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Regulatory Protectionism and the Law of International Trade

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A wide array of policy instruments can protect domestic firms against foreign competition. Regulatory measures that raise the costs of foreign firms relative to domestic firms are exceptionally wasteful protectionist devices, however, with deadweight costs that can greatly exceed those of traditional protectionist instruments such as tariffs and quotas. This Article develops the welfare economics of regulatory protectionism and a related political economy analysis of the national and international legal systems that must confront it, including the WTO, the NAFTA, the European Union, and the United States federal system. It explains why regulatory measures that serve no purpose other than to protect domestic firms against foreign competition will generally be prohibited in politically sophisticated trade agreements, even when other instruments of protection are to a degree permissible. It further suggests why regulatory measures that serve honest, non-protectionist objectives will be permissible in sophisticated trade agreements even though their regulatory benefits may be small and their adverse effect on trade may be great—that is, it explains why trade agreements generally do not authorize “balancing analysis” akin to that undertaken in certain dormant commerce clause cases under U.S. law.

Among the most vexing and persistent disputes in modern international commercial relations involves a European prohibition on the sale of beef from animals treated with certain growth hormones. The use of hormones to fatten beef cattle is widespread in the United States, and hence the European regulation affects United States beef exporters significantly.¹ The United States has

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¹ For a description of the early history of the dispute, see Office of the United States Trade Representative, *Unfair Trade Practices; European Community Hormones Directive*,

maintained that the prohibition is disguised protectionism designed to benefit European beef producers, while the European Union has insisted that it is a sensible public health measure designed to protect its citizens against the possible risks of ingesting hormone residues. After many years of bilateral wrangling,² the World Trade Organization (“WTO”) has now ruled that the European regulation is not reasonably necessary to the attainment of a legitimate health objective and, consequently, that it violates WTO law.³ The dispute continues, however, as the United States and the European Union debate what must be done to bring Europe’s behavior into compliance with WTO law.

The “beef hormones” decision raises many interesting legal and factual issues. This Article, however, focuses on a broader puzzle, a puzzle that is nicely illustrated by the legal rules governing transatlantic trade in beef. Although Europe has now been told that its beef hormone regulations are an unjustified protectionist measure that violates international law, it continues to maintain a hefty tariff on imported beef products.⁴ Further, should beef imports in the future exceed a specified increase over historical levels, an additional and substantial “special safeguard” tariff may be imposed.⁵ Likewise, should increased im-

52 Fed Reg 45304 (1987).

² The dispute began in 1985 when, in conjunction with its ban on the domestic use of growth hormones, the European Community banned the importation of beef from nations that permit growth hormones to be given to cattle for human consumption. This import ban was to become effective in 1988. *Id.* The United States complained, and subsequent European intransigence led President Reagan to impose retaliatory tariffs against European exports under Section 301 of the Trade Act of 1974. Presidential Proclamation 5759, *Increasing the Rate of Duty on Certain Products of the European Community*, 3 CFR 1987 Comp 189. The European Union later modified its regulation to permit beef imports from countries that allow the use of growth hormones if the imported beef could nevertheless be certified as hormone-free. But because compliance with the certification process was expensive, and much United States beef still was excluded by it, the United States continued its retaliatory tariffs for certain imports although suspending the increased duty for others. See Office of the United States Trade Representative, *Modification to the Determination To Impose Increased Duties on Certain Products of the European Community*, 54 Fed Reg 31398 (1989).

³ See WTO, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, WT/DS26/R/USA, Aug 18, 1997; *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, Jan 16, 1998. Both are available online at <<http://www.wto.org/wto/ddf/ep/public.html>> (visited Nov 10, 1998).

⁴ For example, the tariff on carcasses or half carcasses is presently 20 percent plus 2763 ECU per ton, which will gradually decline to 12.8 percent plus 1768 ECU per ton in accordance with European tariff concessions negotiated during the Uruguay Round of multilateral trade negotiations. See WTO, *19 Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994* 16212 (1994).

⁵ See *id.*; WTO, *Agreement on Agriculture*, Art 5, reprinted in John H. Jackson, Wil-

ports of beef “cause or threaten serious injury” to the European beef industry, Europe would be entitled to use temporary additional protective tariffs or quantitative ceilings on imports (quotas) to remedy the problem.⁶ And finally, Europe (like the United States) maintains hefty farm subsidies. To cattle growers in particular, Europe is permitted to bestow an annual subsidy of nearly 2 billion ECU without violating its commitments to limit agricultural subsidies.⁷ Needless to say, subsidies too are a form of protectionism that lower costs for domestic producers and allow them to compete more effectively against imports.

What is going on here? Why are protective tariffs, subsidies, and quotas (under specified circumstances) perfectly legal under WTO law, while protectionism in the form of a regulatory measure such as the hormones regulation is illegal? This Article undertakes to answer this question using some rudimentary economics of international trade melded with simple public choice theory.

Some terminology is useful at the outset. Government regulation⁸ of product markets⁹ can increase the costs of production for firms outside of the regulating jurisdiction (“foreign firms”) more than it increases costs for firms inside the regulating jurisdiction (“domestic firms”) and thereby confer a competitive advantage on domestic firms. I define “regulatory protectionism” as any cost disadvantage imposed on foreign firms by a regulatory policy that discriminates against them or that otherwise disadvantages them in a manner that is unnecessary to the attainment of some genuine, nonprotectionist regulatory objective. Regulatory protectionism can result either from substantive regulatory requirements or from the mechanisms used by regulators to ensure compliance with substantive requirements (the “conformity assessment” process). It need not be deliberate and may result

liam J. Davey, and Alan O. Sykes, *1995 Documents Supplement to Legal Problems of International Economic Relations* 100-02 (West 3d ed 1995) (“*Documents Supplement*”).

⁶ See GATT 1947, as amended, Art XIX, reprinted in *Documents Supplement* at 44-45 (cited in note 5).

⁷ See WTO, *19 Legal Instruments Embodying the Results of the Uruguay Round* at 16955 (cited in note 4).

⁸ Throughout this Article, I use the term “regulation” as it is used in the WTO agreements, to refer to policies promulgated by governments with which compliance is *mandatory*. Regulations should be distinguished from “standards,” with which compliance is *voluntary* and which may result from either government or private sector activity. See Alan O. Sykes, *Product Standards for Internationally Integrated Goods Markets* 13-14 (Brookings 1995).

⁹ Much of what I have to say bears on government regulation of service industries, labor markets, the environment, and similar areas, but these topics raise distinct issues that I will not address directly in this Article.

simply from regulators' failure to appreciate the trade impact of their policies.

To give a few examples, a nation may regulate the pharmaceutical market by requiring government approval of new drugs before they may be sold. If, however, the regulatory authorities require foreign pharmaceutical manufacturers to engage in more testing and clinical trials than domestic manufacturers with no apparent health justification for this difference in treatment, regulatory protectionism arises. Similarly, a policy prohibiting the use of some food preservative in imported foodstuffs, but allowing its use domestically, would constitute regulatory protectionism.

Such cases of overt discrimination provide the clearest examples, but, as the beef hormones case illustrates, facially non-discriminatory policies may also constitute regulatory protectionism. The European regulation at issue in the beef hormones case imposes a cost disadvantage on foreign suppliers from nations that permit the use of growth hormones, because it requires them to undertake costly measures to certify their exports as hormone-free.¹⁰ European beef producers, however, need not concern themselves with the measures, because hormones are purportedly not used at all in Europe. And because this cost disadvantage results from a regulation that is not necessary to attain any legitimate public health objective (according to WTO findings), it constitutes "regulatory protectionism" as defined in this Article.

It is easy to imagine other examples of facially neutral regulatory protectionism. Transportation regulators might require that all new automobiles sold in the domestic market be equipped with a particular type of airbag that is only manufactured domestically, even though other types of airbags manufactured abroad (and available more cheaply to foreign automobile manufacturers) are just as safe and effective. Or regulators might require all products of a certain type to be tested at a particular laboratory that surreptitiously expedites the processing of domestic goods, even though other laboratories could perform the job adequately.

By contrast, some regulations have a protective effect (raising the costs of foreign firms more than the costs of domestic firms), but are nondiscriminatory and necessary to attain a genuine, nonprotectionist regulatory objective. In legal parlance,

¹⁰ The certification process is expensive because cattle growers must keep track of which animals have been treated, make sure that the animals' carcasses are segregated at the packing house, and provide supporting documentation as required.

they might be called the “least restrictive means” to obtain that objective. For example, a nation may wish to attain a higher level of air quality than others and may require all automobiles sold in the domestic market to meet comparatively stringent hydrocarbon emissions standards. Foreign manufacturers may have higher unit costs of compliance—perhaps they sell few vehicles into the country in question and thus are unable to reap the same scale economies or learning-by-doing economies in regulatory compliance that accrue to domestic firms with larger sales volumes. But if the regulation is nondiscriminatory and no less restrictive alternative is available to meet air quality goals, then the measure does not constitute regulatory protectionism as defined in this Article.

So defined, regulatory protectionism is economically inefficient, in part for the same reasons that protectionism of any sort is inefficient. Protectionism draws high cost domestic firms into the market while excluding low cost foreign firms, and it prices out of the market some consumers who would be willing to purchase goods at a price exceeding the marginal cost of production of efficient suppliers.¹¹ What previous work has not appreciated, however, is that in most cases regulatory protectionism causes additional deadweight losses that make it considerably more inefficient than other instruments of protection such as tariffs, quotas, and subsidies. Accordingly, the societal returns to legal constraints on regulatory protectionism are greater, other things being equal, than the societal returns to constraints on other protectionist instruments. This proposition, developed in Section I, is the principal normative point of this Article.

Section II develops some connected, positive claims about the law of international trade. The analysis draws on a blend of public choice theory and the theory of optimal contracts. It posits that trade agreements may be understood as sophisticated contracts among the self-interested political officials representing each member nation. These actors are not concerned with “welfare maximization,” as that phrase is conventionally used by economists, but with the maximization of their own political fortunes as measured by votes, campaign contributions, and the like.¹²

¹¹ See, for example, Peter B. Kenen, *The International Economy* 17-19, 175-77 (Prentice-Hall 1985) (showing how opening trade by removing tariffs or quotas will increase consumer surplus in excess of any decrease in producer surplus). Section I of this Article also elaborates on the economic inefficiencies associated with protectionism.

¹² Other papers that draw on this perspective to explain important aspects of the law of international trade include Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U Chi L Rev 255,

This perspective, when melded with the welfare analysis in Section I, yields two sets of insights.

First, from a political standpoint, regulatory protectionism is an inferior form of protectionism for nations that are unconstrained in their trade policies. But after a nation enters into a trade agreement, circumstances may arise that tempt political officials to employ regulatory protectionism due to constraints on their ability to use other preferred protectionist instruments. It is in the mutual interest of political actors who bind themselves to trade agreements to disable themselves from behaving in this fashion if possible and to encourage renegotiation of the agreed-upon constraints on the politically "efficient" instruments of protection instead. Further, the degree of trade protection afforded by regulatory measures may be difficult to quantify, and the transaction costs of reciprocal trade negotiations can be lowered if protectionism is restricted to more transparent instruments such as tariffs. This line of reasoning affords a "political economy" explanation for the fact that regulatory protectionism is prohibited under the treaty creating the WTO even though various other forms of protectionism are permissible (albeit subject to constraint). The lesson here is but a special case of a more general insight developed in the literature on public choice and regulation—where the self-interest of political actors requires an inefficient transfer of rents to well-organized interest groups (here, domestic industries that seek insulation from foreign competition), it is often best to make that inefficient transfer as efficiently as possible.¹³

Second, regulations that are nondiscriminatory and necessary to the attainment of legitimate, nonprotectionist regulatory objectives will not be prohibited in politically savvy trade agreements. Such measures will be permitted (although they will be a possible subject of future trade negotiations) even though the burden on international commerce may be great and the domestic regulatory benefits may be small. The political economy explana-

274-78 (1991) (using public choice theory to help explain the existence of the GATT escape clause); Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 *Intl Rev L & Econ* 5 (1996) (evaluating injury analysis in antidumping and countervailing duty cases from the perspectives of welfare economics and public choice theory); Warren F. Schwartz and Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 *Intl Rev L & Econ* 27 (1996) (using public choice theory to explain the most favored nation provision of the GATT and its exceptions).

¹³ See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J L & Econ* 211 (1976); Gary Becker, *Comment*, 19 *J L & Econ* 245 (1976) (evaluating Peltzman).

tion for this claim rests on the disjunction between economic efficiency and political efficacy, and the extreme difficulty of fashioning legal rules to identify measures that are politically undesirable from the perspective of trade negotiators even though essential to domestic regulatory goals. Accordingly, politically savvy parties to trade agreements will prefer to negotiate directly over such measures rather than entrust their policing to courts or similar tribunals. The law of the WTO is again consistent with this claim, as the legality of regulatory measures in no way turns on a “balancing” of regulatory benefits and commercial burdens.

Section III concludes with some comparative observations on the treatment of protective regulations in other legal systems, including the North American Free Trade Agreement (“NAFTA”), the European Union, and the United States federal system. The treatment of regulatory protectionism in each legal environment is quite similar to that of the WTO—all systems tend to prohibit it. The treatment of nondiscriminatory regulatory measures that have protective effects but are essential to the promotion of legitimate regulatory objectives varies slightly more across systems; for the most part, however, the treatment is similar to that of the WTO. Hence, all four systems that I examine appear broadly consistent with the political economy analysis.

I. THE WELFARE ECONOMICS OF REGULATORY PROTECTIONISM

Governments have an array of devices at their disposal for protecting domestic industries against outside competition. Taxes on imports (tariffs), restrictions on the quantity of imports (quotas), and subsidies to domestic producers are common instruments of protection. Regulations that disadvantage foreign suppliers relative to domestic firms are a fourth option. Still others can be imagined.

These alternative instruments of protection are by no means equivalent. In particular, although tariffs, quotas, and subsidies can be quite similar in their impact on welfare (though not identical), regulatory protectionism is systematically more pernicious, often by a wide margin. A simple, partial equilibrium comparison of policy instruments makes the point.

Figure I depicts a competitive market for a single good in an importing nation. To keep the diagram as simple as possible, I make the “small country” assumption and imagine that the importing nation can purchase all of the good that it wishes from abroad at the “world price” P . Nothing essential would change,

however, if I assumed instead that the supply curve for the imported good were upward sloping.¹⁴ The domestic supply curve (initially) is S , and the domestic demand curve is D . With no intervention into the market by the government, total consumption would be determined by the intersection of the demand curve D with a horizontal line at the world price P (the horizontal distance Pf). Domestic firms would supply a quantity equal to Pe , and imports would supply the remaining consumer demand ef . Domestic consumer surplus would equal hPf , while domestic producer surplus would equal Pge .

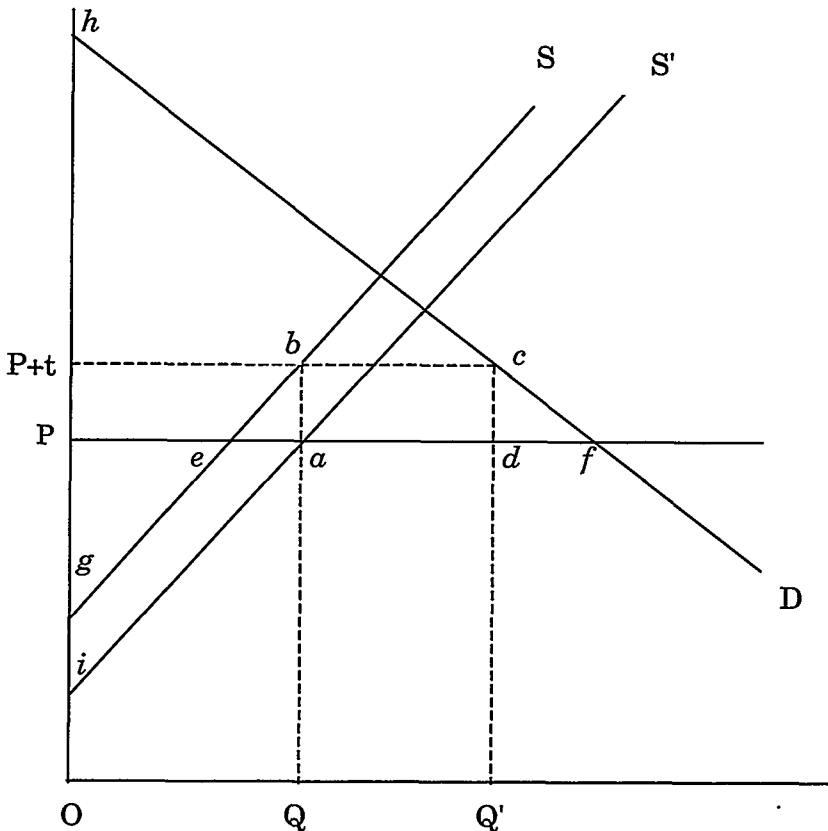


Figure I

¹⁴ The assumption of a perfectly elastic (flat) import supply curve here is unrealistic in an important sense—all costs of protectionism will be passed through to domestic consumers, and hence foreign suppliers will have no reason to complain about it. International rules restricting protectionism exist, of course, precisely because foreign suppliers do care about it. But as indicated in the text, the essential insight that I wish to develop with Figure I—that regulatory protectionism is typically far more damaging to social welfare than other forms of protectionism—holds regardless of whether the import supply curve is flat or upward sloping, and the “small country” assumption allows the reasoning to be presented in a diagram that is far less cumbersome.

Let us suppose, however, that the government decides to protect the domestic industry so that it can achieve a higher level of profit or employment. For concreteness, suppose that the government wishes to confer surplus on domestic producers in an amount Pai , or that it wishes to induce domestic output of Q (both options result in the same surplus for domestic firms). Consider the government's options. A tariff equal to t on all units of the imported good will increase the price of the good to consumers to the level $P+t$. Consumption will then equal Q' , with domestic production of Q and imports of $Q'-Q$. Domestic producer surplus rises to $(P+t)bg$, which is equal to Pai . Consumer surplus has fallen to $(P+t)ch$, but government revenue on the $Q'-Q$ units of imports is now $(Q'-Q)t$, equal to the area $abcd$. Making the welfare comparison to the level of surplus that exists without government intervention, the sum of consumer surplus, producer surplus, and government revenue is now less by the two "dead-weight loss" triangles eba and cdf .

As an alternative to a tariff, the government might impose a quota restricting imports to $Q'-Q$. Price would rise and the market would clear when domestic production reached Q at the price $P+t$. Such a quota would have the same impact on consumer and producer surplus as the tariff of t , but it would not generate any revenue for the government (unless the rights to import under the quota were auctioned). Instead, the "quota rents" $abcd$, equal to the tariff revenue under the tariff system, would be captured by the entities with the right to import under the quota. For example, if admission to the domestic market were offered to the foreign sellers that were first in line, those sellers would be able to command the elevated price $P+t$ for their merchandise and would receive an additional t per unit by comparison to the scenario without government intervention. The difference between the tariff and the quota, therefore, is not in the amount of surplus, but in who captures it.¹⁵

A third option is a subsidy. If the government offers domestic producers a payment equal to t per unit of output, the effect is to

¹⁵ This proposition oversimplifies but does no harm for present purposes. Important differences do exist between tariffs and quotas, for example, in imperfectly competitive markets. The notion that quotas are no worse than tariffs from a welfare standpoint in competitive markets is also questionable under many circumstances. For example, when quotas are allocated among supplier countries, they may not replicate the market shares that each nation would obtain under a most-favored-nation tariff system. Additional deadweight losses can then result because imported goods are no longer obtained from the most efficient suppliers. Such considerations may help to explain the general preference within the WTO system for tariffs over quotas, but nothing in the analysis to follow turns on such matters.

shift the supply curve downward to S' . The domestic industry will produce Q and earn a surplus equal to Pai , while imports will equal af . Here, consumer surplus no longer declines relative to the scenario without intervention, but deadweight loss remains nonetheless. The reason is that government now makes an expenditure on the subsidy equal to Qt , which is equal to the area $bgia$. Part of this amount— $geai$ —is a transfer to domestic producers that increases their surplus. The remainder, equal to the area of the triangle eba , is deadweight loss. Though not reflected in the diagram, a further deadweight loss exists as a result of the taxes necessary to raise the government revenue for the subsidy. When this factor is added to the analysis, it is apparent that one cannot rank the welfare effects of subsidies, tariffs, or quotas. Plausibly, their effects are similar in many settings, and any differences will depend on the circumstances.

Now consider a fourth option—a regulatory measure calculated to disadvantage foreign suppliers. Such a measure might take many forms, as indicated in the introduction, but for concreteness let us suppose that the government announces the following policy: Any foreign supplier who desires to sell a unit of the good in the market of the importing nation must provide an agent to sit on a flagpole for one hour and cluck like a chicken. Let us further assume that the market wage for an hour of sitting and clucking is t .¹⁶ Foreign suppliers who can sell elsewhere at the price P will now demand $P+t$ to sell in this market. The market will once again clear at that price, just as in the case of the tariff and the quota. Imports will equal $Q'-Q$ and domestic production will equal Q . Consumer surplus will be the same as in the case of the tariff or quota, and domestic producer surplus will be the same. But now the deadweight loss may be far greater than it is with the other protectionist instruments. Instead of the triangles eba and cdf , it will equal the entire area $ebcf$ if we assume that the agent who sits and clucks earns no surplus because he can command a wage of t per hour elsewhere (if the regulation merely diverts that agent from some productive activity with wage t so that the agent receives no real benefit from the government's regulatory protectionism).

¹⁶ There is no loss of generality in this formulation. Whatever the precise form of regulatory protectionism, t simply represents the unit cost of resources consumed for the purpose of compliance with the protectionist regulation. It can be a direct expenditure as in my hypothetical, an opportunity cost (such as the foregone interest on the value of imported goods that sit around awaiting inspection or certification), or depreciation in the value of the goods themselves (as when delay in customs processing causes loss of perishable merchandise).

The difference between the regulatory measure and the alternative instruments of protection (tariffs, subsidies, and quotas) is that an amount equal to the area of the rectangle $abcd$ is preserved as surplus for *somebody* under each of the alternative instruments. The government captures it as tariff revenue under the tariff option, consumers retain it under the subsidy option, and whoever holds the rights to import captures it under the quota option. Under the regulatory option, by contrast, the surplus can be completely destroyed because of the socially wasted expenditure of t per unit of imports.

This analysis requires two caveats. First, if the mandated increase in costs under regulation confers surplus on someone (such as the clucker, in my example), the additional deadweight loss from regulatory protectionism will be smaller than the full regulatory compliance cost per unit. But it will be the rare case in which additional waste is absent. Thus, suppose that the wage of t is better than the wage that the clucker can earn elsewhere (call it w). Then, a rectangle of surplus equal to $(t-w)(Q'-Q)$ will be transferred to cluckers, and the additional deadweight loss from regulatory protectionism will be less than $abcd$ —to be precise, it will equal $w(Q'-Q)$. Only if w is zero, however, will the welfare loss from regulatory protectionism be no worse than the welfare loss from other forms of protectionism. That is, unless the resources consumed by regulatory protectionism have zero value in alternative uses—a situation that should be very much the exception rather than the rule—regulatory protectionism will destroy more surplus than other protectionist instruments.¹⁷

Second, the “rectangle” of surplus that is preserved under the tariff, quota, or subsidy option may be the target of rent seeking by interest groups, and their expenditures in pursuit of that surplus may represent a social cost. With the tariff, for example, interest groups may expend resources lobbying the government to transfer the tariff revenue to them through some new government expenditure program. Or with the quota, interest groups hoping to obtain the right to import under the quota, and the associated quota rent, may spend resources lobbying for that right. Consequently, some of the rectangle will likely be dissipated through efforts by interest groups to secure it. But it seems exceedingly unlikely that this possibility could reverse the conclusion that regulatory protectionism is worse from a welfare stand-

¹⁷ Of course, if regulatory protectionism creates insurmountable hurdles to imports that no resource expenditure could overcome, it is no different in its welfare consequences than a prohibitive tariff or an import quota of zero.

point than other forms of protectionism. Rational interest groups will not spend more on efforts to secure the surplus than the expected returns from those expenditures, and hence we would expect their total expenditures to be less than the surplus at stake (in other words, less than the area of the rectangle *abcd*)—rent seekers on average should earn at least a competitive rate of return on their efforts. Further, interest group expenditures in pursuit of the available surplus will often involve transfers (for example, campaign contributions) rather than expenditures that amount to deadweight loss. For these reasons, rent seeking almost certainly will not dissipate the entire “rectangle” that the tariff, quota, or subsidy otherwise preserves. By contrast, regulatory protectionism can destroy all of it. And where it does not—because it confers surplus on the factors of production used in regulatory compliance (the first caveat above)—rent seeking by the beneficiaries of regulatory protectionism will dissipate a portion of their surplus as well. Hence, the net social surplus (left over after all deadweight costs from rent seeking have been netted out) should still be systematically greater with a tariff, quota, or subsidy than with regulatory protectionism.¹⁸

The lessons here are general. Although my hypothetical clucking requirement is rather silly and implausible, regulatory protectionism, as I have defined it, is the economic equivalent. By definition, it raises the costs of foreign suppliers (or the domestic importers with whom they deal) by inducing an expenditure of resources for no purpose (or with no effect) other than to raise the price of imported goods. Whether those resources are consumed in superfluous inspection services, pointless labeling or “safety” requirements, or unnecessary requirements that foreign sellers establish a domestic “presence,” the economic analysis remains the same. A comparable degree of protection against foreign competition could be achieved, at lower economic cost, by employing one of the more efficient protectionist instruments. Accordingly, if protectionism is to be tolerated at all, societal economic welfare will be greater if it is channeled into the less destructive devices for achieving it.

¹⁸ Put more formally, suppose that rent-seeking expenditures by interest groups destroy some fixed proportion x of the surplus potentially available to those interest groups, where $x < 1$. The assumption that $x < 1$ is compelling, for otherwise rent-seeking expenditures would be irrational. Assume further that this proportion x is constant across all of the protectionist options—tariffs, quotas, subsidies, and regulation. It follows that regulatory protectionism is inferior from a welfare standpoint to the alternatives as long as some of the rectangle *abcd* is consumed in regulatory compliance costs—had that part of the rectangle been preserved under a tariff, quota, or subsidy, only the fraction x of it would have been destroyed through rent seeking.

II. POSITIVE THEORY AND THE STRUCTURE OF WTO OBLIGATIONS

The WTO, which supplants the General Agreement on Tariffs and Trade ("GATT"), embodies detailed commitments on scores of issues spanning hundreds of pages of legal text and additional thousands of pages of product by product, service sector by service sector, and country by country obligations.¹⁹ My focus here is on a subset of the provisions contained in these agreements—those pertaining to traditional instruments of protection such as tariffs, quotas, and subsidies on the one hand, and those pertaining to regulatory protectionism in product markets on the other. The goal is to explain the structure of these provisions using a blend of public choice theory (or political economy theory) and the theory of optimal contracts.

Before developing the theoretical analysis, however, I will lay out the legal landscape. Section A considers the WTO rules regarding tariffs, quotas, and subsidies. It discusses how the WTO agreements permit signatories to employ these traditional instruments of protection, albeit subject to substantial limitations, including some that preclude the introduction of *new* tariffs, quotas, or subsidies that would frustrate the expectations created by reciprocal trade concessions. Section B then argues that the WTO agreements *prohibit* regulatory protectionism, as I have defined it, in goods sectors. By contrast, regulatory measures that have protective effects but that are also necessary to the achievement of an apparently genuine regulatory objective other than protectionism are allowed.

The theoretical analysis is developed in Section C. My essential claim is that this structure of permissible and impermissible protectionism can be understood as a part of an optimal "contract" among self-interested political actors.

A. The WTO Rules on Tariffs, Quotas, and Subsidies

The heart of the GATT—predecessor to the WTO—was a set of reciprocal commitments among signatories to lower their tariffs below the high levels that had emerged in the 1930s. Pursuant to these "tariff bindings," nations covenanted product by product not to charge a tariff above the negotiated "bound rate."²⁰

¹⁹ See *Agreement Establishing the World Trade Organization*, reprinted in *Documents Supplement* at 3-14 (cited in note 5).

²⁰ The modern counterpart of the GATT legal obligation not to charge a tariff above the bound rate is created by GATT 1994, Art II, itself a part of the WTO agreements. GATT 1994 is reprinted in *Documents Supplement* at 79-96 (cited in note 5). Articles in-

Periodic negotiations throughout the history of the GATT and the WTO have produced a steady reduction of the bound rates on most goods imported into most countries (less so in developing countries). But tariffs are not illegal. Rather, signatories have a right to charge any tariff they want unless they have negotiated a binding with respect to the particular good in question. Further, bindings can be renegotiated upward, at a price of course, if nations find them too low.²¹

The drafters of the original GATT recognized that tariff commitments would be of little value if signatories could substitute quotas instead.²² Accordingly, to protect expectations under the tariff bindings, the GATT contained a general prohibition of quotas that carried over into the WTO.²³ But this prohibition was subject to a number of exceptions relating to, inter alia, the use of quotas to ensure the efficacy of agricultural price support schemes, to overcome balance of payments difficulties, to protect declining industries, and to protect human, animal, and plant life or health.²⁴ The drafters even included an elaborate provision on how to administer quotas to avoid undue trade discrimination, anticipating that quotas would be used regularly despite the general prohibition.²⁵ Thus, like tariffs, quotas are in no meaningful sense illegal, and they remain in use by many countries in many goods sectors. Quotas are, however, quite constrained and are not

corporated into GATT 1994 from GATT 1947 are reprinted in *Documents Supplement* at 15-78. The term "tariff binding" refers to a negotiated tariff ceiling; the term "bound rate" is the amount of the tariff permitted under that ceiling.

²¹ See GATT 1994, Art XXVIII (cited in note 20).

²² Indeed, some skeptical readers may wonder whether any of the rules of the system are really "binding" and meaningful, since members of the WTO can always quit and pursue whatever policies they wish or violate their obligations to see what happens. I (and others) have argued elsewhere, however, that the level of compliance with WTO rules is quite high because of the damage to reputation and the prospect of trade sanctions that attend deviation from the rules, and the importance to each member of retaining the benefits of the bargain. See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L & Pol Intl Bus 263, 266 (1992); Frieder Roessler, Warren F. Schwartz, and Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System* 15-24, unpublished manuscript (on file with U Chi L Rev); Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 Am J Intl L 416 (1996). For details on the structure of dispute resolution under the WTO and the sanctions that may attend violation, see generally WTO, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, reprinted in *Documents Supplement* at 366-90 (cited in note 5).

²³ See GATT 1994, Art XI (cited in note 20); *Agreement Establishing the World Trade Organization*, Art II (cited in note 19).

²⁴ See, for example, GATT 1994, Arts XI (agricultural price support schemes), XII (balance of payments), XIX (declining industries), XX (protection of human, animal, and plant life or health) (cited in note 20).

²⁵ See id Art XIII.

to be used unless they can be justified under one of the exceptions to the general prohibition. Further, in some instances, the introduction of a new quota will trigger a requirement that trading partners be "compensated" (through alternative trade concessions) for the adverse impact on their exports.²⁶

Much the same thing may be said about subsidies. The original GATT agreement provided that subsidies to domestic producers, with the exception of subsidies applicable only to exports, were generally exempt from legal restrictions.²⁷ The signatories quickly realized that a *new* subsidy to domestic firms could frustrate the market access expectations under a tariff binding and thus developed a rule that new subsidies to domestic producers of goods covered by tariff bindings are impermissible unless adequate trade compensation is paid.²⁸ The GATT also authorized unilateral countermeasures against subsidized imports known as "countervailing duties," which a signatory could use at its discretion if subsidized imports were "such as to cause or threaten material injury" to domestic competitors.²⁹ But there was no attempt in the original GATT or during its subsequent evolution to prohibit subsidies in general. And, although the WTO introduced some new and quite interesting constraints on subsidies, they are still tolerated in many settings even if their only apparent justification is to insulate domestic firms from foreign competition (especially in the agricultural sector). Thus, like tariffs and quotas, subsidies are not in general illegal, but they are constrained in important ways, particularly insofar as nations may wish to introduce new subsidies for products with bound tariffs.

B. The WTO Rules on Regulatory Protectionism

Regulatory impediments to trade have been a subject of considerable and growing negotiation throughout the history of the GATT and the WTO. During the recent Uruguay Round of multilateral trade negotiations, two extensive agreements concerning

²⁶ See, for example, *id* Art XIX.

²⁷ See GATT 1947, Arts III(8)(b) (exempting subsidies to domestic producers), XVI (exempting subsidies applicable only to exports from the Art III(8)(b) exemption) (cited in note 6).

²⁸ See, for example, *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, 37th Supp GATT BISD (1991), excerpted in John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations* 357-62 (West 3d ed 1995).

²⁹ See GATT 1994, Art VI, ¶ 6 (cited in note 20). Countervailing duty was defined as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise." *Id* Art VI, ¶ 3.

regulatory barriers to trade were concluded—the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”)³⁰ and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (“SPM Agreement”).³¹ The SPM Agreement, part of the Agreement on Agriculture, primarily concerns measures to protect human, plant, or animal health from hazards relating to agricultural products—food safety regulations being the paradigmatic example. The TBT Agreement applies to all other product market regulations.

Although the term “regulatory protectionism” is mine and is found nowhere in the text of the WTO accords, the TBT and SPM Agreements nevertheless prohibit regulatory protectionism as here defined in product markets. The legal principles that accomplish this task may be broken down into six categories.

1. Facial discrimination: The national treatment principle.

It is exceedingly difficult to imagine a principled justification for substantive regulatory requirements that apply to foreign firms only. The conformity assessment system for foreign merchandise may differ from that in place domestically to be sure, but a requirement that foreign sellers achieve a level of safety, quality, or any other regulatory objective that domestic firms need not achieve seems transparently protectionist, with rare exception.³² Accordingly, a covenant against regulatory protectionism must generally prohibit such regulatory policies.

The legal principle that condemns additional requirements for foreign firms is known generally in the WTO system as the “national treatment principle,” which forbids governments from treating imported goods differently than domestic goods. With particular reference to product market regulations, the TBT and

³⁰ The TBT Agreement is reprinted in *Documents Supplement* at 149-69 (cited in note 5). The TBT Agreement is a successor to the GATT Standards Code, negotiated during the 1970s. The TBT Agreement is considerably more comprehensive in its substantive provisions than the GATT Standards Code, and, unlike the Standards Code, to which only a subset of the GATT membership acceded, the TBT Agreement applies to all WTO members.

³¹ The SPM Agreement is reprinted in *Documents Supplement* at 121-33 (cited in note 5). The covered measures include regulations to protect plants and animals from entry of diseases or pests; regulations to protect human and animal life from dangers associated with food additives or contaminants; measures to protect human health from diseases carried by plants or animals; and all measures intended to protect against the spread of pests. SPM Agreement, Annex A, Definition 1.

³² Occasionally, measures that might seem to discriminate against imports from a particular source could be justified because of dangers unique to that locale—“mad cow” disease, for example, may be limited for a time to Great Britain, and might justify a ban on British cattle imports only.

SPM Agreements both contain tight national treatment requirements.³³

2. Policing protectionist motives: The sham principle and scientific evidence requirements.

An additional weapon against regulatory protectionism is the “sham principle,” under which the actions of regulators may be directly reviewed for improper motive. A “sham” arises where the purported high-minded objectives of regulation are disingenuous and the real motive is found to be protectionist—where the regulatory measures are “a disguised restriction on international trade.”³⁴ The sham principle is related to nondiscrimination principles in that evidence of discrimination is powerful evidence of protectionist motives, but it has the potential to reach nondiscriminatory regulations as well when their true objective is to disadvantage foreign firms. Also related to the sham principle are rules that require nations to provide credible scientific evidence to support claims made by domestic regulators, such as claims relating to health and safety risks. Such rules may be strengthened by a requirement that sensible procedures be followed in assessing the need for regulation in the first instance.

The WTO Agreements embrace these antiprotectionist devices. The TBT Agreement provides: “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.”³⁵ The corresponding language in the SPM Agreement states that “[s]anitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.”³⁶ Both agreements further require regulators to engage in a proper assessment of the risks and other matters relating to the regulations in question be-

³³ The TBT Agreement provides that “in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” TBT Agreement, Art 2.1 (cited in note 30). The corresponding provisions of the SPM Agreement require member governments to “ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members.” SPM Agreement, Art 2(3) (cited in note 31). This softer language in the SPM Agreement is intended to permit “discrimination” of sorts when the relevant threat to human, animal, or plant life or health is associated with goods only from certain countries.

³⁴ GATT 1994, Art XX (cited in note 20).

³⁵ TBT Agreement, Art 2.2 (cited in note 30).

³⁶ SPM Agreement, Art 2(3) (cited in note 31).

fore promulgating them.³⁷ The SPM Agreement is particularly strong in this regard, with a lengthy article devoted to the principles of risk assessment.³⁸ These provisions in particular were central to the ruling in favor of the United States in the beef hormones dispute.³⁹

3. The information deficiencies of regulators: Comment requirements and reference to international standards.

As noted earlier, regulatory protectionism need not result from a calculated effort to raise rivals' costs. Inadvertence, indifference, and information deficiencies on the part of domestic regulators can also produce important regulatory trade barriers.⁴⁰ One device for addressing this problem is a procedural requirement that regulators consider comments on proposed regulations before promulgating them. Advance comment requirements allow foreign firms to provide regulators with information bearing on the wisdom of their proposed regulations, including information about the costs of compliance to foreigners and alternative methods to achieve the regulatory objective at lower compliance cost. Both the TBT and SPM Agreements thus require regulators to publicize new regulatory proposals and to allow reasonable time for comments by foreign parties before adopting them (with appropriate exceptions for urgent matters of health, safety, or security).⁴¹

Another important device for remedying the information deficiencies of regulators involves using international standards. A number of international institutions develop and publish voluntary product standards (including standards relating to quality, health, and safety),⁴² and it is often desirable that regulators use

³⁷ TBT Agreement, Art 2.2 (cited in note 30); SPM Agreement, Art 2(2) (cited in note 31).

³⁸ The SPM Agreement requires members to ensure that "any sanitary or phytosanitary measure . . . is based on scientific principles and is not maintained without sufficient scientific evidence [except as an interim measure in the face of scientific uncertainty]." SPM Agreement, Art 2(2) (cited in note 31). Detailed risk assessment procedures are set forth in SPM Agreement, Art 5.

³⁹ See text accompanying note 3.

⁴⁰ Food additive regulations that prohibit additives not on an approved list, for example, may result in the prohibition of imports containing additives known elsewhere to be perfectly safe.

⁴¹ TBT Agreement, Art 2.9.4, 2.10 (cited in note 30); SPM Agreement, Annex B, ¶¶ 5(d), 6 (cited in note 31).

⁴² The International Organization for Standardization has jurisdiction to address design, safety, and quality concerns in product markets across the board, and publishes thousands of standards as a result of its work. The Codex Alimentarius, affiliated with the United Nations, focuses mainly on food safety issues. A miscellany of other entities with

these standards in their own national regulations.⁴³ International standards are typically produced only after an extensive exchange of information among countries and thus tend to avoid some of the problems that may result when national regulators act on the basis of limited information. In addition, because international standard-setting institutions generally operate under a consensus or super-majority voting requirement,⁴⁴ the existence of an international standard can reflect a high level of agreement about its acceptability and the absence of a major constituency that would be disadvantaged by its implementation. Accordingly, unless a pertinent international standard is demonstrably inadequate to achieve a particular regulatory objective, its use often will constitute the least trade disruptive method of achieving that goal. The WTO Agreements thus impose an obligation to employ international standards whenever they suffice to achieve the domestic regulatory objective.⁴⁵

Finally, just as it is valuable for regulators to use international standards when possible, it is valuable to have international standards established on the basis of the best information available. Accordingly, to improve the quality of information at the international level, the WTO Agreements require national regulators to participate in the activities of the international standardizing bodies "within the limits of their resources."⁴⁶

4. Information costs and the costs of regulatory surprise for foreign firms: The role of notice and publication requirements.

Firms invariably incur costs to learn about the regulatory systems in the various markets that they serve. They may need to translate regulations into another language, hire lawyers to explain the regulations to them, and even incur substantial costs trying to identify who is in charge of regulating particular matters and where their regulations may be found in an accessible

standard-setting functions includes the International Labor Organization, the International Telecommunications Union, the International Institute on Refrigeration, the International Commission on Illumination, and others. See Sykes, *Product Standards* at 58-60 (cited in note 8) (listing international standardization organizations).

⁴³ See *id.* at 61-62 (describing the problem of incompatible broadcast formats for high-definition television and suggesting that incompatibility could be avoided if nations followed standards set by the International Radio Consultative Committee).

⁴⁴ See *id.* at 59-60.

⁴⁵ TBT Agreement, Art 2.4 (cited in note 30); SPM Agreement, Art 3(1), 3(3) (cited in note 31).

⁴⁶ TBT Agreement, Art 2.6 (cited in note 30); SPM Agreement, Art 3(4) (cited in note 31).

form. These costs tend to be greater for foreign firms than for domestic firms because of language barriers and unfamiliarity with political and bureaucratic systems abroad. Similarly, foreign firms may be disadvantaged unnecessarily by regulatory change or "surprise." Greater advance notice of impending regulatory changes can confer at least a transitory competitive advantage. And because domestic firms tend to be better informed about and more involved in their own political systems than foreign firms, the costs of regulatory surprise seem likely to fall more heavily on foreign firms.

Publication requirements under the WTO address the unnecessary costs that foreign sellers may incur in attempting to learn about existing regulations and how to comply with them. The key provision in each Agreement concerns the establishment of designated "enquiry points"—in effect, national clearinghouses for information about all regulations with which foreign products must comply.⁴⁷ These requirements not only avoid unnecessary costs to foreign firms by reducing search costs, but also reduce costs associated with the uncertainty that some regulation may have been overlooked.

Notice requirements, which require the publication of new regulations substantially in advance of their effective date (barring emergencies), address the unnecessary costs of regulatory surprise. Accordingly, both the TBT and SPM Agreements contain substantial notice requirements.⁴⁸

⁴⁷ TBT Agreement, Art 10.1 (cited in note 30); SPM Agreement, Annex B, ¶ 3 (cited in note 31). Developed country members also have an obligation to make all pertinent information available in English, French, and Spanish if requested to do so by another member. TBT Agreement, Art 10.5; SPM Agreement, Annex B, ¶ 8. For good measure, a specific nondiscrimination rule prohibits charging more for such information when it is sold to foreign firms than when it is sold to domestic firms. TBT Agreement, Art 10.4; SPM Agreement, Annex B, ¶ 4.

⁴⁸ Any time a new regulation would depart from an established international standard, or would address an issue on which no international standard exists, advance notice must be given in the form of "notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it." TBT Agreement, Art 2.9.1 (cited in note 30). Substantially equivalent language in the SPM Agreement may be found in Annex B, ¶ 5(a) (cited in note 31). Direct notice must also be provided to the WTO Secretariat indicating what products would be covered by the proposed regulation and how it would depart from any relevant standards promulgated by international agencies. TBT Agreement, Art 2.9; SPM Agreement, Annex B, ¶ 5(b)-(c). Exceptions exist, as one might expect, where urgent matters of health, safety, or national security preclude this advance notice. TBT Agreement, Art 2.10; SPM Agreement, Annex B, ¶ 6. All regulations must also be "published promptly" when they are adopted. TBT Agreement, Art 2.11; SPM Agreement, Annex B, ¶ 1.

5. Avoiding other unnecessary costs of regulatory compliance: The least restrictive means requirement.

Regulatory objectives often can be achieved in a variety of ways. Food safety can be promoted by inspecting processing facilities, for example, or by testing the finished product. Fire safety can be promoted by chemically treating otherwise flammable materials or using nonflammable materials. When an objective can be achieved in a variety of ways, firms may differ as to which method is the cheapest for them. This difference is especially likely in international commerce, where technologies and input prices will vary from country to country. Regulations that require their objectives to be achieved in limited ways that are advantageous to domestic firms can thus confer an inefficient economic advantage on them.⁴⁹ Likewise, exporting firms can become subject to redundant regulatory requirements that increase their costs of doing business without being necessary to the attainment of regulatory objectives in the firms' export markets.⁵⁰

One solution is to require that regulations be drafted at the highest possible level of generality that suffices to meet regulatory goals; put differently, the law can require that regulators employ the least restrictive means necessary to achieve their objectives. Thus, for example, a regulation governing fire doors in commercial buildings might be drafted to require a certain burn-through time for every door, but should not be drafted to require the use of particular materials or particular thicknesses where satisfactory performance can be achieved without them. Similarly, a regulation concerning automobile emissions might be drafted to require that emissions of particular pollutants fall below certain levels, but should not be drafted to require the use of a particular emissions control technology when others are available or may become available. The general principle that these examples illustrate is that product performance regulations are almost always preferable to product design regulations.

Even if nations attempt to draft regulations in such a manner as to employ the least restrictive means, however, limited information may handicap their efforts. Other nations may employ regulatory means that achieve the same objectives in a way not

⁴⁹ The caveat is that if conformity assessment costs are sufficiently lower under a system that limits the options allowed to achieve a given end, the savings may be worth the costs of foreclosing certain otherwise acceptable methods of achieving regulatory goals.

⁵⁰ Meat packing plants in country A may become subject to the slaughtering process regulations of country B, for example, even though post-slaughter testing for various residues and contaminants by inspectors in country A is enough to ensure that the meat satisfies the health standards of country B.

initially recognized by the importing nation. Where this problem arises, importing nations can avoid regulatory protectionism by accepting the regulations of other nations as equivalent in response to an appropriate petition—in legal parlance, they can afford each other “mutual recognition.”

Each of these ideas finds its way into the WTO Agreements. The least restrictive means principle is embodied in the requirement that regulations not be more trade restrictive than “necessary” to the attainment of their legitimate objectives.⁵¹ The corollary preference for performance rather than design regulations appears expressly in the TBT Agreement.⁵² Finally, both the TBT and SPM Agreements encourage mutual recognition in appropriate cases.⁵³

6. Additional obligations with respect to conformity assessment.

The principles set forth to this point can be applied not only to the substantive regulations of national governments, but also to the methods used to ensure compliance with them. For example, regulations that require goods to be tested at a particular laboratory or by a particular method when equally good alternatives are available can surely inflate the costs of conformity assessment unnecessarily. Requirements for testing or inspection by nationals of the importing nation, or testing or inspection on

⁵¹ The TBT Agreement provides that “technical regulations shall not be more trade-restrictive than necessary to fulfil [sic] a legitimate objective . . . 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.” TBT Agreement, Art 2.2 (cited in note 30). The SPM Agreement’s version of this principle requires members to “ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health.” SPM Agreement, Art 2(2) (cited in note 31).

⁵² TBT Agreement, Art 2.8 (cited in note 30) (“Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.”).

⁵³ The strongest requirement is contained in the SPM Agreement: “Members shall accept the sanitary or phytosanitary measures of other Members as equivalent . . . if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member’s appropriate level of sanitary or phytosanitary protection.” SPM Agreement, Art 4(1) (cited in note 31). The TBT Agreement is softer, requiring that “Members shall give positive consideration to accepting as equivalent technical regulations of other Members . . . provided they are satisfied that these regulations adequately fulfil [sic] the objectives of their own regulations.” TBT Agreement, Art 2.7 (cited in note 30). This weaker language amounts at least to an obligation to give reasons for refusing to accept foreign regulations as equivalent, which should raise the costs of disingenuous refusals to do so.

the soil of the importing nation, may also be unnecessary and invite abuse and capture.

Accordingly, the WTO Agreements specifically extend most of the principles set forth above to conformity assessment. A national treatment obligation exists,⁵⁴ sham principles apply,⁵⁵ a general least restrictive means requirement is in place,⁵⁶ nations shall not require information that is not reasonably necessary to conformity assessment,⁵⁷ nations must process imported goods as expeditiously as they process domestic goods,⁵⁸ nations may not site testing facilities so as to disadvantage foreign goods,⁵⁹ notice and publication requirements apply,⁶⁰ and nations are required to use international conformity assessment standards where they will achieve their purposes.⁶¹ Among other things, these requirements prohibit nations from engaging in selective enforcement of facially nondiscriminatory regulations.

* * *

In summary, the TBT and SPM Agreements contain a wide variety of principles that collectively have the effect of preventing member nations from deliberately or inadvertently engaging in regulatory protectionism. Any such measure—whether in the form of a substantive regulation or a procedure for assessing conformity with a substantive regulation—can be reached under one or more of the legal obligations set out above.

Notice, however, what the WTO Agreements do *not* prevent. Nations that genuinely wish to pursue nonprotectionist regulatory objectives may do so as long as scientific evidence supports the regulatory policy (or during an interim period of scientific uncertainty) and as long as the least trade restrictive measures are employed to achieve the regulatory goal. The *stringency* of a given regulation on a given subject, therefore, is of no concern to the WTO. Nor are the trade effects of stringent regulations, even if large, as long as the regulation complies with the obligations set forth above. The system neither requires nor permits any “balancing” of the adverse trade effects of regulation against the importance of the regulatory goals to be achieved.

⁵⁴ TBT Agreement, Art 5.1.1 (cited in note 30); SPM Agreement, Annex C, ¶ 1(a) (cited in note 31).

⁵⁵ TBT Agreement, Art 2.2; SPM Agreement, Art 2(3).

⁵⁶ TBT Agreement, Art 5.1.2; SPM Agreement, Annex C, ¶ 1(e).

⁵⁷ TBT Agreement, Art 5.2.3; SPM Agreement, Annex C, ¶ 1(c).

⁵⁸ TBT Agreement, Art 5.2.1; SPM Agreement, Annex C, ¶ 1(a).

⁵⁹ TBT Agreement, Art 5.2.6; SPM Agreement, Annex C, ¶ 1(g).

⁶⁰ TBT Agreement, Art 5.6; SPM Agreement, Annex C, ¶ 1(b).

⁶¹ TBT Agreement, Art 5.4; SPM Agreement, Annex C, ¶ 1.

C. The Political Economy of the WTO Rules

1. The prohibition on regulatory protectionism.

When nations enter into cooperative agreements on matters of mutual interest, we might expect that such agreements, much like private contracts, would result in a state of affairs in which the welfare of one party cannot be enhanced without detriment to the welfare of another (Pareto optimality). This notion is no doubt correct most of the time, but the “welfare” measure for the parties needs to be specified with some care.

It is a commonplace in the economic literature on trade policy to observe that consumer interests, which are strongly implicated by national trade policy, are poorly organized and vastly underrepresented in the political calculus. Likewise, not all producer interests are equally well-organized or influential. These facts explain the emergence of tariffs, quotas, and other trade restrictive measures in the first instance, despite their adverse effect on national economic welfare in most cases.⁶²

Just as conventional welfare economics cannot afford an adequate explanation of national trade policies formulated in isolation, so too does it fail to provide an adequate explanation for the particulars of cooperative trade agreements. For if trade agreements such as those that comprise the WTO had as their objective the maximization of economic welfare in the conventional sense, the level of protection permissible in accordance with such agreements would be negligible.⁶³ Yet, as indicated above, tariffs, quotas, and protective subsidies are widespread in the WTO system (although they are subject to important constraints on their magnitude, a key point as shall be seen). A convincing positive theory of cooperative trading arrangements, therefore, cannot rest on conventional welfare economics, but must instead explain why the political optima embodied in trade agreements deviate importantly from economic welfare optima.

The public choice perspective on international trade agreements begins with the observation that trade agreements are compacts not among nations, but among their self-interested po-

⁶² For an introduction to the welfare economics of protectionism, see Jagdish N. Bhagwati and T.N. Srinivasan, *Lectures on International Trade* 105-25 (MIT 1983); Kenen, *The International Economy* at 167-92 (cited in note 11).

⁶³ Even when protectionist measures are plausibly beneficial from the selfish perspective of an importing nation—such as when that nation possesses monopsony power in world markets or can divert rents or positive externalities to its domestic industry from foreign industries—they are nevertheless usually detrimental from a global perspective. See generally Bhagwati and Srinivasan, *Lectures on International Trade* at 174-84 (cited in note 62); Paul R. Krugman, *Rethinking International Trade* 233-42 (MIT 1990).

litical officials. These officials are typically interested in maximizing their political fortunes measured by such things as votes, campaign contributions, and government revenues that can be spent in various ways to secure political support. Thus, a Pareto optimum achieved by a trade agreement will be a political optimum, tending to achieve the Pareto frontier for the political officials who enter the agreement on behalf of their countries, subject to the internal political constraints that confront each official.⁶⁴ If this perspective is correct, trade agreements will result in changes in national trade policy only if such changes enhance the political fortunes of signatory politicians by generating net votes or campaign contributions, by raising government revenues that can be used for other politically valuable purposes, or by benefiting them (net) in some other way.

This analysis provides a ready explanation for the observation that trade agreements tend to be trade liberalizing rather than trade restricting. When nations formulate trade policy in isolation (as they did in the 1930s before GATT), they may take the trade policies of other nations as largely fixed.⁶⁵ The trade policy battle then tends to be fought mainly by import-competing interests who favor protection and certain well-organized import-consuming interests who favor liberalization. When nations have the opportunity to cooperate, however, export interest groups become more important players, for they can then reward their political officials for securing better access to foreign markets during the course of trade negotiations. Because the pro-trade export interests have more influence on policy when nations are cooperating rather than acting in isolation, the result is a greater degree of trade liberalization when nations act cooperatively than when they act unilaterally.⁶⁶

⁶⁴ See generally Robert E. Baldwin, *The Economics of the GATT*, in Peter Oppenheimer, ed, *Issues in International Economics* 82 (Oriel 1980) (analyzing the relationship between the political and economic objectives served by the GATT); Sykes, 58 U Chi L Rev at 274-78 (cited in note 12) (analyzing the political aspects of the GATT through the lens of public choice theory).

⁶⁵ In economic parlance, they become Cournot-Nash actors. See Augustin Cournot, *Recherches Into the Mathematical Principles of the Theory of Wealth* (MacMillan 1897) (originally published in 1838); John Nash, *Equilibrium Points in N-Person Games*, 36 Proc Natl Acad Sci 48 (1950).

⁶⁶ The fact that nations acting unilaterally may sometimes anticipate retaliatory or conciliatory moves by other nations in response to their own does not change the analysis importantly—what matters is that negotiations over cooperative agreements make the returns to exporters much more precise and certain and thus increase their returns from participating in the trade policy process. See Sykes, 58 U Chi L Rev at 281 (cited in note 12).

The public choice perspective also can explain why trade agreements do not achieve complete liberalization. Trade concessions on tariffs reduce government revenues directly, a fact that may be troublesome to incumbent politicians for a variety of reasons. Likewise, not all export interest groups are equally well-organized, and some import-competing interest groups are exceptionally well-organized and influential at any given point in time. It would be quite surprising if the coalition of export interests and import-consuming interests favoring liberalization triumphed all the time in every industry in every country, and indeed it does not. Rather, trade liberalization only occurs to the extent that the consumer and export interest groups who benefit from it are well-organized and prevail in the political process over the import-competing interest groups (and perhaps the politicians concerned about tariff revenue) who resist trade liberalization.

The same perspective further suggests why political officials acting either unilaterally or cooperatively would not be indifferent among the various instruments of protection available to them, and why regulatory protectionism has come to be so disfavored in the trading community. Return for a moment to the analysis accompanying Figure I above, which presents a welfare comparison of tariffs, quotas, subsidies, and regulatory protectionism.⁶⁷ In that comparison, each instrument is used to achieve the same level of protection for import-competing domestic firms. The reader will recall that tariffs and quotas are then similar in their welfare consequences, except that tariffs create government revenue whereas quotas tend to confer an equivalent amount of surplus on private sector firms that hold the property rights to import under the quota. Subsidies are also potentially similar to tariffs and quotas in their welfare effects, except that the potential tariff revenue becomes consumer surplus, and subsidies introduce distortions elsewhere associated with taxation in other markets. Regulatory protectionism, by contrast, destroys considerable additional surplus that can be as large as the foregone rectangle *abcd* of tariff revenue, quota rents, or consumer surplus that exists under the other three options.

This welfare comparison suggests a very simple political economy analysis that can explain why regulatory protectionism would be prohibited in the trading community while the other protectionist instruments are not. It rests on the imminently plausible assumption that the political fortunes of officials in trading nations tend to rise as producer surplus in their econo-

⁶⁷ See Section I.

mies increases, other things being equal, and as their government revenue increases, other things being equal.

Using this assumption, consider first the political interests of officials setting trade policy in isolation from other nations. An official desiring to protect a domestic industry under these circumstances may prefer a tariff to any other instrument of protection. The reason is that the tariff yields government revenue and the other instruments do not. In cases where foreign retaliation is of great concern, however, or where officials prefer to bestow surplus directly on well-organized domestic producer groups (perhaps because of constraints on how officials may spend the tariff revenue), a quota may be preferred to a tariff. The quota can be structured to "bribe" foreign producers with quota rents to discourage foreign retaliation, or can be structured to bestow quota rents directly on domestic importers. Occasionally, a subsidy may dominate a tariff or quota from a political standpoint if domestic consumers of the good in question are quite well-organized (most likely a consuming industry) and would punish their politicians for a loss of consumer surplus attributable to protection. Thus, it is not difficult to imagine scenarios in which any one of these three instruments might be the first choice for protecting a domestic industry.

But what about regulatory protectionism? Unlike the tariff, it produces no government revenue. Unlike the quota, it creates no quota rents to be bestowed on domestic importers, or on foreign producers who might otherwise move their governments to retaliate. And unlike the subsidy, it does nothing to preserve consumer surplus in the market in question. In short, regulatory protectionism seems demonstrably inferior to each of the alternatives from the perspective of political officials setting trade policy in isolation. They can achieve the same level of protection for any domestic industry using a tariff, quota, or subsidy, while conferring additional surplus on the treasury, on foreign suppliers or domestic importers, or on domestic consumers, and reaping the attendant political rewards.

Consequently, if nations were unconstrained in their ability to use the protectionist instrument that they most prefer, we would expect to see very little regulatory protectionism. Each nation acting unilaterally would almost always choose one of the alternative policies.

Now consider the situation that confronts parties to a cooperative trade agreement. In particular, let us suppose that nations have constrained themselves in their ability to employ tariffs, quotas, and subsidies by virtue of the trade agreement. This

is a realistic description of the WTO, as shown above, because of the widespread existence of tariff bindings and the associated constraints on any quotas and subsidies that would frustrate expectations associated with the bindings. Let us further assume that nations take all of these commitments and constraints seriously and would incur a substantial reputational penalty or retaliatory sanction should they deviate from them. Finally, imagine for a moment that the hypothetical trade agreement embodies no constraints on regulatory protectionism.

On these assumptions, the temptation to use regulatory protectionism seemingly arises where it did not exist before. The reason is quite simple: import-competing interests would always like more protection. And if the trade agreement permits nations to afford such protection through regulatory measures and not through other measures, regulatory protectionism would become a tempting way to provide it. Among other things, it might be used in a way that constitutes implicit cheating on the bargain, frustrating the expectations created by tariff bindings through a regulatory protection loophole.

If cheating is the concern, of course, a complete prohibition on regulatory protectionism might seem unnecessary. Rather, parties to a trade agreement could simply adopt the same rule that the WTO applies to subsidies—just as a new subsidy program that frustrates the expectations associated with a tariff binding is impermissible but subsidies in general are not, so might new regulatory protectionism be prohibited. Yet, if the analysis above is right, *all* regulatory protectionism will be new following the entry into force of the trade agreement, since there is no reason to utilize it prior to the establishment of constraints on the preferred instruments of protection. Hence, a complete prohibition on regulatory protectionism and a prohibition on new regulatory protectionism will amount to the same thing. Accordingly, we might expect trade agreements generally, and the WTO in particular, to prohibit regulatory protectionism altogether. At least for the WTO, that expectation has already been shown to be correct in practice.

Much the same conclusion can be reached another way, albeit using a somewhat stronger assumption about the welfare functions of political officials. In particular, suppose that the expected joint political surplus of officials who are parties to the bargain increases with the *sum* of global producer surplus and government revenue. Put differently, suppose that *ex ante*, producer groups in general are expected to be equally well-organized and influential, and that officials are indifferent between a dollar

of producer surplus (which they will be rewarded for generating) and a dollar of government revenue (which they can use to bestow largesse and thus induce political rewards). Though no doubt oversimple,⁶⁸ this assumption does generate the result that tariffs or quotas will always dominate regulatory protectionism—an inspection of Figure I reveals that tariffs and quotas both generate a larger sum of producer surplus and government revenue than regulatory protectionism at any given level of protection. If regulatory protectionism always moves political officials off their Pareto frontier, it will be in their interest to prohibit it.

To this conclusion I add one clarification and two observations about the further benefits of a prohibition on regulatory protectionism. Trade agreements, like private contracts, are subject to ex ante uncertainty and thus to changing circumstances that may (from a political standpoint) warrant departures from prior commitments. This set of issues lies at the heart of some previous work on the GATT escape clause, which suggests that the reimposition of protection for an industry in economic difficulty may at times be justifiable as a politically valuable adjustment of trade commitments.⁶⁹ When such circumstances arise, a mechanism for the adjustment of commitments is required. And, if the adjustment of commitments with respect to tariffs, quotas, and subsidies were unduly costly, regulatory protectionism might be useful as the lesser among evils. In fact, however, the WTO system contains elaborate provisions facilitating the renegotiation of tariff commitments that make this concern quite implausible. Article XXVIII of GATT 1994 provides for the renegotiation of any tariff commitment, for example, and protects the expectations of other parties with a compensation requirement.⁷⁰ Article XIX provides for the reimposition of protection for troubled (and thus politically vocal) industries using tariffs and quotas.⁷¹ Thus, it should always be better to renegotiate over the more efficient

⁶⁸ It has been argued elsewhere that this assumption may not be a bad approximation of the ex ante reality that confronts trade negotiators, and that it may have considerable purchase in explaining the terms of trade agreements. For example, it can explain the existence of the most-favored-nation clause of the WTO/GATT system, GATT 1994, Art I (cited in note 20), which generally forbids tariff discrimination among trading partners (with some interesting and perhaps also explicable exceptions). See generally Schwartz and Sykes, 16 *Intl Rev L & Econ* 27 (cited in note 12).

⁶⁹ See Sykes, 58 *U Chi L Rev* at 289-99 (cited in note 12).

⁷⁰ GATT 1994, Art XXVIII (cited in note 20).

⁷¹ *Id.* Art XIX. See also Roessler, Schwartz, and Sykes, *Economic Structure of Renegotiation and Dispute Resolution* at 11 (cited in note 22) (“[I]t may be politically efficient . . . to afford transitory protection to import-competing industries suffering severe dislocation, at the expense of growing and prosperous foreign competitors.”).

instruments of protection than to introduce the costs of regulatory protectionism.

One additional benefit of a prohibition on regulatory protectionism relates to an observation made in the introduction to this Article—regulatory protectionism need not be deliberate. Regulators may act often with limited information, or without meaningful input from those affected by their decisions. This problem is likely to be particularly acute when those disadvantaged by regulation are foreign firms. International legal agreements that prohibit regulatory protectionism, such as the TBT and SPM Agreements of the WTO, require central governments to pay much greater heed to the implications of their regulations for trade. In significant part, these agreements may be aimed not just at deliberate cheating but also at the costs of inattention and inadvertence in a diffuse bureaucracy. Otherwise, the unwitting destruction of joint surplus through regulations that unnecessarily burden foreign suppliers may become a serious problem. Efforts to avoid such problems by international agreement ensure that protection is afforded only where it is, on balance, politically valuable, and only in a manner that destroys as little surplus for well-organized interest groups as possible.

A second additional benefit of a prohibition on regulatory protectionism relates to the problem of quantifying the amount of protectionism in the system in order to facilitate reciprocal market access negotiations. The central objective of the original GATT, now furthered by the WTO, was to make politically valuable, reciprocal market access commitments to enable exporters to expand their sales.⁷² In the course of negotiation over these commitments, officials needed to know what they were giving and what they were getting. Tariffs provide a clear metric in this regard. A 20 percent tariff will inflate the price of imports to consumers by 20 percent, other things being equal. Exporters and their representatives can thus evaluate the impact of tariffs on export prices rather easily and thereby assess the market access opportunities at differing tariff rates. Regulatory protectionism, by contrast, is much less transparent in its effects. Consider the beef hormones example in the introduction: A prohibition on the importation of hormone-raised beef will raise costs of exporters by some amount that relates to the costs of segregating animals treated with hormones from those not so treated, the costs of certifying that the animals were properly segregated, and so on. These costs may be quite uncertain and variable—are they com-

⁷² See Baldwin, *Economics of the GATT* at 83-87 (cited in note 64).

parable in their effects on trade to a 10 percent tariff? a 20 percent tariff? The answer may be quite unclear, and thus it is helpful for negotiators to have protectionism channeled into an instrument such as a tariff that has a more readily identifiable impact on prices and market access opportunities.⁷³

2. The absence of balancing.

What remains for discussion from the political economy perspective is the absence of any “cost-benefit” or “balancing” rule within the WTO to weed out regulatory measures that serve genuine nonprotectionist objectives where the regulatory benefits are small and the adverse trade impact great. Much of the explanation for this absence lies in the fact that such welfare-reducing measures (using “welfare” in the conventional sense of modern welfare economics) need not be welfare-reducing from a political standpoint. Indeed, if rigorous cost-benefit analysis were the touchstone of policy, virtually all tariffs, quotas, and subsidies would fail to pass muster because of the deadweight losses evident in Figure I. Those measures, and others like them, survive because political officials care not only about the magnitude of costs and benefits, but also about their incidence. Modest benefits to a well-organized interest group can readily outweigh larger costs to a diffuse and poorly organized interest group in the political calculus.

For the same reason, objective cost-benefit analysis is not the proper metric from a political perspective for the evaluation of nonprotectionist regulations that have an adverse trade impact.⁷⁴

⁷³ One additional bit of history fits nicely with this political economy analysis. The GATT began in 1947 with a series of tariff bindings negotiated among the major trading nations of the time. Initially, the only constraints on regulatory protectionism were those of GATT Article III, the national treatment Article. But with time, due to the constraints on tariffs, quotas, and subsidies that the GATT introduced, regulatory barriers to trade became more important. During the Tokyo Round of trade negotiations during the 1970s, some GATT signatories responded by negotiating a “Standards Code” that went considerably beyond the national treatment requirement, though it fell well short of the obligations now embodied in the TBT and SPM Agreements. The perceived deficiencies in the Standards Code led to additional pressures to constrain regulatory protectionism, culminating in new WTO Agreements. The history of legal obligations under the GATT and WTO is detailed in Sykes, *Product Standards* at 63-86 (cited in note 8). In short, the international constraints on the traditional instruments of protectionism came first, and the more elaborate and detailed constraints on regulatory protectionism followed later as nations became increasingly creative in devising new forms of protective regulations. This pattern of legal developments lends support to the notion that regulatory protectionism is of little political utility in an environment where nations are unconstrained in their trade policies, but becomes important once their preferred instruments of protection are disabled.

⁷⁴ This observation is hardly novel, at least not in the domestic context, as it underlies

The constituency favoring a regulation may be well-organized and influential, and the constituency that suffers from it (and particularly from the adverse trade effects) may be poorly organized. A simple balancing of the economic costs and benefits of the regulation can mask these important distributional concerns.

To be sure, the political officials who enter a trade agreement such as the WTO ideally might like to subject regulations with important adverse effects on foreign trade to a political cost-benefit analysis, asking whether the net impact of the regulation on the political interests of WTO members is positive or negative.⁷⁵ I have already argued that regulatory protectionism fails such a cost-benefit test and is accordingly prohibited. But where the regulation in question advances some genuine regulatory objective other than protectionism, only a case-by-case analysis of its political costs and benefits can determine whether it is a net benefit or a net detriment from a political standpoint. Categorical prohibitions, such as those described above, are no longer useful.

But legal tribunals will have great difficulty conducting any sort of political cost-benefit analysis on a case-by-case basis. Scientific and economic experts can provide much of the information necessary for a tribunal to engage in conventional cost-benefit analysis, but the information for an assessment of the political interests of national officials, and the intensity of the concerns on each side, will be largely inaccessible. Moreover, political officials likely would be appalled at the thought of an international tribunal balancing the political considerations on each side and transparently upholding or striking down regulations on political grounds. I suspect that virtually all political officials would prefer to maintain the illusion that regulation is undertaken solely for high-minded reasons.

Accordingly, the WTO does not entrust its dispute resolution process with the task of balancing the political costs and benefits

much of the modern economic theory of regulation. See, for example, George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J Econ & Mgmt Sci* 3 (1971); Peltzman, 19 *J L & Econ* 211 (cited in note 13); Richard A. Posner, *Theories of economic regulation*, 5 *Bell J Econ & Mgmt Sci* 335, 344-50 (1974).

⁷⁵ As a formal matter, the inquiry would be whether the political benefit to officials who favored the regulation (presumably those in the importing country) outweighed the political detriment to officials who disfavored the regulation (presumably those in the adversely affected exporting countries, whose exporters are upset about a loss of market access). In theory, this interpersonal welfare comparison can be made using the "weights" that are implicit in the political Pareto optimum for the trade agreement in question. For a formal treatment, see Sykes, 58 *U Chi L Rev* at 300-03 (cited in note 12). If such a system could be implemented, all political officials could benefit on average so that *ex ante*—at the time the trade agreement is concluded—each official would find the system beneficial.

of national regulations that are necessary to the attainment of genuine regulatory goals other than protectionism. Once a regulation is determined to have this property, it is simply upheld under both the TBT and SPM Agreements. Of course, where a legally permissible regulation has considerable adverse effects on export interests abroad and is of little political value to the officials in the importing country, another avenue exists for getting rid of it—negotiation. A side payment by officials in the exporting nation(s), in the form of a concession on other trade matters or perhaps some unrelated matter of mutual interest, can induce officials in the importing nation to change its policy. As Ronald Coase noted long ago, such negotiation alone can suffice for parties to achieve a Pareto optimum as long as the transaction costs of bargaining are small enough.⁷⁶

Indeed, a Coasean perspective can organize the entire political economy analysis. Officials who enter trade agreements seek to attain their political Pareto frontier. To a considerable degree, they do so through sector-by-sector, product-by-product bargaining over tariffs and other instruments of policy, resulting in highly detailed commitments on each imported and exported good. Likewise, when circumstances change and one party introduces a new policy that affects the welfare of others, the same process of detailed bargaining can restore the Pareto optimum. But bargaining is costly; to economize on bargaining costs it is at times useful to have categorical rules that apply to all products and markets, enforced by a dispute resolution system. This option is appealing when optimal behavior is more or less the same in all product markets, and when that optimal behavior can be achieved by a legal rule that is reasonably precise and straightforward to apply. Regulatory protectionism, as I have defined it, is always suboptimal from a political perspective and can be defined in its particulars by a set of fairly clear legal rules—the rules described in Section B above. The task of policing regulatory protectionism is thus an appropriate one for the quasi-judicial dispute resolution of the WTO. By contrast, it is exceedingly difficult to devise a workable and palatable legal rule to condemn regulatory measures that are necessary to nonprotectionist regulatory goals but that are nevertheless undesirable because of their trade impact. As a result, this task is left to case-by-case bargaining.

⁷⁶ Ronald Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

III. SOME COMPARATIVE NOTES ON OTHER TRADING ARRANGEMENTS

The WTO is by no means the only trading arrangement that confronts the problems of regulatory protectionism. Others include the NAFTA, the European Union, and the United States federal system. If the analysis to this point is right, we might expect strong pressures to prohibit regulatory protectionism in all of these systems. Each of them imposes substantial constraints on the tariffs, quotas, and subsidies that subsidiary jurisdictions might otherwise use to protect their firms from foreign competition. These constraints should in turn lead to pressure to use highly wasteful regulatory protectionism if it is not effectively prohibited. We might also expect that nonprotectionist regulatory measures would be treated with less hostility, even where their effects on trade are great. A quick review of the law of these other systems suggests that these expectations are borne out in the main.

A. The NAFTA

The NAFTA is an agreement under which Canada, Mexico, and the United States afford significant tariff preferences to each other that are not afforded to other trading nations.⁷⁷ Like the WTO, it includes constraints on quotas and subsidies to avoid frustrating expectations under the negotiated preferences.

The NAFTA was negotiated more or less concurrently with the negotiations that led to the WTO, and the proposals in each tended to filter through the other. Perhaps not surprisingly, therefore, the provisions of the NAFTA relating to regulatory protectionism bear striking resemblance to those of the Uruguay Round TBT and SPM Agreements. Both the NAFTA chapters on technical barriers⁷⁸ and on sanitary and phytosanitary measures⁷⁹ incorporate by now familiar WTO principles including the national treatment requirement; the sham principle; obligations to

⁷⁷ See generally North American Free Trade Agreement ("NAFTA"), reprinted in *Documents Supplement* at 489-710 (cited in note 5). Free trade agreements are authorized by Article XXIV of the original GATT, which remains part of the WTO system in GATT 1994. Article XXIV constitutes the principal exception to the most-favored-nation requirement of the WTO system that ordinarily prohibits discrimination among trading partners. To invoke the Article XXIV exception, parties to free trade areas must eliminate barriers to trade on "substantially all" trade between them. See GATT 1994, Art XXIV(5), (8) (cited in note 20).

⁷⁸ NAFTA, Part Three, Technical Barriers to Trade, Chapter Nine: Standards-Related Measures (cited in note 77).

⁷⁹ NAFTA, Part Two, Trade in Goods, Chapter Seven: Agriculture and Sanitary and Phytosanitary Measures, Section B ("NAFTA SPM Chapter") (cited in note 77).

give reasons; notice, publication, and comment requirements; obligations to use international standards; and least restrictive means principles. The chapters extend these obligations both to substantive regulations and to conformity assessment.

Although there are a number of modest differences in wording between the pertinent NAFTA and WTO provisions,⁸⁰ the NAFTA, like the WTO, can fairly be said to prohibit regulatory protectionism.⁸¹ Similarly, the NAFTA is tolerant of nondiscriminatory regulatory measures that have protective effects but that can be justified as essential to nonprotectionist objectives—NAFTA too requires no “cost-benefit” balancing between regulatory benefits and adverse trade impact.

B. The European Union

The European Union, like the NAFTA, affords trade preferences to its members. It has the familiar property of constraining the use of protectionist instruments that nations would ordinarily want to use, thereby raising the danger of regulatory protectionism as a substitute.

1. Legislative response.

Unlike the WTO and the NAFTA, the European Union has legislative authority that can be used to address regulatory protectionism. That authority has been used extensively. The Treaty Establishing The European Community (“Treaty of Rome”) authorized the European Council of Ministers,⁸² upon a proposal from the European Commission,⁸³ to issue directives to “approxi-

⁸⁰ For example, the NAFTA SPM Chapter requires that no measure be maintained “where there is no longer a scientific basis for it.” Id Art 712(3)(b). In the WTO SPM Agreement, by contrast, the obligation is not to be maintained “without *sufficient* scientific evidence.” SPM Agreement, Art 2(2) (cited in note 31) (emphasis added). The NAFTA requirement can be read as less stringent (the difference between “some scientific basis” and “sufficient scientific evidence”), and if so, the NAFTA provision prevails in a dispute between the parties to the NAFTA. See NAFTA, Article 103 (cited in note 77).

⁸¹ For further discussion, see Sykes, *Product Standards* at 108-09 (cited in note 8) (discussing the NAFTA accords on technical barriers and SPMs).

⁸² The Council is the primary legislative body in Europe, from which most Community legislation emanates. It consists of country representatives (Ministers) that act in accordance with various voting rules, dependent upon the subject matter of the action. See *Treaty Establishing The European Community*, [1992] 1 CMLR 573, reprinted in Neville March Hunnings and Joe MacDonald Hill, eds, *The Treaty of Rome Consolidated and the Treaty of Maastricht*, Common Market Law Reports Reprints (Sweet & Maxwell 1992) (“Treaty of Rome”).

⁸³ The Commission is a group of distinguished citizens, acting in their individual capacity rather than under the direction of their home countries, charged with undertaking many of the initiatives required by the Treaty of Rome. Typically, as here, the Commission

mate" (in other words, harmonize) the measures of Member States that "directly affect the establishment or functioning of the common market."⁸⁴ The old approach to harmonization through Council initiatives involved the product-by-product promulgation of detailed technical regulations. Products that met the specifications could circulate freely within the Community, although Member States were sometimes free to require their own producers to meet a different set of technical specifications. In the mid-1980s, the Commission and the Council embraced a new approach that delegates the detail work to others. For the most part, the Council limited itself to setting out the "essential requirements" that products must meet relating to matters such as health, safety, environmental protection, and consumer protection.⁸⁵ The Council can then refer the task of formulating detailed standards that meet the essential requirements to Europe-wide standardization organizations. Once the detailed requirements are established, Member States must conform their national laws and regulations to them, subject to an "escape clause" that permits nations to deviate on grounds such as public morality; protection of human, animal, and plant life and health; protection of intellectual property; and protection of the environment. A product that conforms to the resulting standards, or that conforms to national measures deemed "equivalent" by the Commission, is presumed to meet the essential requirements and is entitled to be marketed freely within the Community, again subject to an escape clause.⁸⁶

makes proposals to the Council, which then acts upon them, subject at times to the requirement that it seek advice from other entities such as the European Parliament. The Parliament has relatively little power. For a general description of the governmental structure of the Community, see Josephine Steiner, *Textbook on EEC Law* 10-19 (Blackstone 3d ed 1992).

⁸⁴ Treaty of Rome, Art 100 (cited in note 82).

⁸⁵ The 1989 "Machinery Directive" affords a nice illustration. *Council Directive of 14 June 1989 on the approximation of the laws of the Member States relating to machinery*, 1989 OJ (L 183) 9. It includes some general principles of safe construction for machinery, such as to "eliminate or reduce risks as far as possible," and to "take the necessary protection measures in relation to risks that cannot be eliminated." *Id.* at (L 183) 15. It then proceeds to a higher level of detail, discussing the need for integral lighting for certain types of machinery, the importance of readily accessible devices to stop all moving parts, the need for controls to avoid accidents due to power supply interruptions, the need for measures to ensure stability against vibration and other disturbances, the importance of eliminating sharp edges, and on and on. *Id.* at (L 183) 16-27. The directive thus addresses virtually every conceivable type of product hazard, and lays down general principles for avoiding each of them. Yet, the directive applies to a vast array of machinery products. Indeed, its application extends to virtually every product that in common parlance might be called a "machine," with a few enumerated exceptions such as "mobile equipment," "medical equipment," "steam vessels," "firearms," and several others. *Id.* at (L 183) 11.

⁸⁶ See Bernard van de Walle de Ghelcke, Gerwin van Gerven, and Koen Platteau, *The*

For product regulations covered by either old or new harmonization directives, a clear consequence of a directive is the elimination of any regulatory protectionism that might result from differences in the substantive regulations promulgated by national regulators. Although the escape clauses permit Member States to adopt more stringent regulations where they can justify them on the basis of goals other than protectionism, any cost disadvantage imposed on foreign firms due to differences in regulatory requirements will require justification before the Commission and perhaps the European Court of Justice as well.

Like the WTO, the European Union has also taken additional steps to eliminate regulatory protectionism that may result from regulatory "surprise" or from information deficiencies on the part of regulators. A 1983 Mutual Information Directive⁸⁷ requires national standard-setting organizations and regulators to notify the Commission and certain European standard-setting organizations of proposed standards or regulations before their adoption. With respect to regulations in particular, Member States must notify the Commission of proposed regulations. The Commission then disseminates that information to other Member States. Either the Commission or another Member State may object to a proposed regulation and request that it be modified to avoid adverse trade effects. The Commission may also opt to prepare a harmonization directive on the subject. In either case, final adoption of the proposed regulation must be delayed until the matter is resolved.⁸⁸

The global approach to conformity assessment⁸⁹ is another important innovation. It encourages all parties involved in certification and testing—both product manufacturers and third-party testing laboratories—to embrace European quality control standards to govern their activities. And once the European quality assurance standards are in place, additional guidelines specify when and where the necessary testing and certification for each product will occur. These guidelines minimize the cost and intrusiveness of testing and certification while still meeting essential regulatory objectives.⁹⁰

New Approach to the Elimination of Technical Barriers in the European Community, 1990 BYU L Rev 1543, 1551-60 (detailing the European Community's product standards requirements).

⁸⁷ Council Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, 1983 OJ (L 109) 8, 9.

⁸⁸ Id at (L 109) 8-11.

⁸⁹ European Commission, *A Global Approach to Certification and Testing*, Commun 89/209 of June 15, 1989, 1989 OJ (C 267) 3.

⁹⁰ See generally id at (C 267) 15-24.

2. Judicial response.

Article 30 of the Treaty of Rome provides that: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member-States."⁹¹ Among the subsequent provisions in the Treaty, one pertinent to regulatory measures is Article 36: "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports . . . justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures . . . ; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on international trade."⁹² This structure should by now seem quite familiar—protectionism is prohibited, bona fide regulation to achieve other objectives is not.

These Articles of the Treaty raise a number of interpretive issues, implicitly left to the Commission and to the Court of Justice. It was settled quickly that Article 30 would have broad applicability and, in particular, that it would encompass all manner of regulatory barriers.⁹³ A 1969 directive from the Commission stated that product regulations can have an "equivalent effect" to quantitative restrictions.⁹⁴ In the view of the Commission, product regulations applicable to imports exclusively ("distinctly applicable measures") were automatically covered by Article 30, and regulations applicable to domestic and imported goods alike ("indistinctly applicable measures") would be covered or not in accordance with a balancing test. It was necessary to inquire whether "the restrictive effects on the free movement of goods are out of proportion to their purpose," and whether "the same objective can be attained by other means which are less of a hindrance to trade."⁹⁵ This early interpretation by the Commission goes beyond mere prohibition of regulatory protectionism, of course, and hints at a more general balancing of regulatory benefits against the costs of trade reduction. In 1974, the Court of Justice took an even more expansive view of the measures that might run afoul

⁹¹ Treaty of Rome, Art 30 (cited in note 82).

⁹² Id Art 36 (emphasis removed).

⁹³ See *Commission Directive of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty*, 1970 OJ (L 13) 29.

⁹⁴ Id.

⁹⁵ Id at (L 13) 31.

of Article 30 in the case of *Procureur du Roi v Dassonville*.⁹⁶ "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."⁹⁷ The *Dassonville* formulation makes no distinction between distinctly and indistinctly applicable measures and requires no balancing test as under the 1969 directive. It does require actual or potential "hindrance" of trade, a concept that has proven elusive to define. Because any regulation or conformity assessment measure that prohibits the importation of a good or substantially increases the cost of importation would surely qualify, however, the details of the "hindrance" concept need not detain us.

The Court later backed away from the broad sweep of its *Dassonville* test in a case known popularly as *Cassis de Dijon*.⁹⁸ The Court held that "disparities between the national laws . . . must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."⁹⁹ The list of mandatory requirements to which the court refers was subsequently held not to be exhaustive.¹⁰⁰ After *Cassis*, therefore, the Court applies a two-tier test: For measures applicable to imports exclusively, the Member State must justify them on the basis of the Article 36 criteria noted above.¹⁰¹ Measures that are applicable to both domes-

⁹⁶ [1974] ECR 837, 851 (holding that a provision of Belgian law "prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document . . . certifying their right to such designation constitutes a measure having an equivalent to a quantitative restriction").

⁹⁷ Id at 852.

⁹⁸ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 ("*Cassis de Dijon*").

⁹⁹ Id at 662.

¹⁰⁰ The encouragement of cultural activities, for example, or the interest in maintaining "national or regional socio-cultural characteristics," can qualify as mandatory requirements. See Steiner, *Textbook on EEC Law* at 86-87 (cited in note 83) (listing cases after *Cassis de Dijon* that apply the mandatory requirements exception).

¹⁰¹ Article 36 requires some interpretation. With reference to regulatory barriers to trade, the two provisions of greatest relevance are the exception for measures to protect human, animal, and plant health, and the "public policy" exception. The latter has been construed very narrowly, however, and has proven to afford essentially no protection to Member States outside of a few areas of little pertinence here. See id at 95. Thus, as a practical matter, the only Article 36 exception likely to be of any use to the importing nation in a dispute is the health exception. Given the breadth of the *Dassonville* test for measures within the scope of Article 30, therefore, trade barriers that result from distinctly applicable regulatory measures will almost certainly be struck down unless a health justification can be shown.

tic and imported goods, however, may be justified on the basis of mandatory requirements not enumerated in Article 36. Those that fail this test cannot be applied against imports, and the *Cassis* decision itself indicates that the Court will scrutinize the purported nonprotectionist justifications for a regulation closely.¹⁰² Further, a presumption exists that products lawful in one State ought be allowed into another, and the Court can force a kind of "mutual recognition" where the regulations in force in the exporting nation achieve all the legitimate objectives of the importing nation, even if they do so in a manner that differs from the importing nation's own approach.¹⁰³

In sum, the jurisprudence of the European Court of Justice has evolved in a manner quite similar to the WTO rules. Discriminatory regulations are extremely difficult to sustain, and nondiscriminatory regulations with adverse trade impact must employ the least trade restrictive means for the attainment of nonprotectionist regulatory goals. Mutual recognition will be required where no violence to legitimate regulatory objectives will occur. Finally, despite some hints to the contrary in earlier statements by the Commission, there is little "balancing" of nonprotectionist regulatory benefits against the burden on commerce.

C. The United States Federal System

The inefficiencies of noncooperative trade policies under the Articles of Confederation are said to have provided much of the impetus for the Constitution of the United States.¹⁰⁴ Like the

¹⁰² [1974] ECR at 853.

¹⁰³ A survey of cases may be found in Steiner, *Textbook on EEC Law* at 87-91, 96-97 (cited in note 83). For some illustrative decisions, see *EC Commission v Greece (Re Beer Purity Standards)*, [1988] 1 Common Mkt L Rep 813, 818-20 (holding that prohibitions on beer imports with certain additives violate Article 30 in substantial part because no scientific evidence could be adduced of any health hazard); *EC Commission v Germany (Re Purity Requirements for Beer)*, [1988] 1 Common Mkt L Rep 780, 799 (same); *EC Commission v United Kingdom (Re UHT Milk)*, [1983] 2 Common Mkt L Rep 1, 16 (holding that requiring an extra UHT treatment on imported milk and cream is unreasonable and thus violates Article 30 as equivalent to a quantitative restriction on imports); *EC Commission v United Kingdom (Re Imports of Poultry Meat)*, [1982] 3 Common Mkt L Rep 497, 519-20 (holding that import restrictions on food products violated Article 30 because the Court was unpersuaded that the health justifications were bona fide or that the least restrictive means had been employed); *EC Commission v Italy (Re Low-Fat Cheese)*, [1992] 2 Common Mkt L Rep 1, 16 (holding that the least restrictive means to protect consumers was labeling rather than prohibition on nonconforming products); *EC Commission v Germany (Re German Sausages)*, [1989] 2 Common Mkt L Rep 733, 741-42 (same); *EC Commission v Germany (Re the Use of Champagne-Type Bottles)*, [1988] 1 Common Mkt L Rep 135, 143-44 (same); *Miro BV*, [1986] 3 Common Mkt L Rep 545, 559-60 (same).

¹⁰⁴ See Laurence H. Tribe, *American Constitutional Law* 404-06 (Foundation 2d ed 1988).

other trading arrangements above, the Constitution imposes a number of restrictions upon the use of traditional protectionist instruments by the states, such as a prohibition upon export or import duties without the consent of Congress.¹⁰⁵ It also grants to Congress the “power . . . to regulate Commerce with foreign Nations, and among the several States”¹⁰⁶ (the Commerce Clause), thereby affording Congress the power to constrain state action expressly through statutory enactments. But not all restrictions on state activities in the commercial sphere are express. State policies that are in tension with federal regulatory policy may be deemed implicitly preempted by the federal regime.¹⁰⁷ And, even when the Congress has taken no action on a subject pursuant to the Commerce Clause, state action may be found to violate the Constitution because of the negative implications of that clause—the so-called dormant or negative Commerce Clause.¹⁰⁸

This allocation of powers has much to say about the treatment of regulatory protectionism within the United States. Congress has eliminated regulatory trade impediments in many areas (though sometimes as an incidental consequence of federal regulation). The Food, Drug, and Cosmetic Act, for example, establishes a federal mechanism for the approval of prescription drugs that preempts state drug regulation.¹⁰⁹ The Federal Communications Act affords the FCC authority to establish television broadcast formats.¹¹⁰ The Ports and Waterways Safety Act,¹¹¹ by promulgating safety rules for the design of tanker vessels, preempts more stringent state standards.¹¹² Innumerable other examples might be offered.

Yet, many regulatory barriers remain outside the scope of federal legislation, even under the implied preemption doctrine. States and localities maintain their own building codes, health regulations, pollution control regulations, and a wealth of other product-related measures. These regulations are a source of im-

¹⁰⁵ US Const, Art I, § 10, cl 2.

¹⁰⁶ *Id* § 8, cl 3.

¹⁰⁷ See Tribe, *American Constitutional Law* at 479-501 (cited in note 104).

¹⁰⁸ This listing of constitutional restrictions upon state actions that affect commerce is not intended to be exhaustive. Other and sometimes similar constraints emanate from the Privileges and Immunities Clause, the Equal Protection Clause, and a range of other provisions.

¹⁰⁹ In general, the Act delegates the authority to promulgate regulations to an agency—the Food and Drug Administration—and allows the agency to decide whether to give its regulations preemptive effect. 21 USC §§ 301 et seq (1994).

¹¹⁰ 47 USC § 151 (1994).

¹¹¹ 33 USC § 1221 (1994).

¹¹² See *Ray v Atlantic Richfield Co*, 435 US 151, 168 (1978).

pediments to commerce domestically and have been a matter of considerable interest internationally.

The WTO accords afford *foreign nations* some legal basis for challenging these state regulations on the basis of the principles laid out earlier. State regulations that are inconsistent with the requirements of the TBT and SPM Agreements can place the United States in violation of international law and thus lead to initiatives by the federal government to correct the problem.¹¹³

Another source of constraints on protectionist state and local regulations, which can be invoked directly by domestic and foreign firms affected by those regulations, is the dormant Commerce Clause. Modern analysis in dormant Commerce Clause cases begins with the question of whether the challenged practice effectuates a "legitimate local public interest, and its effects on interstate commerce are only incidental."¹¹⁴ If any discrimination against interstate commerce is to be tolerated in pursuit of a legitimate interest, it must be because of the absence of adequate "nondiscriminatory alternatives."¹¹⁵ Finally, whenever a demonstrable burden on interstate commerce exists, with or without discrimination against out-of-state producers, the Court will weigh the interests of the state against the burden. Discriminatory policies are likely to be struck down under this balancing analysis, while nondiscriminatory policies are "upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."¹¹⁶

On its face, this doctrine automatically invalidates any substantive state regulation that creates regulatory protectionism as defined in this Article. It requires national treatment in virtually all cases absent a compelling regulatory justification for its absence, and the balancing test implies a least restrictive means requirement.¹¹⁷ More generally, any time a regulatory measure is not necessary to achieve some state regulatory objective other than protectionism, the burden on commerce is self-evidently "excessive in relation to the putative local benefits."

Accordingly, the dormant Commerce Clause has been used regularly to invalidate state measures that amount to regulatory

¹¹³ Note that the states are not per se bound by the WTO Agreements. But the United States is under an international obligation to police compliance by the states and, to avoid international sanctions for a violation, can bring an action to strike down inconsistent state laws. See Uruguay Round Agreements Act, 19 USC § 3512(B)(2)(A) (1994).

¹¹⁴ *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970).

¹¹⁵ *Hunt v Washington State Apple Advertising Commission*, 432 US 333, 353 (1977).

¹¹⁶ *Pike*, 397 US at 142.

¹¹⁷ See Tribe, *American Constitutional Law* at 436-38 (cited in note 104).

protectionism.¹¹⁸ Examples of measures struck down by the courts include: a prohibition by one state on imports from another that display a quality standard developed by the other state;¹¹⁹ a requirement that milk be pasteurized and bottled locally;¹²⁰ prohibitions on the importation of food products from outside a defined radius in which state inspectors would operate;¹²¹ a requirement that eggs imported from out of state be stamped with the two letter postal code for the state of origin;¹²² and requirements that domestic electric utilities either continue to use domestic high sulfur coal or incur substantial regulatory burdens for failing to use it.¹²³

To be sure, the operation of the dormant Commerce Clause has proven controversial in some respects, particularly as to the application of the balancing test. Determining whether the local public interest is "legitimate," whether nondiscriminatory alternatives are "adequate," and whether the local benefit outweighs the burden on commerce can require difficult value judgments that judges have no special capacity to make and that are ordinarily entrusted to the political branches of government. Further, if balancing of interstate burden against local benefit is taken seriously, it requires a wealth of empirical information that often will be unavailable in United States courts. For these and other reasons, commentators are often critical of dormant Commerce Clause doctrine, as are a number of prominent jurists. Laurence Tribe suggests that: "The Supreme Court's approach to Commerce Clause issues . . . often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."¹²⁴ Now Chief Justice Rehnquist wrote in a 1981 dissent: "The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their

¹¹⁸The dormant Commerce Clause assuredly does less than, say, the WTO or the NAFTA to police the process by which regulations are promulgated and the attendant information and costs of regulatory surprise that may afflict foreign firms. This is perhaps an unavoidable consequence of a system that rests on *ex post* challenges to regulations through the judicial system as opposed to the renegotiation required under the WTO or the NAFTA. Further, these kinds of costs may well be less important in the United States federal system where language barriers are absent and transparency of government regulatory operations is more commonplace.

¹¹⁹*Hunt*, 432 US at 350-54.

¹²⁰*Dean Milk Co v City of Madison*, 340 US 349, 356 (1951); *Dean Foods Co v Wisconsin Department of Agriculture*, 478 F Supp 224, 231-32 (W D Wis 1979).

¹²¹*Miller v Williams*, 12 F Supp 236, 242 (D Md 1935).

¹²²*United Egg Producers v Department of Agriculture of Puerto Rico*, 77 F3d 567, 572 (1st Cir 1996).

¹²³*Alliance for Clean Coal v Bayh*, 72 F3d 556, 559-60 (7th Cir 1995); *Alliance for Clean Coal v Miller*, 44 F3d 591, 595-96 (7th Cir 1995).

¹²⁴Tribe, *American Constitutional Law* at 439 (cited in note 104).

laws are valid or how to defend them We know only that [the challenged state] law is invalid and that the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused."¹²⁵ Among the law and economics scholars, Frank Easterbrook and Edmund Kitch have argued that the dormant Commerce Clause strays beyond the limits of judicial competence¹²⁶ and may even be unnecessary given the realities of competition and the incentives for cooperation among the states.¹²⁷

It is instructive that these criticisms are directed mainly toward the balancing analysis in cases that purport to weigh the importance of the state's regulatory goals against the attendant burden on commerce. Where the state's proffered nonprotectionist objective seems genuine and the state has employed the least restrictive means to achieve it, it is indeed difficult to imagine how a court is to determine whether the attendant burden on commerce nevertheless outweighs that objective. But such cases, by

¹²⁵ *Kassel v Consolidated Freightways Corp*, 450 US 662, 706 (1981) (Rehnquist dissenting).

¹²⁶ See Frank H. Easterbrook, *The Constitution of Business*, 11 *Geo Mason U L Rev* 53, 58 (1988); Edmund W. Kitch, *Regulation and the American Common Market*, in A. Dan Tarlock, ed, *Regulation, Federalism and Interstate Commerce* 9, 46-47 (Oelgeschlager, Gunn & Hain 1981). Justice Scalia has at times expressed similar views. See *CTS Corp v Dynamics Corp of America*, 481 US 69, 95 (1987) (Scalia concurring) (arguing that the *Pike* inquiry is "ill-suited to the judicial function and should be undertaken rarely if at all"). Richard Posner, however, takes a more charitable view of the doctrine. See Richard A. Posner, *The Constitution as an Economic Document*, 56 *Geo Wash U L Rev* 4, 17 (1987) ("The 'negative' commerce clause is one device . . . for preventing states from abusing their 'market power'."). For the argument that a proper constitutional interpretation does not support the creation of a dormant Commerce Clause by the judiciary, see Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *Duke L J* 569.

¹²⁷ Proposals for reform of dormant Commerce Clause doctrine abound. Easterbrook and Kitch impliedly argue that much of the dormant Commerce Clause doctrine ought be abandoned, leaving the Congress to police state malfeasance under the "positive" Commerce Clause. See Easterbrook, 11 *Geo Mason U L Rev* at 61 (cited in note 126); Kitch, *Regulation and the American Common Market* at 42-45 (cited in note 126). Donald Regan urged the Court to reject its "balancing" exercise in favor of an inquiry into whether the challenged practice has a "protectionist motive," an approach that he contends is followed already to a considerable degree in the guise of balancing language. Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *Mich L Rev* 1091 (1986). Saul Levmore favors greater attention to the question of whether a challenged practice imposes substantial costs on citizens of other states by exploiting state market power, or whether instead the economic costs of the practice are borne mainly within the jurisdiction. Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 *Va L Rev* 563, 626-29 (1983). A similar proposal, though directed to the proper application of the "state action" doctrine under the antitrust laws, is that of Frank Easterbrook. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J L & Econ* 23, 45-49 (1983). For the argument that the aggregate efficiency consequences of state legislation will not depend systematically on whether the state is able to exploit non-residents, see Daniel R. Fischel, *From MITE to CTS: State Anti-takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 *S Ct Rev* 47, 74-78.

definition, are not cases of regulatory protectionism. Whatever the particular criticisms of dormant Commerce Clause doctrine, therefore, even the critics seemingly exhibit near consensus on the idea that regulatory protectionism as it is defined here ought to be, and is, prohibited under the dormant Commerce Clause. The battle joins when courts go beyond that prohibition to strike down nonprotectionist regulations that unavoidably place significant burdens on commerce.

On this set of issues, perhaps the United States can learn from the international agreements that confront the same problems. The pattern in the WTO, the NAFTA, and the European Union is much the same: balancing regulatory benefits and burdens is neither authorized nor undertaken in the judicial or quasi-judicial process. When a regulatory objective appears to be genuine and nonprotectionist, all that is required is the least trade restrictive means to achieve it. The remaining burdens on commerce resulting from heterogeneous domestic regulations and conformity assessment systems are left to case-by-case negotiation in the WTO or the NAFTA, or to the European government in Brussels in the case of Europe. The regularity of that pattern *perhaps* suggests its wisdom and thus may support the suggestion by a number of jurists and commentators that United States courts ought to steer clear of balancing bona fide regulatory benefits against commercial burdens in dormant Commerce Clause cases. I do not want to overstate the point, however, as I have merely made the case that a balancing analysis is unlikely to be a part of a politically savvy trade agreement—it is unlikely to move signatory officials toward their Pareto frontier. Whether it may nevertheless be defended on independent normative grounds is a distinct issue, although I suspect that the argument against it from a political efficiency standpoint—the inability of the judicial process to measure the relevant costs and benefits accurately—may counsel against it more generally.

CONCLUSION

Protection against foreign competition can be conferred through a range of policy instruments with variable welfare consequences. Regulatory protectionism is generally the most pernicious of the familiar techniques. It holds little temptation for savvy political officials who are free to select among the alternative instruments of protection, and emerges only after those officials become constrained in their choice of policy instruments. This Article has suggested a political economy basis for expecting a prohibition on regulatory protectionism to emerge in multilat-

eral trading arrangements, and has shown that a prohibition is in fact present in the WTO, the NAFTA, the European Union, and the United States federal system. This regularity is striking. It is also fortunate as a normative matter, as it channels protectionism into the instruments that do the least damage.

Regulatory measures can have protective effects, however, without constituting “regulatory protectionism” as defined herein—measures that are nondiscriminatory and are essential to the attainment of some regulatory objective other than protectionism may burden foreign firms. The WTO and NAFTA are tolerant of such measures, and, after a brief flirtation with judicial balancing of the benefits and burdens, the European Union is largely tolerant of them as well. United States doctrine is more murky, and judicial balancing of regulatory benefits and commercial burdens is still undertaken to some extent. This aspect of United States law has been the subject of intense criticism, however, and if the political economy analysis herein cannot settle the debate as a normative matter, it can at least help us to understand its genesis.