniques to be undertaken while interpreting the rules of the covered agreements.⁵⁸⁰

To begin with, Article 31 of the Vienna Convention on the Law of Treaties incorporates various mechanisms that would help interpreters find

⁵⁷⁶ See DSU, art. 3.2.

⁵⁷⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter, VCLT 1969]

⁵⁷⁸ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (April 29, 1996). [hereinafter *US — Gasoline* Appellate Body Report]

⁵⁷⁹ Condon, *supra* note 557, at (2006), p.15; see also Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2(2) AM. J. INT'L L.348 (1908).

⁵⁸⁰ Condon, *supra* note 557, at 10. 2006

the true meaning of a term in a treaty. Most importantly Article 31 directs interpreters to look into subsequent agreements between the parties as well as applicable rules of general international law relevant to the issue. It is important to note that the rules incorporated under Article 31 require a ‘holistic and comprehensive approach’ while utilizing the rules in treaty interpretations.⁵⁸¹ In effect, the provision permits interpreters to utilize other rules of international law applicable to the parties in question that would help resolve any disagreements in relation to a provision in a treaty. Likewise, when the multilateral trading system under the DSU directs its adjudicators to apply customary rules of treaty interpretation, in effect it is directing them to apply the mechanisms of treaty interpretations incorporated under the Vienna Convention on the Law of Treaties.

Actually such holding would not be surprising to anybody. Despite the contention of many designating the WTO as a self-contained regime nobody would argue that rules of general international law are totally contracted out from the application in relation to WTO matters.⁵⁸² However, this does not equally mean that the WTO does not put limitation on the application of general international law in the interpretation of its rules.⁵⁸³ Instead, all depends on the nature of a particular rule in question. What is important here is to understand that the role of the adjudicators should not be evaluated in reference to how they understand a given rule in a covered agreement alone; rather it should be evaluated in reference to how they understand the rules in the covered agreements in relation to the rules of general international law that are not contracted out by the WTO

⁵⁸¹ Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55(2) INT’L & COMP. L. Q. 281, 301 (2006).

⁵⁸² See Pauwelyn, *supra* note 546, at (2001).

⁵⁸³ See Article 3.2 of the DSU; it specifically limited the task of adjudicators in interpreting the covered agreements. This in effect puts some limitation on the scope of application of rules of international law outside the covered agreements.

Agreements. This is in line with the inherent jurisdiction of international tribunals to apply rules and principles of international law.⁵⁸⁴ The multilateral trading system adjudicators also have this inherent jurisdiction to apply principles of international law.⁵⁸⁵

The other most important point that needs to be discussed regarding the relationship between WTO rules and international law is the impact of Article 31(3)(c) of the Vienna Convention on Law of Treaties.⁵⁸⁶ It is imperative to discuss it here with a view to see its role within the interpretive apparatus of the rules of the multilateral system. Article 3.2 of the DSU expressly mandates the adjudicators to interpret the rules of the covered agreements on the basis of rules of interpretation of public international law. Therefore, this direction obliges adjudicators to apply the rules of treaty interpretation envisaged in the Vienna Convention on the Law of Treaties as it is confirmed as the authoritative indication of rules of interpretation of international law.⁵⁸⁷ Most importantly the method envisaged under Article 31(3)(c) plays significant role in the interpretations of the rules of the multilateral treaties keeping up the developments in related areas of international law that have relevance to the issue in question. Thus, the interpretations of the rules of the multilateral trading system that can impact consumers interests can be illuminated by rules and principles developed in other areas of international law that have relevance to consumers' interests, such as environmental law or rights of access to

⁵⁸⁴ See Andrew D Mitchell & David Heaton, *Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, *The*, 31(3) MICH. J. INT'L L. 559 (2009). (They discussed principles of international law that international tribunals can apply through exercising their inherent jurisdiction)

⁵⁸⁵ *Id.*

⁵⁸⁶ See VCLT 1969.

⁵⁸⁷ *US — Gasoline* Appellate Body Report, *supra* note 578, at 17; *see also* SHAW, *supra* note 490, at 933.

vital medicine in case of the TRIPS, for instance.⁵⁸⁸ The method enshrined under Article 31(3)(c), therefore, helps adjudicators to interpret the rules of the multilateral trading system in line with such developments.⁵⁸⁹

5.3.4 Precedent in the WTO Jurisprudence

It is important to examine the role of precedent in the WTO jurisprudence to effectively evaluate the impact of case laws in the formulation of rules in the multilateral trading system. It will also be instructive to understand how the multilateral trading system was shaped over the years and can be shaped towards the right direction in the future. It is also very important to understand the real value of case laws in the multilateral trading system, especially in the face of little or no real progress in the negotiation process to amend or come up with additional rules for international trade. As clearly pointed out by a commentator that:

If the WTO Agreement is interpreted in an *ad hoc* way, without regard to previous decisions, uncertainty will arise as to whether government policies are inconsistent with the WTO Agreement. Such uncertainty will deprive Panel reports of the practical value desired by contracting parties, and impair the achievement of GATT/ WTO objectives.⁵⁹⁰

Predictability and certainty is a great virtue for a multilateral system like the WTO. As it regulates multilateral trade on the basis of a wide ranging rules covering various aspects of international trade it is crucial to maintain consistent interpretation of the rules in order to ensure stability of

⁵⁸⁸ See TRIPS Agreement, art. 8

⁵⁸⁹ For further discussion on the role of Article 31(3)(c) of VCLT see Sec. 5.1.1 below

⁵⁹⁰ Chua, *supra* note 552, at 173.

the system. Accordingly, such systems demand a recognition of the persuasive value of previous decisions if not expect them to set a precedent. It is accepted that following the reasoning of past decisions helps in ‘the development of a comprehensive body of law which can be used not only as direct evidence of specific rules of law but also as indicative of the method and the spirit in which’ similar cases may be resolved.⁵⁹¹ In a similar fashion, recognition of the reasoning of past panel and Appellate Body reports will contribute in the development of comprehensive body of law and a firm expectation on the part of member states as to the manner that future disputes will be resolved.⁵⁹² Consistent application of a given rule of law will certainly develop confidence among the subjects and increases the legitimacy of a system in the eyes of its members. Hence, if we adhere to the objectives and spirit of the multilateral trading system it is important to the adjudicatory organs to follow their previous decisions.⁵⁹³ Otherwise “legal credibility can hardly be achieved if judicial decisions are inconsistent, affronting even the most elementary sense of justice”.⁵⁹⁴

Due to the legislative process in the WTO, which makes amendment of the rules very difficult, it is through the judicial process that the rules of the multilateral trading system are clarified and even sometimes crystallized.⁵⁹⁵ It is also common for multilateral systems to incorporate generalized rules in order to accommodate competing interests. Due to the complex bargaining process within the multilateral trading system, "rules are often purposefully drafted in a vague manner as part of a political compromise" that is why members bestowed a “significant de facto power

⁵⁹¹ LAUTERPACHT, *supra* note 488, at 18.

⁵⁹² Chua, *supra* note 552, at 173.

⁵⁹³ *Id.*

⁵⁹⁴ LAUTERPACHT, *supra* note 488, at 8.

⁵⁹⁵ For the role of adjudicators in multilateral organizations see JACKSON, *supra* note 489, at 11.

to the WTO dispute settlement system to interpret and effectively make WTO law”.⁵⁹⁶ Under the WTO jurisprudence cases involve more than the judicial resolution of an individual dispute. The WTO panels and Appellate Body decisions on a given case also produce systemic effects for future cases.⁵⁹⁷ The Appellate Body clearly recognized the authoritative values of adopted panel reports. According to the Appellate Body, panel reports serve equal role as do precedents in municipal laws.⁵⁹⁸ Accordingly, they create legitimate expectation on the part of members and can be considered as sources of rights and obligation among members to the effect that members need to observe such obligations created by adopted reports.⁵⁹⁹ The same is true with adopted Appellate Body reports in that they serve as precedents for subsequent cases.⁶⁰⁰ Therefore, it is important as well as possible to remedy the systemic imbalance, if any, in the multilateral trading system through the development of a more balanced jurisprudence.⁶⁰¹ A closer look at the working of the WTO panels and Appellate Body reveals the fact that panels follow the reasoning and interpretation reached by preceding panels thereby maintaining consistency in the interpretation and application of the rules of the multilateral trading system.⁶⁰²

Therefore, even though the WTO does not recognize formal precedent as it is known in domestic legal systems, it nevertheless accords due weight to adopted panel and Appellate Body reports as they can at least create expectations among the members.⁶⁰³ As the task of the

⁵⁹⁶ Shaffer, *supra* note 528, at (2003), p.11.

⁵⁹⁷ Shaffer, *supra* note 528, at 11.

⁵⁹⁸ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 108.

⁵⁹⁹ *Id.*

⁶⁰⁰ See *US — Shrimp Recourse to Article 21.5* Appellate Body Report, *supra* note 414.

⁶⁰¹ See Shaffer, *supra* note 528, at 11.

⁶⁰² See Chua *supra* note 452, at 174.

⁶⁰³ Hilf, *supra* note 188, at 116.

adjudicators is to maintain the certainty and predictability of the decision making in the system, granting such values to previous decisions of adjudicators is the least expected from the dispute settlement mechanism. Thus, given its reliance in the reasoning of previous cases, it is fair to say that the WTO follows precedents even though it is not as strong as it is commonly known in the municipal jurisprudences of the common law legal tradition.⁶⁰⁴ This in turn will have far-reaching effects unless the jurisprudence is guided in the right direction. Therefore, the adjudicators need to bear in mind the systemic implication of their decisions at any time and give due attention to the balance that should be maintained while interpreting the rules. An interpretation of a rule that does not take into account the underlying rationale coupled with a strong commitment on the part of the adjudicators to follow precedent will be counterproductive to the legitimacy of the multilateral trading system.⁶⁰⁵

5.4 The Role of WTO Jurisprudence in Shaping the Multilateral Trading System

To understand the role of the WTO jurisprudence in shaping the multilateral trading system, we need to locate the place of the adjudicators of the WTO within the system. In effect we need to know the exact mandate and status of the adjudicators of the multilateral trading system. In the preceding part we have seen that international tribunals play a significant role in shaping a regime through active participation in the rule making process. We have seen that adjudicators are expected to play

⁶⁰⁴ JACKSON, *supra* note 171, at 447. (He argued that the precedent in the WTO can be compared to be closer to the *stare decisis* than very lower precedents)

⁶⁰⁵ It will affect the systemic interests of members that do not participate at current dispute settlement mechanism, when they want to utilize at some point in time.

important role in the rule-making process while undertaking their judicial functions. However, this understanding is predicated on the conclusion that the WTO adjudicators are judicial organs of an international institution mandated to adjudicate cases on the basis of international law.

It is argued that the multilateral trading system incorporates a judicial organ mandated to adjudicate trade disputes among its members on the basis of international law. Commentators claimed that the system has transformed into a rule-oriented system from its former structure which was dominated by a power-oriented diplomatic forum.⁶⁰⁶ Therefore, it can be argued that by incorporating a dispute settlement mechanism mandated with the resolution of disputes on the basis of international law, the multilateral trading system consciously established a judicial dispute settlement organ within the system. This in effect leads the dispute settlement mechanism to become judicialized.⁶⁰⁷ As judicial organs mandated with the administration of the covered agreements of the multilateral trading system, the adjudicators are expected to shape the multilateral trading system to move forward in achieving its ultimate goals. To do so the adjudicators are expected to clarify the rules which appear to be unclear as well as crafting a workable rules from the rules where there appears to be no specific rule to resolve a certain dispute so important to the achievement of the goals of the system.

In preceding parts an attempt has been made to highlight the roles and powers of international tribunals in the administration of the rules of a system they are operating and the impact of their adjudication in transforming a system. The WTO dispute settlement system is no different than those international tribunals credited for their significant role in

⁶⁰⁶ Cameron & Gray, *supra* note 533, at 248.

⁶⁰⁷ *Id.* at 249.

shaping the rules of the system they are operating. Most importantly as a dispute settlement organ established and operating within the ambit of international law, the Dispute Settlement Body of the multilateral trading system is expected to fulfill its mandates in accordance with the rules and precedents of international law.

The multilateral trading system expressly confirmed the judicial status of the adjudicatory bodies and its mandate to rule on the basis of international law.⁶⁰⁸ The Dispute Settlement Understanding, the legal document that establishes and regulates the dispute settlement mechanism of the multilateral trading system, provided that the Appellate Body should undertake legal interpretation on the basis of international law.⁶⁰⁹ This is a clear proof as to the intention of the multilateral trading system to create a dispute settlement organ to adjudicate cases on the basis of international law. More importantly it is a proof for the autonomy of the adjudicators in fulfilling their duties and to base their decision on international law.⁶¹⁰

In conclusion it can be said that the adjudicative organs of the multilateral trading system, in particular the Appellate Body, are empowered with a sufficient power to shape the multilateral trading system through the introduction of the necessary transformation. It is accepted that the Appellate Body has the autonomy to introduce the necessary change within its jurisprudence and transform the multilateral trading system.⁶¹¹ Most importantly, the adjudicators are required to undertake their duties on the basis of international law with the understanding that the multilateral trading system operates within the larger system of international law. As a result, they are expected to interpret the multilateral trading rules in light of

⁶⁰⁸ Pauwelyn, *supra* note 546 at. 553.

⁶⁰⁹ *See* DSU, art.3.2.

⁶¹⁰ *Id.*

⁶¹¹ *See* Alvarez, *supra* note 531, at 1-2.

the parallel developments in other branches of international law that are relevant to trade disputes. In doing so, they can keep the system moving in tandem with the dynamics of international law. Such undertaking is a common feature of judicial organs mandated with the administration of justice in a multilateral setting where the rule-making process requires a lengthy process and the accommodation of diverse interests. The other important aspect of a rule-based dispute settlement process is its contribution in balancing a multilateral system, especially where there is a power asymmetry in the rule-making process.⁶¹²

5.5 The Implication of Current WTO Jurisprudence on Consumers' Interests

We have seen that the adjudicators have the mandate to guide the multilateral trading system to the right direction through their adjudicatory roles. Thus, it is expected that the jurisprudence which develops through the years can have certain impacts on all involved in international trade. Since this research is limited to highlighting the actual and potential impact of the ensuing WTO jurisprudence on consumers' interests, especially on their ability to meet their non-economic interests, an attempt shall be made to examine the jurisprudence that developed so far in relation to issues that have direct or indirect impact on consumers' interests.

To evaluate the impact of the jurisprudence of the multilateral trading system we need to evaluate whether the trends so far have any positive or negative impact on the promotion of consumer interests. To do

⁶¹² See James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11(3) REV. INT'L POLIT. ECON. 542, 546 (2004).

so we need to put in perspective the parameters we are going to use to evaluate the jurisprudence. First and foremost, it is important to evaluate the working of the adjudicators against the backgrounds discussed in the preceding parts regarding the role and mandate of international tribunals. In so doing we can evaluate the direction of the jurisprudence in relation to consumers' interests while ensuring predictability and security in the multilateral trading system. In this regard, we have spelt out the parameters to be used in evaluating the role of judicial organs within a given system. Therefore, we are going to evaluate whether the adjudicatory process of the multilateral trading system is up to the standards required from adjudicators under international law. Secondly, it is also important to evaluate the trends of the adjudicators in adjudicating cases that have some impact on the issue at hand. This will be done in line with the approaches used in the determination of violations in the selected cases and other cases used in the discussion.

One of the characteristics of an international tribunal is to decide a case on the basis of international law to which no one would disagree.⁶¹³ Hence, adjudicators of the multilateral trade system are required to adjudicate trade disputes among members on the basis of international law. This does not mean, however, that all international tribunals apply the same sets of rules or general international law. It all depends on the rules of the system in which they are operating. This may sound like a simple issue since most tribunals called up on to adjudicate interstate disputes need to base their decisions and invariably apply international law and the multilateral trading system will not be any different. Therefore, the distinguishing feature of an international tribunal does not rest only on its role in applying international rules rather it is on how it bases its decision.

⁶¹³ The UN Charter and the Statute of ICJ, *supra* note 494.

Proceeding in international tribunals can be contrasted with civil litigation in domestic courts in terms of how they treat the arguments of the parties' vis-à-vis the law to be applied to a given case. Unlike in litigation in civil cases between private parties where the judge is expected to pronounce judgment in favor of a party who preponderantly convinced him, this is not the case in international tribunals where they are expected to focus on the rules than the arguments of the parties. The difference in international and municipal law proceedings is rightly observed by Lauterpacht in the following words:

International tribunals, when giving a decision on a point of law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is. Their decisions are evidence of the existing rule of law.⁶¹⁴

From this we can clearly understand that in international adjudications tribunals are required to focus on the rules to be applied to the case rather than the argument of the parties. This is precisely because, they are more focused on the systemic implication of the settlement of a particular dispute rather than the immediate resolution of the dispute among the contesting parties alone. In order to understand the impact of the jurisprudence of the multilateral trading system we need to address the prime objective of the system and the rationale for which the adjudicatory process is established in the first place. It is a common knowledge that the multilateral trading system was established to promote trade liberalization.⁶¹⁵ But the question to be answered first is whether trade liberalization is a means to an end or an end in itself. To grasp the goal for which the multilateral trading system is established we may need to look

⁶¹⁴ LAUTERPACHT, *supra* note 488, at 21.

⁶¹⁵ See Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 J. INT. ECON. 151 (2007).

into the rules of the system itself. In this regard the preamble to the WTO Agreement may give us some insight about the declared goal of the members of the multilateral trading system when they established the institution with an inbuilt legalistic dispute settlement mechanism. The Preamble to the WTO Agreement states that:

Relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment . . . while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.⁶¹⁶

From this it is easy to infer that trade liberalization is a means to an end rather than an end in itself.⁶¹⁷ Even though economic gain is the prime goal, the preamble sought to achieve multiple goals through trade liberalization under the multilateral trading system.⁶¹⁸ It is possible that the various objectives can conflict at times and need proper evaluation by the adjudicators that are required to strike a delicate balance among these competing objectives in line with the underlying rationale. Therefore, national policies geared towards sustainable development, for instance, may impact trade liberalization and in turn trade liberalization may impact the regulatory autonomy of a member state to regulate its national policies.⁶¹⁹ It should also be noted that international adjudicators are required to focus on the general impact of the overall resolution of the dispute rather than resolving a particular argument. In so doing they can refer to rules of other international law other than the treaty they are meant to apply or the treaty under which they are constituted to adjudicate the case. In this regard, the International Court of Justice maintains the

⁶¹⁶ See Preamble to the WTO Agreement.

⁶¹⁷ Reid & Steele, *supra* note 417, at 19.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.* at 19-20.

position that it has jurisdiction to interpret treaties other than those treaties which are included in the instrument that confers jurisdiction to a particular case.⁶²⁰ From this we can infer how the adjudicators of the multilateral trading system should behave in undertaking their duties of resolving trade disputes among its members. They need to make sure that their decisions take into account the whole interests involved in the system. Furthermore, they need to realize that in resolving a particular dispute they are also setting a set of rules for the future course of action of the contesting parties as well as the other members of the system. Thus, they need to take into account the interests of both the contesting members and those that are not taking part in the dispute. If they are to focus on the arguments of the parties and pay attention only on the reciprocal obligation of the parties without resorting to the overall balance in the system, in effect they are departing from their mandates as international adjudicators. They should always pay attention to the systemic effect of their decision in addition to the resolution of the particular disputes.

It is important to focus on the examination of the works of the adjudicators and see whether they adhere to these characteristics of an international tribunal or not. As an inter-governmental institution, the concern of the multilateral trading system is the states not the entities within a member state. It is only a member state that has a standing before the WTO Dispute Settlement Mechanism. And it is only against the state that the WTO Dispute Settlement Body can take an action. However, this does not mean that the rulings of the WTO would not affect private individuals and non-governmental authorities. Most importantly the rulings of the WTO focus on measures taken by member states within their domestic sphere. Thus, whenever a WTO Panel or Appellate Body rules

⁶²⁰ LAUTERPACHT, *supra* note 488, at 206.

that a certain measure violates the WTO rules, such state is required to bring into conformity such measures to the rules of the multilateral trading system at issue.⁶²¹ This in effect requires the state to change the measures or take remedial actions so as to bring its measures into conformity with its obligation under the WTO. On the other hand, states have a duty towards their citizens to make sure that the markets within their jurisdiction are properly functioning. States need to make sure that the markets are not harming their consumers in the guise of free trade. In other words, the multilateral trading rules are established with a conscious balance between the need for free trade and the obligation of member states towards their consumers and other stakeholders. Therefore, the adjudicators need to take into account this balance whenever they are called to interpret the covered agreements. They need to make sure that their holding responds to the systemic demands of the multilateral trading system while addressing the interests of contesting members at the same time.

If we look at the rules of the multilateral trading system alone, they appear to be in favor of securing free trade with less or no regard to other equally important interests.⁶²² Actually this is not necessarily a bad sign for the promotion of consumers' interests. It needs, rather, to understand why such mechanism was introduced in the first place. As has been discussed earlier, it is believed that free trade is in the best interests of consumers. In addition to that it is thought that obstacles to free trade were the reasons for international frictions and conflicts.⁶²³ As a result it was believed that making international trade more free than it used to be is the solution to avoid unnecessary competition and conflicts that might be caused as a result. Therefore, at the beginning what was required was a set of rules that

⁶²¹ See DSU, art. 3.7; see also SECRETARIAT, *supra* note 47, at 75.

⁶²² See for instance Ronald, *supra* note 4.

⁶²³ See Mansfield & Pevehouse, *supra* note 182.

would tackle unnecessary trade barriers among member states with a view to ascertaining free trade.⁶²⁴ Every possible mechanisms were devised to make sure that goods and services are traded everywhere. And the dispute settlement mechanism that followed these rules also reflects this intention. Every possible instance of violations is covered under the dispute settlement mechanism. This can be inferred from the incorporation of non-violation and situation complaints under both the GATT and WTO systems. As indicated in preceding parts, the WTO adjudicators could impact consumers through their jurisdiction on the basis of non-violation complaint and to some extent through situation complaint under Article XXIII:1(c) of GATT.⁶²⁵ For instance in case of non-violation complaint a member might be implicated for an action by consumer groups that would require taking up some measures, even though the state itself did not do anything that violates its commitment under the WTO.

Indeed, this can be cited as a policy manifestation on the part of the multilateral trading system as showing its favor to ascertaining free trade. However, we need to look at the other side as well. If states are considered as self-interested and keen to promote their own will with apparent disregard to the good of the world, a system that aims to tackle this needs to try to close any loop holes. The adjudicators in such systems need to make sure that all endeavors do not overstep their intended purpose. It is what the adjudicators would do that would make sure that every interest at stake are properly weighed. Therefore, due attention should be paid in examining the cases in order to check whether the adjudicators take note of these competing interests that are aimed at a similar goal of achieving an improved standard of living to mankind. It should be understood that both the promotion of free trade through the multilateral trading system and the

⁶²⁴ See Baldwin, *supra* note 89, cited by Du, *supra* note 89.

⁶²⁵ See GATT 1947, art. XXIII.

promotion of consumers' interests should be evaluated within the same framework of ascertaining an improved wellbeing of mankind. The adjudicators must be guided with this purpose in interpreting the multilateral rules whenever they are called to do so.

The WTO Dispute Settlement Mechanism addresses the issue of non-governmental entities in many cases while trying to ascertain the rights and obligations of states.⁶²⁶ Nevertheless, under the current dispute settlement system of the WTO only members bear the rights and obligations that would accrue from any legal proceedings. That is why all agreements talk of states alone. However, there are various acts that can affect international trade and can be undertaken by non-governmental entities. As a matter of fact, most of the acts that trigger trade measures by states and thereby led to trade dispute are acts undertaken by non-governmental entities. For the purpose of this study it suffices just to understand that the WTO jurisprudence can affect and shape the behavior of consumers' at least indirectly through the member states of the WTO.

The basic issues that can affect the interests of consumers positively and negatively are, among others, the analysis of the adjudicators as to the 'likeness' of products and regulatory objectives.⁶²⁷ The criteria used in the determination of the 'likeness' of a product have a far-reaching consequences when it comes to the impact on consumer interests. Therefore, any approach that does not properly address consumers' interests in the analysis of 'likeness' will have substantial impact on the

⁶²⁶ Panel Report, *Japan — Trade in Semi-Conductors*, L/6309 - 35S/116, (May 4, 1988); see also SECRETARIAT, *supra* note 47, at 40. For detail discussion on the discrepancy between norms of international law and the WTO jurisprudence on the treatment of state and non-state actions see Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law: The Danger of Blurring the Chinese Wall between 'State Organ' and 'Non-State Organ' as Designed in the ILC Draft Articles*, 49(1) J. WORLD TRADE 117 (2015).

⁶²⁷ For a detail discussion on likeness analysis see Section 4.1-4.4 above.

outcome of a dispute and the interests of consumers. Adjudicators need to take into account the interests of consumers in choosing an interpretive approach or the factors used in the analysis. Thus, since any choice as to the interpretive approach or the weight given to each factors rests on the judgment of adjudicators they can play significant role in ensuring that the interests of consumers are reflected in the dispute resolution. In the discussion under chapter 4, we have seen that the adjudicators of the multilateral trading system are trying to accommodate the interests of consumers in the 'likeness' analysis. This can be a proof for the positive development of the jurisprudence in terms of consumers' interests. Therefore, if this understanding continuous in the adjudicatory circle it is possible for the multilateral trading system to assure stakeholders that trade liberalization will not be secured at the expense of other vital consumers' interests.

Chapter 6

Mechanisms to Develop a Consumer Friendly Jurisprudence

6.1 Through Normative Integration

6.1.1 Normative Integration and WTO Jurisprudence

In this chapter the term “Normative integration” is used to refer to the process through which different institutions in international law try to apply international law holistically.⁶²⁸ It is a common knowledge that various institutions are operating within the international plane with their own mandates and sets of rules to rely on. It is argued that to keep up with the basics of international law and check the threat of fragmentation, such institutions should work towards normative integration and dispute settlement processes are the best avenues to achieve this.⁶²⁹ It is understood that international law is just a system rather than a rule and as such every legal act under international law should be understood in relation to such system.⁶³⁰ As has been pointed out by Rosalyn Higgins “international law is better understood as a normative system and a process rather than as rule”, and thus everything in the system should be reckoned against such

⁶²⁸ See for instance Benn McGrady, *Fragmentation of International Law or “Systemic Integration” of Treaty Regimes: EC — Biotech Products and the Proper Interpretation of Article 31 (3)(c) of the Vienna Convention on the Law of Treaties*, 42(4) J. WORLD TRADE 589 (2008).

⁶²⁹ See Lindroos and Mehling, *supra* note 548, at 858. (They argue that Dispute settlements serve as the best measure for assessing the relationship of trade rules and international law at large)

⁶³⁰ Campbell McLachlan, *The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention*, 54(2) INT’L & COMP. L. Q. 279, 282 (2005).

understanding.⁶³¹ If we are to accept that the WTO operates within the larger family of international law it has to acknowledge the need for normative integration so as to avoid unnecessarily normative clashes that would threaten the survival of the system itself. The adjudicatory process of the multilateral trading system should strive to integrate the multilateral rules in the covered agreements with relevant rules of general international law as well as other relevant treaties. It is clearly understood that if international law is continually developing in a fragmented manner giving rise to various institutions and regimes with their own primary as well as secondary rules, it is difficult to bring all these institutions within a single adjudicatory forum. It is more likely that the trend will continue in the same fashion. Therefore, it is wise to focus on normative integration so as to avoid the undesirable effect of fragmentation and clash of norms.

Normative integration can serve various purposes to the development of international law in general and the multilateral trading system in particular. Conflicting developments of norms, if not properly managed, can give rise to unnecessary dispute that could be avoided in an integrated international system. It is also argued that normative diversity is a tool to promote a politically motivated hegemonic agenda that runs counter to international legalism.⁶³² A judge in the International Court of Justice warned about the danger of fragmentation as a source for forum shopping that would lead to unnecessary confusion and stated that:

⁶³¹ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1, 8 (1994), cited by McLachlan, *supra* note 630.

⁶³² Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 LOY. U. CHI. INT'L L. REV. 173, 174 (2008).

All this may exacerbate the risk of conflicting judgments and gives rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases.⁶³³

Therefore, one mechanism to avoid such threat to the unity of international law is to seek advisory opinion from the International Court of Justice on important issues that can have impact on the unity of international law as suggested by Judge Gilbert Guillaume and Judge Stephen M. Schwebel.⁶³⁴ The other alternative could be to leave the task to each regime to interpret rules of international law having due regard to the unity of international law and to interpret their respective rules in consonance with the general precepts of international law. In doing so, they can maintain the unity of international law through the integration of the norms of international law. The multilateral trading system is not immune to such dangers. Many rules are developing in other branches of international law that have relevance to trade relations or at least on those areas that can affect international trade. Most members of the WTO are also parties to many multilateral treaties which regulate various issues that can impact international trade or at least their obligations to the multilateral trading system. Given the exclusive and compulsory jurisdiction of the dispute settlement mechanism of the multilateral trading system, it is very difficult, if not impossible, to harmonize their obligations to those other obligations while fulfilling their commitment to the multilateral trading system and vice-versa. That is what normative integration is meant to serve and what Article 31(3)(C) of the VCLT envisages. Through integrative interpretation of the multilateral rules in line with applicable international law rules, adjudicators can maintain harmony in the multilateral system as

⁶³³ Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15(3) LEIDEN J. INT'L L. 553, 554 (2002). (Quoting Gilbert Guillaume's, President of the ICJ, Speech to United Nations General Assembly, 26 October 2000)

⁶³⁴ *See id.*

well as the general family of international law. Through this method the adjudicators can be able to take into account the various developments that took place after the establishment of the multilateral organization and the conclusion of most of its covered agreements.

It is true that as international rules concluded in the auspices of international law, the rules of the multilateral trading system affects other rules of international law and vice versa.⁶³⁵ As it impacted rules of international law it is possible that subsequent developments of international law can impact the rules of the multilateral trading system.⁶³⁶ It is possible that members of the multilateral trading system can conclude treaties or assume obligations that would conflict with their commitments under the WTO agreements. In such cases it is possible that the new treaties or obligations assumed by the members may prevail over conflicting WTO rules.⁶³⁷ All depends on the rule of interpretation of general international law and the conflict of law rules in the WTO agreements and other treaties concluded after the WTO treaties.⁶³⁸ Such phenomenon obviously requires harmonized interpretation of the rules of the multilateral trading system with other rules of international law that have relevance to international trade or in some way impact international trade. However, this alternative does not seem to be attractive for multilateral systems like the WTO that advocates a claim of self-contained regime. This appears to be true especially with the WTO adjudicatory bodies that try to avoid the application of norms of general international

⁶³⁵ See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 25-35 § 29 (2003).

⁶³⁶ For the relationship between WTO law and other international law *see id.*

⁶³⁷ *Id.* at 547.

⁶³⁸ *Id.*

law even though they do not expressly propound the “absolute normative insularity of an explicit self-contained regime”⁶³⁹

However, a prudent system need not ignore the danger and should work effectively towards normative integration within the general family of international law. This will help the system to check on other parallel developments that can have an impact on international trade as well. Most importantly, it will help resolve unnecessary conflicts that could result from a decentralized law making process of the international legal system. This in turn will give a relief to the adjudicatory bodies that wish to interpret the rules of the multilateral rules in line with developments of international law. In effect it will give the chance to the jurisprudence of the multilateral trading system to remedy the systemic imbalance that might have resulted from the law making process through the interpretation of those rules in light of subsequent developments. If we are to argue otherwise and limit ourselves to the application of those rules in the covered agreements without any regard to subsequent developments in international law, we are in effect ignoring the nature of international law as a rule meant to address dynamic social developments.⁶⁴⁰ Let alone rules of international law, the interpretation of any rule has to take into account this fact.

Another most important point that needs to be discussed regarding the relationship between WTO rules and international law is the impact of Article 31(3)(c) of the Vienna Convention on the Law of Treaties in the interpretation and application of the rules of the multilateral trading system.⁶⁴¹ It is imperative to discuss it here with a view to see its role within the interpretive apparatus of the rules of the multilateral trading

⁶³⁹ Broude, *supra* note 632, at 175-176.

⁶⁴⁰ McLachlan, *supra* note 630, at 282.

⁶⁴¹ VCLT 1969.

system. Article 31(3)(C) of VCLT contain the rule that plays a decisive role in integrating WTO rules with other rules of international law.⁶⁴² It should be noted, however, that the application of the VCLT only tells us the approaches to be used rather than the exact rules or principles of international law to be applied in a given case.

The discussion as to the relevance of Article 31(3)(c) raises different issues to be examined before deciding generally whether the provision has a meaningful contribution to the application of the rules of the multilateral trading system. A discussion about Article 31(3)(c) should answer questions about the types of international rules, the nature of the parties referred therein and the issue of relevance. As to the types of rules that Article 31(3)(c) refers to, publicists and judicial decisions concur that all the relevant sources of international law referred under Article 38(1) of the Statute of the International Court of Justice can be consulted.⁶⁴³ The second important question and the one that seems to divide authorities is the reference as to “applicable in the relation between the parties”.⁶⁴⁴ This reference draws conflicting interpretation when it comes to its application within the multilateral trading system.⁶⁴⁵ The basic disagreement seems to rely on the reference as to “the parties”. While some interpret it as referring to all the parties to the relevant treaty, others interpret it as referring only to the parties to the dispute.⁶⁴⁶ Those who advocate the restrictive

⁶⁴²French, *supra* note 581, at 301; *see also* Report of the International Law Commission Fifty-sixth session General Assembly Official Records Fifty-ninth session Supplement No. 10 (A/59/10), 2004, at 301 ¶ 349.

⁶⁴³ *See* Pauwelyn, *supra* note 635, at 254-255; Marceau, *supra* note 538, at 1087; *Case of Golder v. UK*, no. 4451/70 [1975] 13 ECHR ¶ 35 (Feb. 21); *US — Shrimp Appellate Body Report*, *supra* note 48, ¶ 158.

⁶⁴⁴ *See* VCLT 1969, art. 31(3)(c).

⁶⁴⁵ *See* McGrady, *supra* note 628, at 2008.

⁶⁴⁶ *See* Pauwelyn, *supra* note 635, at 257-263; Panel Report *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R WT/DS292/R WT/DS293/R (Sept. 29, 2006) [hereinafter *EC — Approval and Marketing*

interpretation relied on the definition article, Article 2(g) of the VCLT which defines the term “parties” as “a state which has consented to be bound by the treaty and for which the treaty is in force”⁶⁴⁷ and argued that parties under Article 31(3)(c) has the same reference and refers to all the parties to the treaty which is being interpreted.⁶⁴⁸The same argument was advanced by the Panel in the *EC — Approval and Marketing of Biotech Products* which held that:

It may be inferred from these elements that the rules of international law applicable in the relations between ‘the parties’ are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force.⁶⁴⁹

One point that needs to be noted in relation to Article 31(3)(c) is the issue of relevance to the interpretation of a rule in question. Regarding this issue it is argued that the rule of international law referred under Article 31(3)(c) can only be consulted if it ‘sheds light on the meaning of the WTO term’ being interpreted.⁶⁵⁰ Therefore, in a nutshell adjudicators of the multilateral trading system are expected to consult any rule of international law that is relevant to the interpretation of a term in the covered agreements. Since there seems a disagreement as to the scope of application of these rules of international law outside the covered agreements, it is safe to say at least those rules of general international law

of Biotech Products Panel Report] French, *supra* note 581, at 305-307; McGrady, *supra* note 628, at 591-592; McLachlan, *supra* note 630, at 313-315.

⁶⁴⁷ See VCLT 1969, art. 2(g).

⁶⁴⁸ See McGrady, *supra* note 628, at 594.

⁶⁴⁹ *EC — Approval and Marketing of Biotech Products* Panel Report, *supra* note 646, ¶ 7.68.

⁶⁵⁰ Pauwelyn, *supra* note 635, at (2003)264; see also Panel Report, *Chile — Price Band System And Safeguard Measures Relating To Certain Agricultural Products*, ¶ 7.85, WT/DS207/R (May 3, 2002).

and general principles of law that have relevance to the interpretation of a rule in the covered agreement should be consulted.

Another point that needs to be dealt with in relation to Article 31(3)(c) is its temporal scope vis-à-vis the WTO agreements. In international law terms may be interpreted contemporaneously or evolutionarily.⁶⁵¹ Thus, it is important to determine the scope of the interpretation suggested by Article 31(3)(c). Authorities agree that as far as the application of Article 31(3)(c) is concerned, evolutive interpretation seems the rule rather than the exception.⁶⁵² Therefore, the WTO adjudicators are expected to apply relevant rules of international law as existed at the time of the dispute rather than at the conclusion of the WTO agreement subjected to the dispute unless a different interpretation is merited by the nature of the term to be interpreted.⁶⁵³

The other systemic effect of normative integration for the multilateral trading system is to accommodate the widening gaps in the regulatory demands among its members. The multilateral trading system includes members found in polar opposite positions in terms of their level of development arguably deserving different level of regulatory deference. Building jurisprudence on the basis of subjective deference may not be condoned as it will deprive certainty and predictability in the system which is a sacred attribute of a rule-based system. It is not even an outcome from an integrated jurisprudence. What normative integration would do in such cases is helping the adjudicators to be able to interpret the rules of the multilateral trading system in accordance with the changing demand of the system itself. This will not deprive the system certainty as every member is expected to keep abreast every development in international law that would

⁶⁵¹ See Pauwelyn, *supra* note 635, at 264.

⁶⁵² *Id.* at 268.

⁶⁵³ For further discussion on Evolutive Interpretation *see* Sec 6.1.3 below.

impact their reciprocal rights and obligations under the multilateral trading system.

6.1.1.1 WTO as a Self-contained Regime

The notion of self-contained regime refers to sub-system in international law that contains rules that would exclude the application of rules of general international law among its members.⁶⁵⁴ The issue of self-contained regime is not new to the discussion of international law. However, the proliferation of international institutions and international tribunals with special mandates make it more pressing recently. Different authorities understood the concept differently and that greatly contributes to the debate. The concept is misunderstood as an argument for ‘an entirely autonomous legal subsystem’.⁶⁵⁵ However, this does not seem the true essence of the concept since it is difficult to find an entirely autonomous subsystem within the general framework of international law.⁶⁵⁶ In fact, it is international law that determines whether a certain regime is self-contained or not. Thus, it is difficult to imagine a legal system created by the operation of international law to detach itself from the family of international law. Nevertheless, this does not mean that all sets of rules are applicable within such subsystems. It is common to have subsystems with their own peculiar features that can distinguish them from one another. Otherwise it is inconceivable to imagine subsystems that are entirely separate from a system under which they are created.⁶⁵⁷ Therefore, it is

⁶⁵⁴ Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) EUR.J. INT’L L.483, 490 (2006).

⁶⁵⁵ *Id.* 492.

⁶⁵⁶ For the discussion of self-contained regime see also LAURA NIELSEN, *THE WTO, ANIMALS AND PPMS* (2007); Pauwelyn, *supra* note 635, at 25-35.

⁶⁵⁷ Simma and Pulkowski, *supra* note 684, at 492.

inconceivable to find a regime that operates parallel to international law”.⁶⁵⁸ As aptly observed that:

No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes, not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished.⁶⁵⁹

Such understanding is shared by other institutions that claim the status of a self-contained regime. A case in point could be the recognition by the European Court of Justice regarding the application of rules of general international law to cases subjected to EC laws.⁶⁶⁰ Therefore, the notion of self-contained regime is used to refer to the degree of specialization of regimes both in terms of primary and secondary rules of state responsibility. Therefore, a self-contained regime should be understood as a sub-system in international law that determines its substantive or procedural rules and the rights and duties of its members can be ascertained with the application of such rules. It is possible to talk of self-contained regime either in terms of primary rules or secondary rules. The Permanent Court of International Justice referred it in terms of primary rules in the Wimbledon case while the International Court of Justice applied it for secondary rules in the Teheran Hostages case.⁶⁶¹ In its original reference as used by the Permanent Court of International Justice, the concept refers to treaty regimes that cannot be complemented by other

⁶⁵⁸ *Id.*

⁶⁵⁹ ILC Study, *supra* note 565, ¶ 120.

⁶⁶⁰ Simma and Pulkowski, *supra* note 654, at .492.

⁶⁶¹ See *Case of the S.S. Wimbledon, Judgment*, PCIJ, Ser. A., No. 1, 1923 and *United States Diplomatic and Consular Staff in Tehran, Judgment*, 1980 I. C. J. 3, respectively.

treaties by analogy.⁶⁶² Accordingly, in a self-contained regime in respect of primary rules the substantive rules that determine the rights and duties of the parties must be the rules of the regime alone. However, this does not mean that relevant rules of interpretation will not apply in the determination of the substantive rules unless there is a specific qualification in that regard. After the Teheran Hostages case the discussion of self-contained regimes concentrated on their reference to secondary rules and hence refers to sub-systems that contain ‘a full, exhaustive and definitive set of secondary rules’.⁶⁶³ Thus, the understanding is that in self-contained regimes it is the substantive rules and the procedural rules of the regime that are applicable as among the members. It is not possible to apply rules from other branches of international law by analogy.

This is in tandem with what the International Law Commission tried to address under the Draft Articles on State Responsibilities.⁶⁶⁴ The draft addresses both the issue of primary and secondary rules of state responsibilities. In any case the draft article is instructive to the understanding of the nature of self-contained regimes. It provides under Article 55 that:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.⁶⁶⁵

⁶⁶² Simma and Pulkowski, *supra* note 654, at (2006)492.

⁶⁶³ Dirk Pulkowski, *Narratives of Fragmentation: International Law between Unity and Multiplicity* 1 (Paper presented at 'Agora' 2005 Florence Founding Conference of the European Society of International Law (ESIL), 2005).

⁶⁶⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 53th Sess., Apr. 23-June 1, July 2- Aug. 10, 2011, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10(2001).[hereinafter ILC Draft Articles]

⁶⁶⁵ ILC Draft Articles, *supra* note 664.

From this it is clear that general international law recognize the existence of the so called self-contained regimes in that their special rules will be given priority over the general rules of responsibility where they clearly provide or it appears from the provision that such result is intended.⁶⁶⁶ Even though the debate continues as to the nature of self-contained regime, no one denies the nature of the WTO as a self-contained regime in that it sets both the primary and secondary rules that would govern the responsibility of its members in relation to their commitments under the covered agreements. Thus, the question is to what extent does self-contained regime like the WTO are open to rules of other sources of international law binding on its members and most importantly to general international law?⁶⁶⁷ In this regard the Appellate Body has acknowledged the right place of the multilateral trading system within the general environment of international law and confirmed that “the GATT remains firmly imbedded in general international law”⁶⁶⁸ and stated that “the General Agreement is not to be read in clinical isolation from public international law”.⁶⁶⁹ Thus, when we come to the position of the multilateral trading system adjudicators regarding the status of the WTO, it seems that there is a consensus on the relevance of other rules of international law in determining the rights and obligations of the members.⁶⁷⁰ Therefore, what we need to understand regarding the relationship between the WTO covered agreements and other rules of international law is that the multilateral trading system consciously accepts the applicability of such other rules as far as they are relevant to the determination of rights and duties of members. The express reference

⁶⁶⁶ See *id.* art. 55; see also Simma and Pulkowski, *supra* note 654, at 490.

⁶⁶⁷ Lindroos and Mehling, *supra* note 548, at 858. (They claim that despite the fact that WTO is a special regime it is not a totally closed regime)

⁶⁶⁸ Simma and Pulkowski, *supra* note 654, at 492.

⁶⁶⁹ See *US — Gasoline* Appellate Body Report, *supra* note 578, at 17.

⁶⁷⁰ See Jackson, *supra* note 535, at 829.

under Article 3.2 of the DSU as to the applicability of customary rules of interpretation of public international law in fact calls for the application of other relevant rules of international law to the determination of rights and obligations of member states under the multilateral trading rules. This is because Article 31 of the Vienna Convention on the Law of Treaties which is accepted as a rule of customary international law⁶⁷¹ refers to the application of other relevant rules of international law applicable in their relation between the parties.⁶⁷² This in effect invites the application of rules of customary international law applicable to the contesting parties as well as treaties in force between the contesting parties in the interpretation of the rules of the multilateral trading system. This is in line with the general principle in which Article 31 itself is founded; that is treaties are the creation of international law and as such should be interpreted in accordance with international law.⁶⁷³ Even though the reference under Article 3.2 of the DSU does not specifically mention the provisions of Article 31 and the following of the Vienna Convention on the Law of Treaties, the Appellate Body confirmed as to the reference in various cases involving the applications of the rules of the convention.⁶⁷⁴

Having said this, it is important to point out the implication of the status of the WTO within the family of international law and its impacts on the overall discussion made in this part as well as the overall discussion of the topic. If we are to hold that the fact that WTO claims the status of self-contained regime would not shut out the application of other rules of international law in the interpretation of the rules of the multilateral trading system, it follows that the multilateral jurisprudence should develop with

⁶⁷¹ See ROBERT JENNINGS & SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 1271-1275 § 1 (1995).

⁶⁷² See VCLT 1969, art. 31(3)(C).

⁶⁷³ See McLachlan, *supra* note 630, at 280.

⁶⁷⁴ See *Japan — Alcoholic Beverage II* Appellate Body Report, *supra* note 111, at 17.

this conclusion in mind. The multilateral trading system adjudicators need to consult relevant provisions of customary international law as well as treaty laws other than the covered agreements whenever necessary in order to interpret the rules of the multilateral trading system properly. Such other rules can help in the understanding of the rights and obligations of member states as enshrined in the covered agreements taking into account the continuous development in various fields relevant to the administration of international trade. However, it should also be noted that being a part of the general family of international law and applying the rules of international law are different. The fact that the multilateral trading system operates within the general family of international law does not mean that the adjudicatory process is entitled to apply substantive rules from other branches of international law that are related to trade.

The implication of such holding for the overall understanding of the multilateral trading system in general and the discussion in this research in particular is that, since the adjudicators are expected to base their decisions on the basis of international law, their interpretation should not be water-tightly limited to the rules in the covered agreements. This in effect will allow them to interpret the rules in the covered agreements in line with the rules and precedents of international law. As has been discussed in preceding parts, one of the criticisms directed against the multilateral trading system is the absence of sufficient rules expressly dealing with consumer interests or the mechanism to balance regulatory autonomy and free trade.⁶⁷⁵ However, it is possible to interpret the existing rules on the basis of the underlying balance that should exist between members' regulatory autonomy and free trade as established under the multilateral framework. Thus, those rules can be interpreted in line with rules of

⁶⁷⁵ See Rolland, *supra* note 4.

interpretation of international law as the self-contained status would not contract out the rules of interpretation unless there are expressed limitations to that effect under the rules of the system.⁶⁷⁶ A closer look at the rules of the multilateral trading system, especially the rules in the DSU shows that the multilateral trading system does not contract out rules of treaty interpretation.⁶⁷⁷ This in effect opens the room for the incorporation of relevant principle in parallel branches of international law to help in the interpretation of the rules of the multilateral trading system. Therefore, given our holding above as to the status of the WTO as a self-contained regime with sufficient room for the application of relevant rules of general international law rules in the interpretation of the rules of the multilateral trading system, it is possible for the adjudicators to import those precepts from other multilateral regimes whenever they are relevant. In so doing they can be able to address the continually changing landscape of the multilateral trading system environment properly.

At this stage caution should be taken not to oversimplify the special status of the WTO within the framework of general international law. It is precisely for this reason that multilateral regimes like the WTO claim the status of self-contained regime. Thus, any trade dispute among the WTO members must be taken care of under the multilateral trade rules and any fall back to general international law should be discouraged. This is what is

⁶⁷⁶ See *Korea — Procurement* Panel Report, *supra* note 575. The panel states that:

Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

⁶⁷⁷ See DSU, art. 3.2.

envisaged under Article 3.2 last sentence of the DSU of the multilateral trading system.⁶⁷⁸ However, given the lack of progress in trade negotiations and the encouraging parallel developments in other branches of international law that are closely linked to international trade, an integrated interpretive approach that takes into account the development of the subject at issue should be promoted. Such undertaking would help the adjudicatory process to address the ever growing demands of consumers that need to keep up with trade liberalization. As has been said earlier, this does not mean that rules of other branches of international law will be applicable in resolving trade disputes among members of the multilateral trade regime. It should be only in the interpretation process that a given rule needs to be consulted in order to understand the essence of a provision or a rule in the multilateral trading system. Therefore, it is only the adjudicatory process that can realize the integration of the interpretation of the rules of the multilateral trading system in line with the development in other branches that have relevance to international trade. Ignoring such development in the guise of self-contained regime may not help the multilateral trading system in its quest for legitimacy in the eyes of consumers and other stakeholders.⁶⁷⁹ As consumers' interest in the market is not limited to accessing cheaper goods and services, a mere success in trade liberalization at the cost of other vital societal interest will not add up to the achievement of the multilateral trading system. Consumers' interest transcends the economic understanding of consumption. Therefore, the multilateral trading system rules which are predicated on ensuring market access to goods and service cannot be sufficiently understood by interpreting them within the multilateral rules alone. They need to be

⁶⁷⁸ See DSU, art. 3.2; see also Joost Pauwelyn, *The Transformation of World Trade*, 104(1) MICH. L. REV. 1(2005).

⁶⁷⁹ See Howse and Tuerk *supra* note 226, at 284. (They argue that, one of the criticism to WTO emanates from consumers and Environmentalist concerns)

interpreted against the changing demands of consumers' that might not have been foreseen during the multilateral rounds that developed the rules of the multilateral system.

6.1.1.2 Evolutionary Interpretation

One of the techniques of interpretation that has relevance to the interpretation of the rules of the multilateral trading system is an evolutionary interpretation of treaties. The multilateral trading system expressly mandated the adjudicators to base their interpretation on the rules of interpretation of international law.⁶⁸⁰ Therefore, it is important to see the essence of the evolutionary interpretation within the wider body of international law in general and within the WTO system in particular. In order to evaluate the relevance of evaluative interpretation in the interpretation of the multilateral trade rules its conceptual boundaries should be understood with sufficient clarity. Therefore, the essence of evolutionary interpretation as understood in international law as well as its place within the rules of international law will be discussed. In relation to treaty interpretation, evolutive interpretation refers to “an interpretation where a term is given a meaning that changes over time”.⁶⁸¹ According to the evolutive principle terms in a treaty needs to be given a meaning that takes into account the evolution of the meaning of the term both linguistically as well as conceptually.⁶⁸² A change in the meaning of a term can occur both due to the development of the concept itself as well as a

⁶⁸⁰ See DSU, art. 3.2.

⁶⁸¹ Sondre Torp Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD. 161, 162 (2013).

⁶⁸² *Id.*

result of development or change in the language.⁶⁸³ Thus, evolutionary interpretation is one of the techniques used to interpret terms that are meant to have changing denotations over time.⁶⁸⁴ As an instrument to regulate the social behavior, law needs to have the ability to adjust to the social dynamics that change over time due to various factors. Due to its ability to accord terms meanings that can respond to the evolution in meaning and concepts, evolutive interpretation is very convenient to the interpretation of rules of a multilateral system where changing the rules to respond to changing circumstances is not easy.⁶⁸⁵ This is true especially for a multilateral system with a large membership and where amendment or introduction of new rules is difficult. In such cases sufficient mechanisms should be there to address issues that arise over time and under changing circumstances. This is true for the multilateral trading system where the law making process required complex and tiresome negotiations among its ever increasing members over myriads of trade issues. Therefore, the multilateral trading system needs to have sufficient scheme to interpret its rules in a way to address emerging issues in international trade relations. It is through the adjudicatory process that terms can be given the meaning that reflects their evolutionary developments. Thus, the adjudicators of the multilateral trading system are expected to take into account the evolution of concepts in the covered agreements. However, before any suggestion is made as to the utility of the evolutionary interpretation in the interpretations of the rules of the multilateral trading system its place within the multilateral trading system and international law in general should be ascertained. Therefore, it is important to examine its rightful place in international law and whether it can be used to interpret the WTO

⁶⁸³ *Id.*

⁶⁸⁴ Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences*, 9(3) LAW & PRAC. INT'L CTS. & TRIBUNALS 443, 444 (2010).

⁶⁸⁵ Helmersen, *supra* note 681, at 165.

agreements. In doing so it will help us to know how far the rules of the multilateral trading system are responsive to subsequent developments in the rules of international law that have relevance to international trade.

It is expected that those who disagree with the status of the evolutionary interpretation of treaties may criticize the active involvement of the adjudicatory organs in interpreting the multilateral rules in line with subsequent developments. There are arguments to the extent of precluding the application of international rules other than those in the covered agreements claiming that it would amount to judicial activism and thereby against the explicit provisions of the DSU.⁶⁸⁶ It is true that the nature of the multilateral trading systems precludes the applications of rules of other branches of international law in the determination of the rights and obligations of members. However, as has been discussed earlier the application of a substantive rule and consulting it for the purpose of interpretation are quite different. Therefore, it is necessary to delimit the two understandings and use them accordingly. Consulting a rule from another branch of international law or from general international law in the interpretation of the rules of the multilateral trading system would not amount to judicial activism as it is allowed under the rules of the multilateral trading system itself.⁶⁸⁷ Therefore, whether the adjudicators overstep their power and amounts to a judicial activism should be evaluated within the context of the general family of international law.⁶⁸⁸ It is the rules of international law that would tell us the status of the

⁶⁸⁶ Pauwelyn, *supra* note 678. (He claimed that the DSU itself includes a powerful warning against judicial activism: It explicitly prohibits panels and the Appellate Body to "add to or diminish the rights and obligations" of WTO members)

⁶⁸⁷ See DSU, art. 3.2.

⁶⁸⁸ See Richard H Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98(2) AM. J. INT'L L.247 (2004).

multilateral trading system within the family of international law and its relation with other rules of international law outside its covered agreements.

Social needs and social progress are dynamic and need such understanding from those involved in the adjudicatory process so as to take into account these and devise a mechanism that would address the changes. The main role of a judicial system is to interpret rules of a system in consonance with changing circumstances and developments. That is why legal rules are crafted in such a way that can accommodate behaviors for a fairly longer time without the need to make changes in the rules frequently. We have seen in the preceding chapters that the WTO adjudicators are empowered to interpret the rules of the multilateral trading system taking into account the balance and its status within the family of international law. It is empowered to utilize the rules of interpretation of public international law.⁶⁸⁹ We also have seen that the WTO jurisprudence sufficiently relies on precedent in dealing with current cases.⁶⁹⁰ Therefore, in fact what the evolutionary interpretation asks is the blending of those past experiences with the present and future circumstances.⁶⁹¹

It is well understood that subjects of treaties are constantly changing and any treaty interpretation needs to respond to that. As pointed out by Georg Nolte, member of the ILC that:

Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the

⁶⁸⁹ See DSU, art.3.2.

⁶⁹⁰ See the discussion on Section 5.2.3 above.

⁶⁹¹ See for eg. Schaefer, Walter V Schaefer, *Precedent and Policy*, 34(1) U. CHI. L. REV. 24 (1966).

international community and can, sometimes, fall into
obsolescence.⁶⁹²

This is very fitting exposition for our discussion as to the role of the evolutionary interpretation for the interpretation of the rules of the multilateral trading system. The multilateral trading system operates under a complex sets of treaties negotiated among its members covering a very wide range of subject matters designed to function for a long period of time. Their interpretation needs to take into account the changes that happen to the subject matters covered under these agreements. Therefore, if we are to hold that the WTO adjudicators should respond to the emerging demands of the multilateral trading system, they need to have a power to accommodate such changes in the jurisprudence. This can only be possible if they are allowed to utilize the evaluative approach, which in turn presupposes the incorporation of the concept into customary international law to which the adjudicators are entitled or required to refer to in the interpretation of the rules of the multilateral trading system. This understanding is in consonance with the attending circumstances in the multilateral trading system. It became common for trade negotiations to take more than decades in the multilateral trading system.⁶⁹³ Therefore, it is in the interest of the multilateral trading system to interpret the existing rules in light of the development that took place after the conclusion of the agreements.

Non-trade concerns of consumers are typical instances where changes can occur over time due to social developments. As societies grow issues that were not factors in the consumers' tastes can be very important

⁶⁹² Report of the International Law Commission Sixtieth session, 5 May-6 June and 7 July-8 August 2008, Annex A ¶ 1, U.N. Doc. A/63/10 (2008). [hereinafter ILC Report 2008]

⁶⁹³ The Review of the Dispute Settlement Understanding started in 1997, but not yet completed. See https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations

determinants.⁶⁹⁴ Thus, the analysis of consumers' interests should change to reflect the changes in consumers' attitudes. That is why, for instance, the issue of 'likeness' is said to be subjective and needs to be seen in a case by case basis.⁶⁹⁵ Therefore, evolutive interpretation is fit to address such changes by taking into account the general structure of the system.

In preceding parts, we have discussed that the rules of the multilateral trading system should be understood within the larger family of international law. Thus, an interpretive approach recognized under general international law should be followed while interpreting the rules of the multilateral trading system.⁶⁹⁶ Therefore, it is necessary to verify the status of evolutionary interpretation within the general framework of international law. Accepting evolutionary interpretation as forming part of international law applicable to treaty interpretation will incorporate it into the rules of treaty interpretation that the multilateral trading system adjudicators are required to apply.⁶⁹⁷ This in turn can have an impact on the landscape of the multilateral trading system as the rules of the covered agreements can be subjected to an evaluative interpretation that would give rise to a different outcome than a plain interpretation would yield. Nevertheless, since the evolution of a term in the covered agreement should always be reckoned against the general structure of the system, incorporating evolutionary interpretation will not lead to an outcome not dictated by the system. Therefore, before we look into the impact of evolutive interpretation in the discussion of consumer centered jurisprudence, let us first examine whether it really forms part of customary international law. As has been stated repeatedly the starting point for any discussion regarding the rules of treaty interpretation is

⁶⁹⁴ See Lowe, *supra* note 54.

⁶⁹⁵ See Cottier et al., *supra* note 180, at 1001.

⁶⁹⁶ See DSU, art. 3.2.

⁶⁹⁷ DSU, art. 3.2.

Article 31 and 32 of the Vienna convention on the Law of Treaties as it forms part of customary international law.⁶⁹⁸ Therefore, in effect the question whether evaluative interpretation forms part of international law or not rests on the question of whether Article 31 and 32 incorporate evaluative interpretation or not.

Article 31 and 32 of the Vienna Convention on the Law of Treaties incorporate various techniques that need to be utilized by adjudicators called upon to interpret a term in a treaty provision. A closer look at those techniques incorporated under Article 31 and 32 of the VCLT invites the application of evolutive interpretation.⁶⁹⁹ The techniques under Article 31 and 32 do not tell us whether the meaning to be accorded to a term is the one at the time of the conclusion of a treaty or at the time of interpretation. It depends on the nature of the term to be interpreted and the intention of the parties to the treaty in question that determines the reference time for the interpretation. It is true that finding whether a term needs to be interpreted evolutionarily or not is not an easy undertaking. Nor does the VCLT have express answer for that. Therefore, in order to determine whether the customary rules of treaty interpretation permit evolutionary interpretation or not we may need to employ subsidiary sources of international law. As authoritatively listed under Article 38 (1) (d) of the Statute of the International Court of Justice, judicial decisions and the teachings of the highly qualified publicists of the various nations are the

⁶⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 110 ¶ 160 (February 26); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 174 ¶ 94 (July 9); *Case concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, 2004 I.C.J. 48 ¶ 83 (March 31); *LaGrand Case*, *supra* note 497; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment, 2002 I.C.J. 645, ¶ 37 (December 17).

⁶⁹⁹ See Helmersen, *supra* note 681. (Argue that the VCLT Article 31-33 permits evolutive interpretation)

subsidiary sources of international law that would help us to determine what the law is at a given point.⁷⁰⁰ Thus it is important to see what the publicists and international tribunals have to say about evolutive interpretation.

Evolutive interpretation of treaties is recognized by various international tribunals including the International Court of Justice and is ‘considered permissible under the rules of the 1969 VCLT.’⁷⁰¹ The European Court of Human Rights (ECHR), for instance, incorporated the evolutive interpretation in its jurisprudence starting with the *Tyrer v. United Kingdom* case.⁷⁰² In this case, the ECHR utilized the evolutive interpretation while trying to interpret the term ‘degrading punishment’ that appeared in the European Human Rights Convention.⁷⁰³ The International Court of Justice utilized the evolutive interpretation in various disputes that required the interpretation of terms and concepts that need to be interpreted in light of developments in international law.⁷⁰⁴

In the *Namibia Advisory* case the ICJ was called upon in 1971 to interpret a provision under a 1920 mandate putting South West Africa under the mandate of South Africa. The Court addressed the interpretation

⁷⁰⁰ See The UN Charter and the Statute of ICJ, *supra* note 494.

⁷⁰¹ Arato, *supra* note 684, at 445.

⁷⁰² See Helmersen, 678, at 167.

⁷⁰³ See *Tyrer v. United Kingdom*, no. 5856/72, Eur.Ct. H.R. ¶ 31 (Apr. 25, 1978); see also Convention for the Protection of Human Rights and Fundamental Freedoms adopted 4 November 1950, (Entered into Force 3 September, 1953) 213 U.N.T.S. 222 (ECHR).

⁷⁰⁴ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J.16 (June 21) [hereinafter the *Namibia Case*]; *Aegean Sea Continental Shelf [Greece v. Turkey]*, Judgment, 1978 I.C.J. 3 (Dec. 19) [hereinafter *Aegean Sea Continental Shelf*]; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 2009 I.C.J. 213 (June 21). [hereinafter *Dispute regarding Navigational and Related Rights*]

of Article 22 of the Covenant of the League of Nation which regulates the mandate system.⁷⁰⁵ In that case the ICJ stated that:

The Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant-"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned-were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust"⁷⁰⁶.

In the Aegean Sea case between Greek and Turkey in relation to a dispute regarding the delimitation of the continental shelf in the Aegean Sea, the Court was called upon to interpret the expression "disputes relating to the territorial status of Greece" that appears in the instrument of Greek's accession and reasoned that the Court needs to take into account the evolution that occurred in relation to the rules of international law that have relevance to the dispute.⁷⁰⁷ The Court reasoned that:

Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have

⁷⁰⁵ See Covenant of the League of Nations, art. 22, Apr. 29, 1919, 4 U.K.T.S. (Cmd. 153).

⁷⁰⁶ *The Namibia case*, *supra* note 704, at 31, ¶ 53.

⁷⁰⁷ *Aegean Sea Continental Shelf*, *supra* note 704, at 34, ¶ 80.

a fixed content regardless of the subsequent evolution of international law.⁷⁰⁸

In the dispute between Costa Rica and Nicaragua the meaning of the term ‘commerce’ was required to be interpreted evolutively.⁷⁰⁹ In this dispute the ICJ underscores the situation where an evolutive interpretation should be employed to interpret terms in a treaty over time and stated the requirement in the following words:

...where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration” the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.⁷¹⁰

Having observed this, the court decided to interpret the term “commerce” as having a different meaning than it has at the time of the conclusion of the treaty taking into account the evolution of the meaning of the term at the time when the term is required to be interpreted.⁷¹¹ The decisions of the ICJ on these cases confirms the need to interpret terms in accordance with the evolution of the meaning of a term or a concept over time as a result of change in the language or the understanding of a concept denoted by a given term. It also answered the important question that relates to the intention of parties to a treaty subjected to an evolutive interpretation whether their intention needs to be proved in order to employ evolutionary interpretation or their intention should be presumed. Accordingly, the Court resolved it by affirming that the intention of parties

⁷⁰⁸ *Id.* at 32, ¶ 77.

⁷⁰⁹ *Dispute Regarding Navigational and Related Rights*, *supra* note 704.

⁷¹⁰ *Id.* at 34, ¶ 66.

⁷¹¹ *Id.* p.35 ¶ 70.

as to their desire to interpret terms in a treaty evolutionarily should be deduced from the usage of terms which needs evolutionary understanding.⁷¹² Therefore, if there are general terms, for instance, the presumption will be in favor of interpreting such terms evolutionarily. The other indicator for evolutionary interpretation is the duration of a treaty in question. If it is entered into for longer or indefinite period the presumption has to be in favor of evolutionary interpretation.⁷¹³ This is understandable given the fact that social developments are dynamic and needs dynamic understanding.

The rules of the multilateral trading system are rules entered into for an unlimited duration as does the 1858 Treaty⁷¹⁴ which merited an evolutionary interpretation by the ICJ. It is possible to find terms in the multilateral rules that are generic that needs evolutive interpretation in light of the developments in the subject and the overall development of international law. This is expressly confirmed by the Appellate Body in the *China — Publications and Audiovisual* case when it examines the nature of the multilateral trading system agreements.⁷¹⁵ Therefore, terms used in the multilateral trading system agreements need to be interpreted by taking into account the developments in the subject at issue. The Appellate Body in the *US — Shrimp* case also confirmed the need to employ evolutionary

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ *Id.* at 11, ¶ 12. (The Dispute relates the interpretation of the Treaty of 1858 that concerns the obligation to facilitate and expedite traffic on the San Juan River)

⁷¹⁵ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services For Certain Publications and Audiovisual Entertainment Products*, ¶ 397, WT/DS363/AB/R (Dec. 21, 2009). The Appellate Body States that:

We consider that the terms used in China's GATS Schedule.....are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time.

interpretation while interpreting the term “natural resources” as to include living and non-living things by taking into account the development of the relevant international law on the subject.⁷¹⁶ It should also be noted that the evolutive approach to interpret treaties equally apply to all the methods enshrined under Article 31-33 of the VCLT.⁷¹⁷ Thus, whenever we employ the methods indicated under Article 31-33 of the VCLT we need to consider the evolution of the terms wherever appropriate. Therefore, for instance, in giving a term its ordinary meaning or a meaning taking into account the context we need to consider the evolution of the ordinary meaning or contextual meaning as the case may be. It should be noted, however, that it is not always the case that terms in a treaty should be interpreted evolutionarily. There are cases where terms should be interpreted contemporaneously.⁷¹⁸ The choices whether to give an evolutionary meaning or contemporaneous should depend on the circumstance of the cases. Therefore, it is up to the adjudicatory process to determine those terms that need evolutive interpretation and those that require contemporaneity by taking into account the nature of the particular term that requires interpretation.

From the preceding discussions we can clearly see the significance of evolutive interpretation to address current problems with rules that were drawn up a little longer, probably without anticipating the current developments on the subject. We have also seen that the multilateral trading rules were crafted in the first place to tackle trade barriers and developed further on that primary aim. The focus appears to provide

⁷¹⁶ See *US — Shrimp* Appellate Body Report, *supra* note 48, ¶ 130; In this case the AB stress on the need to interpret the term “natural resource” under GATT Article XX(g) to include living and non-living things in accordance with the development of the relevant international law on the area.

⁷¹⁷ Helmersen, *supra* note 681, at 166.

⁷¹⁸ Malcolm N Shaw, *Control, and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission*, 56 INT’L & COMP. L. Q. 755, 762 (2007).

sufficient rules that would address trade barriers leaving other vital interests to be reckoned against the underlying balance. That is what interpretive techniques are meant to deal with. Thus, the rules need to be interpreted taking into account the changes that occurred afterwards.

6.2 Through Adjusting the Interpretive Approach

6.2.1 Modifying the Interpretive Approach

In the preceding parts we have seen that the interpretive approach used by the adjudicatory process plays significant role in the outcome of a given dispute. We have seen that the importance of the ‘likeness’ analysis in the national treatment obligation which is most implicated obligation of members in relation to measures aimed at safeguarding consumers’ interests. The interpretive approach used in the analysis of ‘likeness’ is very important in the determination of whether an alleged measure is discriminatory or not for the purpose of the national treatment obligation.⁷¹⁹ Thus, by opting for a given interpretive approach, the adjudicatory process in effect can determine the direction of a dispute in relation to whether there exists violation or not. We also seen that the various approaches used by the adjudicatory process so far addresses the issue of ‘likeness’ from different perspectives.⁷²⁰ Since a given approach can have a positive or negative bearing on the ability of members to take measures that address consumers’ interests, modifying the approaches alone can bring a significant change in the interaction between trade and the need to safeguard other interests of consumers.

⁷¹⁹ See Goco, *supra* note 219, at 315.

⁷²⁰ See the discussion on Likeness Analysis under Chapter 4 above.

In the preceding parts we have seen that a market-based analysis focusing on the goods and services side may miss some aspects of consumers' interests. A discussion also has been made regarding the need for a harmonized understanding of the rules of the multilateral trading system taking into account the underlying balance that should exist between free trade and the regulatory autonomy of members. Thus, any measure taken by a member state in pursuance of other legitimate goals need to be seen from the perspective of the regulatory autonomy of the member vis-à-vis its commitment to the multilateral trading system. Hence, the adjudicatory process is expected to opt for an interpretive approach that would help it to reflect this balance in the analysis of the national treatment obligation. It is also a common knowledge that the negotiation process in the WTO proved to be a tedious undertaking. It is unlikely to come up with a negotiated amendment in the rules of the system any time soon. The negotiation to amend the DSU alone took almost the entire life of the system so far and it is unlikely to be concluded soon.⁷²¹ This trend is a good reminder to focus on the existing rules and look for mechanisms that can be addressed through the application of the existing rules. One such mechanism is to incorporate, as far as practicable, interpretive approach that would better address the growing concerns of consumers. We have also seen that there is no inherent imbalance that cannot be addressed through the appropriate interpretive approach because the rules are crafted with a conscious understanding of the balance between regulatory autonomy of members and the need to promote free trade. Since the multilateral trading system is all about promoting the well-being of mankind,⁷²² the interpretations of its rules should be aligned towards this goal. The current jurisprudence also reveals the different approach used by

⁷²¹ See *supra* note 693.

⁷²² See Preamble to the WTO Agreement.

the adjudicative process in interpreting the covered agreements and the possibility to use various approaches within the existing jurisprudence.⁷²³ In the process it is also observed that adjudicators tried to address all the stakes involved in a measure in dispute. Their choice to base their analysis on a certain approach is predicated on its suitability to reflect those interests properly.

The discussion clearly shows that it is quite possible to address the non-trade concerns of consumers adequately through the existing rules as long as we apply the right interpretive approach that can take into account the underlying rationale of the multilateral trading system and that can give due attention to the extent of autonomy of members to take regulatory measures to safeguard consumers' interests within their jurisdiction. One such approach considered to be fit to reflect the underlying balance in the multilateral trading system is the regulatory purpose-based analysis of 'likeness'. This approach is suitable to determine whether an alleged internal measure is discriminatory and violates the national treatment obligation. Since discrimination is not a mere difference in treatment this approach will help adjudicators to look into the rationale behind the distinction between the products in question.⁷²⁴ The regulatory purpose-based analysis also helps adjudicators to resolve the issue of violation there and then without the need to examine the alleged measure under the exception clauses.

⁷²³ See *US — Clove Cigarettes* Appellate Body Report, *supra* note 127, ¶ 115.

⁷²⁴ See Howse and Tuerk, *supra* note 226, at 288.

6.2.2 Giving Due Weight to the relevant Criteria

Applying one interpretive approach and analyzing the criteria relevant for that approach are quite different. It is possible for panels and the Appellate Body to rely on the same interpretive approach and yet reach a different conclusion regarding the ‘likeness’ of comparable products or in the determination of consistency of the measure at issue to the WTO commitments.⁷²⁵ Therefore, it is totally possible to rely on the same interpretive approach and give the appropriate weight to the criteria so as to arrive at a more plausible conclusion that would take all the interests at stake into account.

There are cases where panels and the Appellate Body relied on the same approach but reached in a different conclusion as to the ‘likeness’ of the products in question or regarding the issue of violation.⁷²⁶ As has been indicated earlier in the discussion of the WTO cases, in the *EC — Asbestos* case, the Panel and the Appellate Body have based their analysis on the competitive approach but arrived at opposing conclusion as to the ‘likeness’ of the products in question.⁷²⁷ In that case even though both the Panel and the Appellate Body agreed that the ‘likeness’ analysis should be made on the competitive relation of the two products they differ in their approach as to competitiveness itself. Thus, while the panel considered their function as the basis of their relationship the Appellate Body argued that competitiveness has to be seen in general terms taking into account all the elements of competition.⁷²⁸ This case can give a practical lesson on the implication of the interpretive approaches to the interests of consumers since ‘likeness’ analysis is central in the determination of violations

⁷²⁵ See *EC — Asbestos* Appellate Body Report, *supra* note 110.

⁷²⁶ *Id.*

⁷²⁷ See the discussion of the *EC — Asbestos* Case in Chapter 4 above.

⁷²⁸ See for instance Potts *supra* note 237, at 16.

resulted from internal regulatory measures taken with a view to addressing non-trade concerns of consumers. Thus, the focus of analysis as well as the weights given to each criterion in the ‘likeness’ analysis should be considered while arguing for a harmonious jurisprudence.

The ‘likeness’ analysis in the WTO jurisprudence seems to focus on the supply side than the demand side. This tendency is understandable given the primary target of the multilateral trading system was rooting out trade barriers as much as possible. Therefore, the best mechanism to discourage disguised protectionist measure is to tackle discriminatory treatments that are based on marginal differences. This would give equal opportunity of competitions to goods that are competitive to certain degree. However, such threshold would deny members the autonomy to treat products that exhibit sufficient difference for legitimate regulatory objective. That is why it is argued that competitiveness in the market should be seen from the perspective of consumers’ choices.⁷²⁹ They argue that it is the treatment of consumers as “‘like’” or “‘unlike’” that should be dispositive of competitiveness of products in the market.⁷³⁰ It is also important to recall the analysis of similar products by the European Court of Justice which stated that competitiveness has to do with the economic relation of the products at issue.⁷³¹ It also stated that similarity of products should be determined from the perspective of consumers.⁷³² However, this does not tell us whether this is about functional or general competitiveness. If we look at its analysis in the *Rewe Case* that stated comparable products are said to be similar if they “‘have similar characteristics and meet the same needs’” it appears to shed some light on the essence of similarity. The fact that the issue of similarity should be seen from the perspective of the

⁷²⁹ See *Rewe Case*, *supra* note 313, ¶ 12.

⁷³⁰ See Emch, *supra* note 268, at 369-415.

⁷³¹ *Commission v. France*, *supra* note 313, ¶ 13.

⁷³² *Rewe Case*, *supra* note 313, ¶ 12.

characteristics of the products as well as their use indicates that competitiveness is not about serving similar end use alone. Rather, it requires the examination of other factors relating to the products, such as physical identity and production process and methods. This is what the Appellate Body wanted to incorporate in the determination of ‘likeness’ in the *EC — Asbestos* case.⁷³³ This in effect allows states to consider attributes of the goods that can sufficiently reflect consumers’ interests in making distinction for the purpose of regulation. And adjudicators can bring a balance to the system through their interpretive approach if they analyze properly those factors that can reflect consumers’ interests.

Consumers’ choices can reflect their non-economic interests in relation to a given product. They take into account all tangible and intangible elements in making their consumption decisions. Thus it is possible to consider such factors in the determination of competitiveness so as to reflect their interest in the determination of ‘likeness’. Therefore, not only through a change in the interpretive approach used in the determination of ‘likeness’ but also a change in the respective weight given to the factors in the determination of ‘likeness’ that the adjudicatory process can respond to the non-trade concerns of consumers. Thus, by incorporating the relevant factors that can help the adjudicators to distinguish legitimate measures from disguised restriction in international trade they can address consumers’ interests properly. In doing so they can respond to the concerns of many observers worried about the ability of the rules of the multilateral trading system in accommodating consumers’ interests as they help to open up markets.

⁷³³ *EC — Asbestos* Appellate Body Report, *supra* note, 110.

6.3 Significance of Consumers' Friendly Approach to Trade Liberalization

Any discussion as to the effectiveness of the adjudicatory process needs to take into account its utility in furthering trade liberalization. It should not be forgotten that the prime goal of the multilateral trading system is trade liberalization.⁷³⁴ It is through trade liberalization that the system wants to contribute to the well-being of mankind. Thus, other interests of members, no matter how important they might be, should be seen in line with the main objectives of the multilateral trading system. However, this does not mean that the multilateral trading system wants to achieve trade liberalization at the costs of other vital consumers' interests. The multilateral trading system permits the promotion of vital interests of consumers even to the extent of limiting free trade in the interest of human health and other equally important values.⁷³⁵ The argument advanced in this study is not about prioritizing other interests over trade liberalization. Rather, it is to show that trade liberalization and other vital interests can be equally addressed under the existing frame work of the multilateral trading system. Thus, in this part the benefit of addressing non-trade concerns of consumers for the smooth functioning of the multilateral trading system in furthering trade liberalization will be shown.

Trade liberalization requires a concerted effort from all stake holders in international trade. Consumers' are one of the key actors in international trade that can play significant role in furthering trade liberalization.⁷³⁶ It is hard to conceive of trade liberalization without the active and constructive

⁷³⁴ Subramanian & Wei, *supra* note 615; *see also* understanding the WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm

⁷³⁵ *See* understanding the WTO

https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm

⁷³⁶ *See* Waterson, *supra* note 1.

role of consumers in the process.⁷³⁷ Therefore, it must be noted that addressing consumers' interests adequately will contribute to a constructive engagement of consumers in the governance of international trade and work towards a healthy trade liberalization. A strong adherence to the realization of consumers' interests is beneficial to both the consumers as well as the market in general. Their engagement can derive trade liberalization and competition both globally and within the domestic markets. It is argued that strong and demanding consumers are beneficial for innovation and efficiency on the part of domestic industries and thereby contribute to the competitiveness of a nation.⁷³⁸ With the same token strong consumers are fit to withstand potential negative externalities associated with the surge in global commodities that results from trade liberalization. As members are forced to open up their markets to the world, consumers could be vulnerable unless they are ready to deal with it. Consumers, if they are ready, can reduce the negative impact of market opening and derive the benefit thereof through active participation in the process. If organized, they can air their voices before relevant bodies involved in international trade and make sure that the system operates without causing undue harm to the interests of consumers.

It is hard to imagine workable rules that address the interests of consumers without the active participation of consumers in one or other forms. It is also unthinkable to come up with rules and procedures that can promote consumer interests without the participation of consumer groups. It is asserted that meaningful participation on the part of consumers' organizations in the development of international standards and rules is a *sine qua non* to address consumers' interests properly.⁷³⁹ When we

⁷³⁷ See Federation of German Consumer Organizations, *supra* note 49, at 11.

⁷³⁸ Porter, *supra* note 79, at 73.

⁷³⁹ Federation of German Consumer Organizations, *supra* note 49, at 11.

consider the avenues available to consumers to participate in the decision making process of the WTO and thereby shape the multilateral trading system, it is hardly satisfactory given their place in international trade. The Appellate Body has confirmed that the WTO DSM allows private organizations like consumers organizations to submit unsolicited *amicus curiae* submissions in support of issues of interest even though it is not specifically regulated in the DSU.⁷⁴⁰ Such endeavors require a thorough analysis of the issues at hand and a good understanding of the system in order to properly defend the interests at stake. Consumer groups so far tried to utilize this avenue and recorded some success in this regard.⁷⁴¹ However, such endeavor requires not only a strong consumer group but also a strong coordination among consumer groups elsewhere that might be affected with the same or similar measures. Thus, it is in the best interest of consumers and the multilateral system to be supported by a strong consumer groups that would help in the interpretation of the rules and the development of the jurisprudence of the multilateral trading system.

The other point that needs to be addressed here is the potential concern for the drawbacks of incorporating regulatory purpose-based approach in the analysis of, for instance, the national treatment obligation on the market access of products from developing members. It can be argued that introducing a consumer friendly interpretation in the jurisprudence may be counterproductive to the efforts of developing countries to compete in the international market as developed countries may introduce protectionist measure in the guise of consumers' interests.

⁷⁴⁰ See *US — Shrimp* Appellate Body Report, *supra* note 48, ¶ 105-108.

⁷⁴¹ See Gregory Shaffer, *The challenges of WTO Law: Strategies for Developing Country Adaptation*, 5(2) WORLD TRADE REVIEW 177, 195 (2006). In the *EC — Trade Description for Sardines* case, the UK Consumers' Association, the largest consumers association in Europe and the second largest in the world, worked with a UK law firm, Clyde & Co, on a pro bono basis, to prepare an *amicus curiae* brief in support of Peru's submissions to the WTO panel.

For instance there are concerns from the developing countries that environmental measures may be used as a form of disguised protectionism and reduce market access.⁷⁴² This is more so especially regarding labeling requirements by the developed members which is difficult to meet by producers in developing countries and thereby constitutes a trade barrier for products from the developing and least developed members.⁷⁴³ However, we should also note that the issue of market access by the developing countries can be dealt with the special and deferential treatment provision. Agreements such as the TBT also have provisions that would mitigate the problems of market access of developing countries as a result of measures from developed members pursuant to those agreements. For instance, Article 12.3 of the TBT Agreement states that:

Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.⁷⁴⁴

This provision is meant to ensure that legitimate regulatory measure should not create burden on the export of developing and least developed members. It should be noted, however, that this is different from the requirement that member states should employ the least trade restrictive means when they design regulatory measures to address non-trade

⁷⁴² Marceau, *supra* note 203, at 88.

⁷⁴³ For the implication of labelling requirement *see* Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599 (1998).

⁷⁴⁴ TBT Agreement.

concerns.⁷⁴⁵ The other point that should be considered in relation to regulatory purpose-based approach is that it is possible to use it in the determination of ‘likeness’ as well as in the determination of the treatment.⁷⁴⁶ Therefore, if a regulatory distinction of ‘likeness’ is a concern for developing and least developed members export interest it is possible to use it in the determination of the treatment. This will help to address the concerns of developing and least developed members while maintaining the regulatory autonomy of members to make distinction between competitive products for the purpose of regulatory measures.

⁷⁴⁵ TBT Agreement, art. 2.2.

⁷⁴⁶ *See* the discussion under Chapter 4, Section 4.1 above.

Conclusion and Recommendation

The multilateral trading system is established to promote the wellbeing of mankind through free trade. Its rules are geared towards this goal. Adjudicators bestowed with the obligation to interpret the rules of the multilateral rules vis-à-vis the rights and obligations of members are expected to be guided by this underlying goal.

The dispute settlement system of the multilateral trading system is a well-organized rule-based system mandated to interpret the rules of the system in accordance with the rules of international law. Therefore, the adjudicatory process needs to be guided by the principles of international dispute settlements and the goals of the multilateral trading system as reflected in the rules of the covered agreements. In the discussions made so far we have seen that the interpretive approaches utilized by the adjudicators determines the outcome of a dispute. This is a clear proof for the role of the adjudicatory organs in shaping the multilateral trading system through their interpretive mandates. Balancing the right of member states in adopting regulatory measures to pursue other societal values and their obligation under the multilateral trading system is at the heart of the multilateral trading system. Thus, the tasks of the adjudicators are to interpret the rules of the covered agreements in a manner that would maintain this balance. This task requires first and foremost the application of the appropriate interpretive technique that could reflect the underlying balance properly.

In the preceding discussions we have seen that the adjudicatory process has the ability to devise the appropriate interpretive technique that would reflect the balance and guide the jurisprudence. A given interpretive

approach used in the determination of ‘likeness’ is a key in the evaluation of national treatment or the most favored nation treatment which are the pillars of the multilateral trading system. Therefore, the adjudicatory process has a key role in determining the direction of an examination of discrimination through its interpretive role and the choices made in the ‘likeness’ analysis. The discussions also revealed that market-based analysis that is the most favored approach by the adjudicators has limitations in fully addressing the interests of consumers as envisaged in the multilateral system. It is found that this approach has limitations in reflecting the balance required between freedom of members to adopt regulatory measures to respond to consumers’ interests and their obligation towards the system in promoting trade liberalization. Therefore, it is found that had the adjudicators incorporate the regulatory purpose-based approach at least in the determination of the treatment of the products, the concerns of consumers could have been reflected properly. In addition to that the research also came to the conclusion that even the market based approach can yield better results in regards to consumers’ interests, if due attention is given to the demand side of the equation in the determination of, for instance, the ‘likeness’ of products.

The discussion also revealed that normative integration is a good mechanism to help interpret the rules of the multilateral trading system in line with parallel developments in relevant international law and to integrate the system within the general framework of international law so as to avoid normative conflicts. Such move can help the adjudicators to incorporate relevant rules and principles that would illuminate the interpretations of the rules of the multilateral trading system. Dispute settlement mechanism in a multilateral system is expected to balance competing goals in the system. Thus, the multilateral trading system adjudicators are expected to maintain the balance between regulatory

autonomy and free trade as established under the multilateral trading system through the application of the appropriate interpretive approach.

The discussion in the preceding parts revealed that the adjudicatory organs of the multilateral trading system have sufficient power to interpret the multilateral trading rules in line with the balance that should be maintained between regulatory autonomy and free trade. The discussion of the jurisprudence developed so far also revealed the willingness of the adjudicatory organ to employ the regulatory based analysis at least in the determination of the treatment accorded to comparable products in the analysis of the national treatment obligation of member states. This willingness, if consistently followed by subsequent panels and Appellate Body proceedings, can address the concerns of consumers that might not be properly addressed through the market based analysis alone. Such move is in line with the textual applications of the rules of the multilateral trading system as well as the underlying rationale of the system itself. It is also in line with the obligation of the adjudicators to interpret the rules of the multilateral trading system in accordance with the rules of interpretation of international law which calls for holistic applications of the rules of the system as well as relevant rules of international law.

Finally, the researcher would like to recommend that the adjudicators of the multilateral trading system should play an active role in integrating the multilateral rules with other relevant rules of international law through their interpretive endeavors. In doing so, they can avoid a possible conflict that would result in over-burdening member states that might arise due to the multiple sources of international obligation. It will also help the multilateral trading system to contribute to the development of international rules that would serve trade liberalization in tandem with other equally important issues.

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Abstract in Korean

국제재판소들은 그 설립목적인 체제의 형성에서 중요한 역할을 담당한다. 대표적으로 WTO 분쟁해결제도는 무역과 관련하여 회원국들 간 발생한 분쟁을 해결하기 위하여 수립된 체제이다. 이 연구에서는 WTO 분쟁해결절차에서 소비자 이익과 관련된 다자간 무역규범을 어떻게 형성해 왔는지를 검토하고자 한다. 특히 소비자 이익과 연관된 다자간 무역체제의 규칙을 어떻게 해석하는지를 검토하는 데 초점을 맞춘다. 지금까지 다자간 무역체제의 법리가 어떻게 발전해 왔는지를 검토하고, 그러한 법리가 소비자 이익을 보호하는 데 어떤 함의를 갖는지를 검토한다.

이 연구는 다자간 무역규범을 해석하는 한편, 사법절차에서 어떠한 다양한 기법을 고안하는지에 초점을 맞춘다. 이러한 검토를 통해 재판관들이 채택한 다자간 무역규범의 분석방법이 소비자 이익을 향상하는 데 중요한 의의를 가질 수 있음을 확인하였다. 지금까지 WTO 분쟁해결절차에서는 상품의 '동종성' 판단에 관하여 다양하게 해석해왔으며, 이는 자유무역이라는 가치를 손상시키지 않고 소비자 이익을 보호한다는 점에서 의의를 갖는다. 재판관들은 회원국들의 규제상 자율성과 다자무역체제가 표방하는 자유무역이라는 가치 사이에서 균형을 유지하기 위해 노력해왔다. 이는 재판관들이 WTO 규범을 해석할 때 다양한 접근법을 통해 이러한 균형을 유지하고자 노력해왔다는 데서 잘 나타난다.

이 연구는 WTO 다자간 무역체제의 재판관들이 이 체제의 규범을 해석할 때 적절한 접근방식을 고안함으로써 이 체제의 규칙들을 형성하는 데 상당한 기여를 해왔다는 점을 주장한다. 또한, 이 논문에서는 사법절차에서 국제법의 다양한 규칙과 원칙을

도입함으로써 이러한 규범적 통합을 통해 어떻게 WTO 체제를 소비자들의 경제적 내지는 비경제적 이익과 조화롭게 해석하였는지를 검토한다. 이 연구는 재판관들이 수요 측면과 공급 측면을 모두 반영하는 해석방법을 채택함으로써 다자간 무역규범을 적절히 해석하고, 소비자 이익을 향상하는 데 기여할 수 있다는 점을 확인하였다.

주요어: 소비자 이익, 발전적 해석, 해석방법, 동종성 분석, 규범적 통합, WTO 법리

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