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Regulatory Protectionism A Hidden Threat to Free Trade

by K. William Watson and Sallie James

Executive Summary

Despite the impressive success of trade liberalization, domestic industries continue to find ways to use the power of government to protect themselves from foreign competition. The practice of using domestic environmental or consumer safety regulation as a way to disguise protectionist policy has become a serious and growing problem in the United States. This regulatory protectionism harms the U.S. economy and violates our trade obligations.

A number of factors combine to explain the rise in regulatory protectionism. Economic globalization has provided Americans with access to a wide range of imported products. This has enabled consumers to demand not only high-quality products at low cost but also products that are produced according to consumers' philosophical or ethical preferences. Simultaneously, domestic producers seeking protection from this influx of imports must find alternative shelters now that the use of tariffs and quotas is constrained by international law and economic good sense. The consequence is a perfect storm in which social welfare activists and special commercial interests join forces to promote regulatory regimes that unfairly and unnecessarily restrict imports.

There is already a system of laws in place to

prevent regulatory protectionism. The rules of the international trading system recognize that domestic laws can be just as protectionist as tariffs. Many of the disciplines of World Trade Organization (WTO) law are embedded in the rules U.S. administrative agencies follow when setting new regulations.

But the U.S. government must take its WTO obligations more seriously. Prior to implementing a new regulation, federal agencies should be required to evaluate the possibility that less trade-restrictive alternatives could meet regulatory goals as effectively as their preferred proposal. Also, the U.S. government should not dilute or bypass the multilateral rules of the WTO through bilateral or regional negotiations that accept managed protectionism.

This paper uses a number of recent examples of protectionist regulations to show that the enemies of regulatory protectionism are transparency and vigilance. Policymakers should be skeptical of regulatory proposals backed by the target domestic industry and of proposals that lack a plausible theory of market failure. These are red flags that the proposal is the product of privilege-seeking special interests disguised as altruistic consumer advocates.

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Regulatory protectionism imposes significant, often hidden costs on the U.S. economy.

Introduction

The American economy has benefited immensely from open trade and globalization. Through international trade agreements and some laudable examples of unilateral liberalization, the United States has adopted historically low tariffs. But while mercantilist economic policy is out of vogue these days, special interests have not stopped in their quest to use the power of government to protect themselves from import competition. An increasingly common and less transparent mechanism for achieving protectionist ends has emerged in this post-tariff world—regulatory protectionism.

National economies are beset with countless regulations designed to guide consumer purchases toward approved products and uses. The general purpose of regulations in a market economy is to overcome a perceived inadequacy of the free market to generate maximum social benefit. Many regulations are prompted and shaped by concerns over the environment or public health and fueled by a progressive skepticism of laissez-faire capitalism and preference for government stewardship.

Even from the perspective of its advocates, there is a danger present when establishing or maintaining any regulatory regime in that the substance of the rules can be used to further the interests of certain economic actors. The legitimacy of the modern administrative state rests upon an inaccurate assumption that regulators will reliably behave like selfless agents of the public interest. On the contrary, legislators and bureaucrats respond to personal incentives just like anyone else. Because of this, the entire regulatory edifice is susceptible to lobbying and even capture by special interests.

Protectionism is just one form of political privilege that grants a competitive advantage to domestic producers over their foreign counterparts. Regulatory protectionism is defined as the use of regulatory policy to discriminate against foreign firms in a way that is not necessary to achieve a le-

gitimate, nonprotectionist objective.¹ It can also be thought of as the motivating force behind the imposition of such regulations.

Regulatory protectionism is evident in a variety of U.S. policies. A particular regulatory scheme may be supported and promoted by activists with genuine concern about social or economic problems, but self-interested domestic industries have learned to use their own political clout in Washington to champion regulations that provide protection from foreign competition. Recent high-profile examples, discussed below, include a food safety inspection regime for catfish that imposes huge burdens on importers; a ban on flavored cigarettes from Indonesia; labeling rules for dolphin-safe tuna that are stricter for Mexican tuna; a country-of-origin label requirement for beef that prevents efficient integration of U.S. and Canadian supply chains; record-keeping requirements meant to prevent illegal logging that are impossible for lumber importers to follow; and a longstanding ban on commercial trucks operated by Mexican nationals on U.S. roads.

Regulatory protectionism imposes significant, often hidden costs on the U.S. economy. A 2010 study commissioned by the Office of Advocacy at the Small Business Administration claimed that the annual cost of all federal regulations to the U.S. economy in 2008 was close to \$1.8 trillion.² The share of those costs attributable to the damage from regulatory protectionism is difficult to measure empirically, but case studies examining the cost of individual regulatory trade barriers suggest that the aggregate cost runs into the billions of dollars per year.

Administrative and legal safeguards offer some defense from the political forces and dynamics that produce these kinds of pernicious regulations. Federal administrative law imposes limitations on government agencies that aim to depoliticize the rule-making process. Those limitations, such as the need to perform a science-based risk assessment or a cost-benefit analysis prior to implementing a proposed rule, make a difference by improving transparency and

holding regulators accountable. Yet the continued existence of special-interest-driven regulation provides damning evidence that these safeguards are insufficient.

When the domestic safeguards fail to prevent protectionism, the WTO provides an international solution. The potential for protectionism to reroute through domestic regulation was foreseen even in the earliest days of postwar trade liberalization. The General Agreement on Tariffs and Trade (GATT), one of the WTO's core treaties drafted in 1947, does not stop at border measures but also requires national treatment of imports; that is, governments' domestic laws must treat imports the same as goods produced at home. Since that time the members of the World Trade Organization have established more specific, sophisticated disciplines designed to curtail protectionism in product standards. These disciplines are contained within the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

WTO members recognized that domestic political forces are sometimes too powerful to resist, even when they call for economically harmful policies. While critics of U.S. membership in the WTO claim that the rules limit U.S. sovereignty and expose American consumers to harmful deregulation, the truth is that WTO law strikes a very good balance between two compatible aims shared by most of the world's governments: to regulate domestic economic activity and to prevent harmful protectionism in both foreign and domestic markets.

New limits should be placed on the discretion of administrative agencies to ensure that regulations meet WTO requirements. In addition to scientific risk assessment and cost-benefit analysis, agencies should consider whether proposed rules are more trade restrictive than necessary to meet their stated goals. Meeting this WTO requirement would prevent almost all regulatory protectionism. Failure to do so has been a major source of international friction over U.S. policies and

has prompted a slew of successful legal challenges against the United States.

The United States should also be careful not to subvert or bypass WTO rules during bilateral negotiations. Some recent agreements have included negotiated product standards and regulations that do not meet WTO requirements. By accepting a level of protectionism in foreign regulations and demanding acceptance of our own, the United States is moving backwards from the level of openness negotiated in earlier multilateral efforts.

Perhaps the most important deterrents to regulatory protectionism are increased vigilance and skepticism of regulatory proposals. Support from the domestic industry raises a bright red flag that a proposed regulation does more to pick winners and losers than to protect consumers or improve national welfare. The lack of a plausible theory of market failure is another red flag that should evoke calls for a closer look at the consequences of a new regulation. Ultimately, advocates of consumer welfare should be more open to the possibility that no regulation is needed at all to meet their goals. Unnecessary government actions will by definition always be more restrictive than necessary and provide opportunities for commercial interests to seek special privilege at the expense of the U.S. and global economies.

The Economic and Political Roots of Regulatory Protectionism

The historical success of trade liberalization has made traditional forms of protection less available while enabling consumers to develop product preferences and expectations that are simultaneously stricter and more global. The consequence has been a confluence of interests between progressives concerned about consumer welfare and domestic industries seeking protection from foreign competition. Progressive activists look at the broad consequences of regulation

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on social welfare while special interests seek to accrue narrow benefits by tilting the law in their favor. Domestic industries wanting to use regulation to gain an advantage over foreign competition can do so more effectively by allying with other more altruistic interests seeking similar changes.

All regulations carry benefits and costs. They can bring real benefits to some: by providing information to consumers, for example, the existence of and conformity to standards may ease commerce by encouraging people to buy and may increase competition if they make it easier to compare products. In that sense, they may facilitate trade, including across borders. Such standards may also correct for “adverse selection” in a product market, which occurs when consumers, uncertain of a good’s quality, are unwilling to pay a high price for it, thereby discouraging firms to produce high-quality goods and leaving only lower-quality goods in the market.³ The economy at large gains if the information-related technical standard benefits consumers more than it costs producers to comply with it.⁴

But this benefit is not shared equally. Producers who already comply with the standard benefit from their “first mover” status while their noncomplying competitors play catch-up, with all of the adjustment costs that implies. That may not bring a net gain to the economy as a whole, because the first-mover producers presumably gain at others’ expense, but these gains would have to enter into the calculation of benefits.

Another feature of common standards can be both a blessing and a curse to consumers: by decreasing the variety of goods on the market, a standard aims to drive out so-called “inferior goods” and may allow for economies of scale in production. Meeting the standard may also make imports closer substitutes and therefore more competitive with domestic goods. Consumers would gain from that increased competition, and also perhaps from the absence of lower quality goods on the market.

On the other hand, quality is subjective

and not always of equal importance to all customers. A larger variety of goods, so that consumers can decide for themselves which mix of product attributes—quality, price, and so on—they wish to buy, is often considered a significant benefit of trade. Increasing people’s access to goods from all over the world and increasing their scope of buying possibilities are benefits from trade that governments need to consider as they weigh up the merits of imposing uniform standards.

Product standards affect the supply side of the market too, because they affect the costs of a firm and become yet another factor that firms must weigh when deciding how much, and where, to produce. As discussed, when products are traded across borders, product standards can distort the market by discouraging imports when they increase foreign firms’ costs relative to those of domestic firms. That feature of product standards is what makes them attractive for protectionists: firms and other interests that would prefer less global competition among producers, if necessary by isolating domestic markets from import competition, see product standards as a promising, and relatively easily disguised, route to monopoly power.

The political economy of standards lends itself well to lobbying. The more technically complex the product standard, the higher the likelihood that it can be captured, if not directly written, by industry insiders with the technical expertise and the political incentive to ensure the standard is written in such a way that favors their interests. Consumers (and to a lesser extent activists), having less information and a lower incentive to organize against the standard, will be politically outclassed. The tendency to write regulations in favor of domestic incumbents may not be deliberately self-serving: it may seem natural to industry in Country A to assume that their standard is the commonsense one. But the fact remains: a domestic industry’s standard may not always be the one that environmental or consumers’ activists would like to see—the dolphin-safe label is a good example.⁵

Bootleggers and Baptists

The political decisionmaking model known as “bootleggers and Baptists” describes how the existence and substance of regulation depends on the confluence of two constituencies, one seeking personal profit and the other interested in furthering an altruistic cause. The eponymous example explains the political support for blue laws outlawing liquor sales on Sunday—Baptists mount a very public campaign denouncing the evils of drink, while bootleggers profit from the competitive advantage they gain over legitimate business one day a week. The law depends on support from two groups who appear to themselves and others to have no common interests. The cause of temperance adds a veneer of legitimacy to the policy, but the concentrated economic benefits driving political action accrue to the bootleggers.

The model could just as well be called “progressives and protectionists,” as it aptly describes the political dynamic in which prominent standard bearers for left-liberal causes to improve welfare through government intervention ride on the shoulders of inefficient, rent-seeking industries. This unsavory and often unintentional alliance between progressive activists seeking stronger laws to protect health, safety, or the environment and domestic industries seeking trade barriers to protect themselves from import competition is an increasingly common driver of import regulation.

Even if a particular regulation serves a protectionist end, its most vocal and visible supporters may be activists or organizations pursuing an independent agenda that has no particular sympathy for domestic industry. Indeed, environmental regulation that prevents import competition in raw materials, for example, may be promoted by political forces that at others times work diligently to oppose interests of the protected domestic producers. We will see a few recent examples of this in the case studies to follow. But for now it is worth observing that changes to regulations may find support from both sides of an ongoing domestic political battle if the biggest losers are foreign competitors, who carry less political weight.

The Challenge of Success

Regulatory protectionism has risen in prominence in recent decades for a few reasons. First, as people around the world become richer, partly through trade liberalization, they start to prefer goods with certain characteristics unrelated to the performance of the good itself—think again of dolphin-friendly tuna, for example. Richer people can also better afford to exercise that preference, giving an incentive for firms to provide goods possessing those characteristics.

Second, as global trade increases, consumers are exposed to products with varying characteristics and standards, some of which may be unwelcome. That can lead to pressure on policymakers to “do something” to address allegedly inferior imports. For example, U.S. consumers have, in general, a higher tolerance for food produced using biotechnology, which many European consumers reject. Consequently, regulations on genetically modified food are stricter in the European Union (EU) than in the United States.

International differences in preferences and in risk tolerance, and the regulations that follow, can also give rise to trade disputes. Indeed, the members of the WTO saw the potential for these types of disputes when they first drafted the GATT in 1947 and have designed rules (outlined in the next section) to prevent them since then, with varying degrees of success.

Third, the successful reduction in conventional trade barriers such as tariffs and quotas has made non-tariff measures more obvious. As trade economist Robert Baldwin warned as early as 1970:

The lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away.⁶

Negotiated reductions in tariff and quantitative trade barriers to lower ceilings bound by international law have also increased the temptation of governments to look for new

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and ever more creative ways in which to appease domestic industries’ persistent calls for protection. And industries can get away with it because of the ambiguous nature of many regulations: whereas the case for reductions in tariffs is (almost) universally accepted, many “behind the border” issues are matters of judgment and balance. Some country-specific quarantine laws are well justified, while others may be *de facto* trade protection. Different labor and safety laws may in fact be part of the legitimate comparative advantage of low-labor-cost countries. Not everyone will agree on uniform environmental protection measures. The goal, then, should be to establish general “rules of the game” to prevent ambivalence from becoming subterfuge.

Case Studies

Unfortunately, there are plenty examples of regulatory protectionism and its damage to the economy. Most of the case studies bear the familiar hallmarks of a well-intentioned goal hijacked by protectionist interests, leaving consumers, businesses and even the original “cause” itself assuming the costs. The following examples demonstrate the various ways that protectionism can impact the existence and substance of regulation.

Catfish Inspection. A particularly embarrassing and unsubtle attempt to tie protectionist ends to more altruistic regulatory justifications has been the ongoing saga over imported “catfish.” A kind of fish, known as pangasius, is currently imported from Vietnam and China and competes in the market with U.S.-grown catfish. After finally succeeding in making it illegal to call pangasius “catfish” to preserve their marketing advantage, the U.S. catfish industry has fully reversed course and is now lobbying heavily to get the government to recognize that pangasius is indeed “catfish” after all.

Did the domestic producers finally realize that regulatory protectionism is a lose-lose position for U.S. producers and consumers? Hardly. The 2008 farm bill included a new, onerous inspection regime for imported “catfish” in response to studies promoted by

the Catfish Farmers of America alleging excessive use of antibiotics in foreign fisheries.⁷ If the fish from those farms are not “catfish,” then the inspection regime does not apply. This bit of head-spinning regulatory back-and-forth demonstrates that purported concerns for food safety are often merely meant to encourage ongoing government efforts to restrict import competition.

Lacey Act Amendment. Baptists and bootleggers came together when the hundred-year-old Lacey Act was amended in 2008. The Lacey Act has prohibited interstate and international trade in illegally killed or captured wildlife since 1900. The 2008 farm bill amended the Lacey Act to expand the scope of covered products to include plants and extended liability so as to expose downstream parties without control over or even knowledge of foreign practices to possible seizure of goods. Now, as Gibson Guitars found out during a dramatic midnight raid of their U.S. factory, imported wood can be seized by the government under suspicion that it was logged without proper permission from a foreign government regardless of whether the current owner has any knowledge of the transgression.⁸

While one obvious reason behind the law is to protect the world’s forests from unauthorized logging, the result has been to increase the legal risk of importing any wood products at all. In lumber-rich countries like China and Russia, the process for acquiring and proving a legal right to cut down trees is not as transparent and organized as it is in the United States. And if one small error in record keeping by a nonaffiliated foreign supplier can result in massive government confiscation of property, the incentive is much higher to find a domestic supplier—even if it costs more. That is why the 2008 amendment to the Lacey Act was supported by the American lumber industry. While the idea to amend the Lacey Act came from anti-logging environmentalists concerned about global deforestation, turning this idea into a reality depended on the support from the self-interested American logging companies

concerned about global competition, and their sponsors in Congress.⁹

Even more genuinely well-intentioned regulations can have chilling effects on importation. The Dodd-Frank Financial Reform bill included a requirement that publicly traded companies importing certain minerals from central Africa report on their efforts to ensure that those minerals are not financing rebel armies in the Democratic Republic of the Congo. Complying with this type of regulation may seem innocuous and even noble, but the necessary recordkeeping and due diligence will drastically increase the cost of buying minerals from Africa, whether or not they are “conflict minerals.” Business groups fighting implementation of the law have argued that complying with the rules would cost them \$3–4 billion up front, with annual compliance costs in the order of \$200–600 million per year according to estimates from the Securities and Exchange Commission.¹⁰ Most troubling though, the embargo is not expected to stop the fighting in the Congo, but it may shut down mines throughout central Africa that have no connection to the conflict.¹¹

Mexican Truck Ban. Rarely is the coalition of interests as transparent as it has been with the current ban on Mexican trucks. Under NAFTA, the United States had until the year 2000 to allow Mexican trucks to operate freely throughout the country, but the U.S. Congress continues to withhold open access over a decade later. The reason offered for the delay? Safety. Mexican trucks could be hazardous on the road, it is claimed, because they may not meet all the requirements imposed on U.S. trucks. The most Congress has agreed to do toward meeting its NAFTA obligations is a compromise transition proposal by which Mexican trucks are allowed to operate outside a 25-mile buffer zone inside the U.S. border only if they gain permission to participate in a tentative pilot program supposedly designed to gather data on the safety of trucks operated by Mexican drivers. Even now, the onerous costs of participating in the pilot study, and the uncertainty around

the final fate of the ban, has had a chilling effect on Mexican truck companies.¹²

The most vociferous opponent of allowing Mexican trucks to operate in the United States has been the Teamsters union, whose supposed concern for safety on America’s roads is neither credible nor supported by evidence.¹³ But a ban that is otherwise obviously protectionist in favor of a single U.S. service industry has received strong support from groups concerned about both safety and the environment. When the Bush administration made a preliminary attempt to implement a pilot program, left wing (and trade skeptic) advocacy group Public Citizen joined the unions in raising a legal challenge based on the government’s failure to meet environment-oriented procedural requirements.¹⁴ Although the challenge was ultimately unsuccessful, the lengthy litigation, eventually decided by the Supreme Court, delayed implementation of the program for years.

In truth, trucks owned by Mexican companies and driven by Mexican nationals are no less safe than their American counterparts.¹⁵ Other reasons the Teamsters have offered in support of the ban are that Mexican trucks will bring terrorism and drugs and, unsurprisingly, that competition from Mexican truckers will lower wages and kill jobs.¹⁶ The first concern is pure hysteria and the latter is likely to affect only union bosses.

Mandatory Country of Origin Labels for Beef. Some of the United States’ trading partners have already started fighting back against these kinds of regulations. The impact of protectionist forces on the substance and application of regulations in the United States has prompted a number of disputes at the WTO—all resulting in U.S. losses. The disputes have involved a range of measures covering protection of foreign wildlife; health control measures against exotic tobacco products; and food safety laws that target imports. In each case, the ultimate reason for why the WTO challenge succeeded was that the U.S. measure in question was tainted by a hidden protectionist purpose.

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The U.S. Food, Conservation and Energy Act of 2008 (popularly known as the “2008 farm bill”) included provisions requiring country-of-origin labeling (COOL) on all imported beef, chicken, lamb, pork, and goat meat and certain perishable commodities sold in retail outlets in the United States. The labeling requirement makes consumers pay for information they don’t really want by increasing the price of these goods. It does so by imposing a tracking and recording requirement that necessitates segregation of livestock and meat based on the country in which the product was born, raised, and/or slaughtered. The costs involved in keeping track of this information have prompted downstream processors to buy products of a single origin, rather than maintain inefficient segregation. The result has been a de-integration of the supply chain for beef in the United States and Canada.¹⁷

A WTO panel found, and the Appellate Body confirmed, that mandatory COOL rules violate Article 2.1 of the TBT Agreement by treating imported livestock and meat from Canada and Mexico (the two complainants in the case) less favorably than similar domestically produced products. According to the Appellate Body report, the burden of maintaining detailed records, which caused harm to foreign livestock producers by increasing their costs, was not justified by the goal of informing consumers, because the information ultimately given to consumers was much less specific than what the processors were required to keep track of. This disparity sufficiently revealed the protectionist nature of the law.¹⁸

Clove Cigarette Ban. In 2009 the Family Smoking Prevention and Control Act banned the sale of all flavored cigarettes in the United States, except menthols. Why the exception for menthols? It’s not because menthol cigarettes have fewer negative effects than other flavored cigarettes¹⁹ or because menthol cigarettes are less favored by new, underaged smokers than clove cigarettes.²⁰ No, there are two reasons menthols were excluded. One, because they are popu-

lar—25 percent of all cigarettes smoked in the United States are menthols—especially among African-Americans (80 percent of black smokers choose menthols). And two, because a ban on flavored nonmenthol cigarettes did not affect U.S. cigarette producers, only their foreign competition. The result was a ban on less popular flavored cigarettes from Indonesia but not on the flavored cigarettes made in the United States.

The WTO found this law also to be inconsistent with U.S. obligations under the TBT Agreement. Here, the Appellate Body considered that prevention of youth smoking was a legitimate goal. They even accepted that treating cloves less favorably than menthols would be acceptable if that different treatment was based on a “legitimate regulatory distinction.”²¹ But they also recognized that exempting menthols did not further the stated goal of the regulation, because there was no evidence that young people would not choose to smoke menthols instead of cloves.²²

Shrimp-Turtle and Tuna-Dolphin. In 1999 the United States failed to justify its ban on imported shrimp from countries that did not require the use of turtle-exclusion devices by their shrimping fleets. The infamous *Shrimp-Turtle* case garnered a lot of attention from environmentalists who saw the trade rules as a threat to environmental regulation.²³ Ironically, though, the reason the measure failed to pass muster under WTO law was not because it was overly restrictive of trade but because it did not do enough to protect turtles.

Protectionist interests had tainted what would otherwise have been a perfectly legal attempt at regulating global shrimping practices through import restrictions. The contested measure was an import ban on shrimp from countries where shrimpers did not use turtle excluder devices to prevent turtle by-catch in shrimp nets. The WTO Appellate Body found that there were many ways that a country might regulate shrimping practices to protect turtles; by allowing imports only from countries that used a particular approach, the United States was choosing protectionism over conservation. Also, the

U.S. rules were different for some countries than for others.²⁴

A very similar situation caused the United States to lose a more recent case about dolphin-safe tuna labels. This time, however, the law was not a transparent import ban like in the *Shrimp-Turtle* case. Rather, the challenged law was a prohibition on marketing tuna in U.S. stores as “dolphin safe” unless certain requirements were met. Primary supporters of the labeling regime argued that it ensured that consumers had accurate information about whether they were supporting fishing practices that harmed dolphins when they bought a can of tuna.²⁵

The measure was deemed WTO-inconsistent in *U.S.-Tuna II* because the labeling requirements inconsistently applied different standards in a way that was unjustifiably discriminatory.²⁶ While they were quite strict for tuna caught where Mexican tuna fishers operated, the rules were overly lax for tuna caught where the U.S.-based fleet was active. The law prohibited any tuna caught using purse-seine nets in the Eastern Tropical Pacific from being labeled dolphin-safe even if an international observer certified that no dolphins were killed. Tuna caught elsewhere, like the Western Central Pacific where U.S. fishing fleets operate, may be labeled dolphin-safe without any certification that dolphins were not harmed. The different treatment simultaneously discredited the accuracy of the label and discriminated against Mexican tuna fishers.²⁷

Although the WTO judicial organs recognized that protecting the world’s dolphins was a legitimate goal that trumped trade concerns under WTO law, that goal could not justify the discriminatory nature of the regime, which afforded protection to U.S. producers by effectively excluding foreign competition in the domestic market. Resistance by Congress to implement the recommendations of the ruling, which could be accomplished by more actively regulating dolphin bycatch in parts of the ocean where U.S.-based tuna fleets operate, reveals that the law’s political support is guided by some-

thing other than just dolphin safety.²⁸

Misguided Opposition

These WTO decisions are not universally welcomed. Indeed, because they represent members’ desire not to overregulate imports, WTO rules are a source of resentment among some interest groups:

“Right now, the United States has become a punching bag for smaller nations. . . . They’re using the WTO for all kinds of things for what it was not intended to do,” said Joel Joseph, the general counsel of the Los Angeles-based Made in the USA Foundation, a group that promotes products manufactured in the U.S. and that advocates for labeling laws.

Lori Wallach, the director of Public Citizen’s Global Trade Watch division, a consumer advocacy organization, predicted that the tuna case will go a long way in helping the public understand the expansive reach of the WTO.

“Every kid who gets sent to school with a tuna fish sandwich, having seen the smiling dolphin on the back of the can, is about to have Flipper-murder on their hands if they have lunch again,” she said. “This is one of those few trade cases where everyone can pick up the can, see the label and realize, ‘What do you mean the WTO says we can’t know what’s in our tuna fish?’”²⁹

While the debate over the proper balance between regulatory cooperation and national sovereignty is a legitimate one, most of the outcry has come from the usual suspects who have always opposed trade liberalization—progressive activists, anticompetitive industry associations, and lawmakers supported by rent-seeking special interests. Consider the previous quote, for example: Public Citizen’s Global Trade Watch has fought trade liberalization for almost 20 years, while the Made in the USA Foundation explicitly promotes domestic manu-

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facturing and advocates country-of-origin labeling to aid their cause.

Opponents of imposing regulatory discipline through international trade law rely on two persistent myths. The first is that bringing existing U.S. laws into compliance with WTO rules will necessarily weaken environmental and safety regulations. The second is that responding to WTO dispute settlement decisions by reforming U.S. law amounts to a transfer of sovereignty from the United States to international bureaucrats. These myths can have a strong impact on the public and lawmakers across the political spectrum, and they are both totally false.

To be sure, following WTO rules does make imposing trade restrictions politically more costly, and in that sense compliance may force policymakers to be more thoughtful when designing and implementing policies. Those who wish for a strong and broad role for government in the economy may lament the speed bumps the WTO puts in the way of trade restrictions, but free traders should by and large welcome the WTO and the role it plays in regulating the regulators.

Diplomatic Avoidance

The WTO allows members signing preferential trade agreements or forming customs unions to deviate from normal nondiscrimination rules, but those deviations appear to apply only to preferential tariff rates and not to TBT or SPS measures. In practical terms, this means that WTO members signing free trade agreements or customs unions can agree to provisions that are broader and/or stricter than WTO rules on TBT or SPS measures, but they cannot allow for weaker standards, or less onerous enforcement, for preferred trade partners. After all, to do so would be to imply that the level of risk that the country is willing to accept is not based on absolute scientific standards, but rather is an elastic concept that could be traded off for other economic considerations.

The current, so-called Doha Round of multilateral trade negotiations is dead in all but name. More exclusive trade deals have

been flourishing in its absence, raising concerns about destabilizing “trade blocs” and trade diversion to less efficient producers. Although WTO rules prevent members from granting preferential TBT or SPS terms in trade agreements, most of them cover standards at least rhetorically: the WTO’s 2011 trade report showed that approximately 60 percent of preferential trade agreements contained provisions on TBT/SPS measures.³⁰ As countries look increasingly to bilateral and regional avenues for trade liberalization, free traders need to be vigilant about further damage to disciplines on standards and technical barriers to trade.

A couple of recent controversies provide instructive examples of how bilateral agreements can undermine multilateral disciplines.

Korean Autos. There was an interesting twist to the renegotiation of the Korea-U.S. Free Trade Agreement (KORUS), which needed to get the support of President Obama before he agreed to submit it to Congress for ratification. Many of the tariff-related modifications were ugly, especially the decision to delay, in both markets, tariff cuts on cars. As a perhaps surprising result of the accord, American pork producers now have to wait two years longer for duty-free access to the Korean market.

But standards were caught up in the horse-trading, too. Somewhat undermining his claim to want to increase environmental standards in trade agreements, President Obama convinced the Koreans to exempt American car makers that sold less than 4,500 vehicles in Korea in 2009 (the year before the renegotiation) from Korean fuel efficiency and carbon dioxide emission regulations, which are stricter than those in the United States and which U.S. automakers have trouble meeting. Korea will also exempt up to 25,000 American-made cars per carmaker from Korean safety inspections.

Strict deference to standards also was relaxed when the United States agreed to let Korea maintain its ban on U.S. beef from cattle older than 30 months. Surrendering

that market access was controversial and constituted a rare loss for a powerful domestic lobby group. Especially since the World Organization for Animal Health had ruled U.S. sanitary measures sufficient to meet Korea's standards even for older cattle.³¹

Some of these dubious transactions could promote trade, of course. But by compromising on its supposedly inviolable auto emissions standards for the Americans, Korea is tacitly admitting that those standards are unnecessary. Presumably, every other WTO member now has the enforceable right to sell its "substandard" cars to Korea under the same terms as the U.S. deal. In any event, it arouses suspicion about the true motivation for the Korean auto emissions standards if they are relatively easily negotiated away.

Disease-free recognition in the Brazilian cotton deal. Following a series of WTO rulings, Brazil won the right to suspend certain trade obligations to the United States in retaliation for American cotton subsidies, which were deemed to be harming Brazilian trading interests and those of other, poorer cotton-exporting nations. Had the retaliatory sanctions gone into effect, U.S. exports worth hundreds of millions of dollars would have been subject to higher tariffs in Brazil, and U.S. intellectual property rights holders would have lost many millions of dollars worth of royalties.

Instead of amending its cotton support policy to comply with the rulings, the United States convinced Brazilian farmers to accept almost \$150 million per year in "technical assistance," paid for by U.S. taxpayers, to stave off the retaliation. The deal allowed the United States to continue subsidizing politically connected cotton farmers without incurring the ire of other domestic interests that would have suffered under Brazilian sanctions.

Many free traders were rightly outraged by that part of the deal, but another, less publicized part of the settlement has damaging implications for the world trading system, too. The United States additionally agreed to recognize the southern Brazilian state of Santa Catarina as free of foot-and-mouth

disease, thereby permitting easier access to the U.S. market for exports from that region. But recognizing areas as "disease free" is an obligation under the SPS Agreement, not a favor to certain trade partners or, even worse, a bribe to offer as part of a legal settlement.

The United States, in other words, should have already recognized the disease-free status of Santa Catarina beef farmers if the scientific evidence warranted it, and if it was requested by Brazil. By not doing so until it needed to call in a favor, the United States has undermined the spirit, and possibly the letter, of the SPS Agreement.

The Trans-Pacific Partnership Tobacco Proposal. The Trans-Pacific Partnership (TPP) is a potential preferential trade agreement among the United States and 10 other Pacific Rim states. During negotiations for the TPP, the U.S. Trade Representative drafted a proposal to provide a special exemption for tobacco-related regulation. The catalyst for the proposal was the WTO ruling against the U.S. ban on clove cigarettes and the growing resentment for international trade rules within the anti-tobacco lobby.

Substantively, the proposal was meant to prevent any actions by the Food and Drug Administration (FDA) under the 2009 tobacco law from being challenged as a violation of the TPP. While the specific text of the proposal has not yet been published, the U.S. Trade Representative has stated that it "would clarify that TPP governments may adopt regulations that impose origin-neutral, science-based restrictions on specific tobacco products or classes in order to safeguard public health."³² Under the TBT Agreement, a regulation must also be no less trade-restrictive than necessary and may be deemed, as the clove cigarette ban was, to be discriminatory when disparate impact on imports does not stem from a legitimate regulatory distinction.³³ The tobacco proposal would bypass the WTO requirement that regulations be applied in an "even-handed" manner.³⁴

Critics of the proposal have further pointed out that it demonstrates unwarranted dissatisfaction with the framework of general

It arouses suspicion about the true motivation for standards if they are relatively easily negotiated away.

**Results show
how “good”
phytosanitary
policy can be bad
economic policy.**

exceptions in the GATT and the safeguards already in place in the TBT and SPS agreements. In order to avoid bringing its laws in line with those disciplines, the United States was trying to use its significant bargaining power to impose ad hoc exemptions for pet policies. There does not seem to be any reason that tobacco-control regulation deserves special attention, other than that the United States is concerned about it. By opening the door to calls from other states for similar exemptions, this proposal can only harm the effectiveness and primacy of broader WTO rules.

Counting the Costs

By all measures regulatory protectionism is costly and growing. An analysis by the United Nations Conference on Trade and Development and the World Bank showed that technical barriers affect 30 percent of international trade, and SPS measures affect about 15 percent, including more than 60 percent of trade in agricultural products.³⁵ Moreover, it showed that the use of non-tariff measures is widespread and increasing.

How much does this increased regulatory activity cost? Answering that question is not as easy as looking into the cost of a tariff. Regulations may have benefits as well as costs, and many are designed to manage risks that are themselves difficult to quantify. There is also the question of who accrues the benefits and who suffers the costs.

The difficulty of even defining what measures constitute “regulatory protectionism,” a necessary first step in calculating the costs, has been a fruitful avenue of research by economists. Some consensus seems to have formed around the idea that a standard is not protectionist if it is set at a level the policymaker (or “social planner” in some economists’ somewhat chilling jargon) would choose if all producers were domestic: that which maximizes “international welfare,” equal to domestic welfare plus the foreign producers’ profits.³⁶ One obvious shortcoming of this approach is the assumption that, in the words of Marette and Beghin, “the domestic standard is selected by a policy maker

seeking to maximize welfare defined by the sum of the producers’ profits and consumers’ surplus.”³⁷ It is far from certain that consumers’ surplus would carry much weight in policy decisions of a highly technical nature, and given the public choice effects described above.

A group of French economists suggest an indicator more intuitive and practical for the purposes of assessing protectionism empirically: they propose that an obscure measure codified by only one or a few countries is more suspicious than if, say, three-quarters of WTO members insist on a certain standard for a given product. The choice of how many countries need to insist on a measure before it can be considered “legitimate,” however, is somewhat arbitrary, as the authors acknowledge.

Even if a generally accepted empirical definition of “regulatory protectionism” were reached, though, that leaves the measurement of the costs. Precise estimates for “the cost of regulations” are flawed, sometimes controversially so. Methods for measuring the “tariff equivalent” of various technical standards are imperfect, especially in the presence of other trade barriers that make it difficult to separate out effects.³⁸

Disclaimers aside, a few case studies suggest substantial costs from trade barriers. Many of them are focused on the agricultural sector, perhaps because the commoditized nature of agricultural goods makes it easy to compare prices and regulations.

A recent examination of Australian barriers to pig meat imports calculated the measures as equivalent to a tariff of about 113 percent above the world price. Australian consumers would gain about A\$409m from the removal of nontariff measures on pig meat products alone.³⁹

An older study on the U.S. ban on Mexican avocados estimated that removing the ban would increase U.S. national welfare by \$13.9 million, even if pest infestation was certain and caused maximum damage to the domestic avocado industry.⁴⁰ That sort of result shows how “good” phytosanitary policy

can be bad economic policy.

The Congressional Budget Office reckons the Food Safety Modernization Act will cost the U.S. taxpayer \$1.4 billion between 2011 and 2015.⁴¹ But the costs to the private sector of complying will be higher still, based on analyses of previous, similar legislation.⁴² The Congressional Budget Office figure captures more than just the costs from fewer or more expensive imports, of course. But a study of analogous legislation (in this case, mandatory requirements for a certain type of production method called Hazard Analysis and Critical Control Points, or HACCP) for seafood products in the United States between 1990 and 2004 showed that the regulations reduced U.S. seafood imports by between \$11.4 million and \$30.6 million, mainly at developing country exporters' expense.⁴³

The mandatory COOL regulations on U.S. agriculture have inspired a number of quantitative studies. Economic consulting group Informa Economics estimated that COOL would cost the U.S. beef industry between \$1.058 and \$1.265 billion per year, and the U.S. pig meat industry between \$167.5 and \$228 million per year.⁴⁴ Again, the costs to the U.S. economy would be greater still, as those figures don't include the consumers' losses. Another study of COOL estimated damage to the U.S.-Mexico tomato trade at between 14 percent and 32 percent of dollar value, partially undermining the NAFTA tariff reductions and reducing consumer welfare when consumers have a mild or no preference for U.S. over Mexican tomatoes.⁴⁵ And in a broader study using advanced economic modeling techniques, a group of agricultural economists estimate that the COOL regulations would decrease U.S. agricultural production, exports, imports, and national welfare (the latter by about \$212 million per year from 2004 levels). Global agricultural trade, production, and welfare would fall, too.⁴⁶

The WTO recently released a comprehensive analysis of current thinking about the relationship between trade and standards.⁴⁷ They found that TBT and SPS measures generally have positive effects for trade in

technologically advanced sectors (perhaps because of improvements in consumers' confidence in imports), but negative effects on trade in fresh and processed agricultural goods.

Although the focus of the current study is on goods trade, services trade is not immune to regulatory barriers either. The WTO found that estimates of the "tariff equivalent" of services barriers have varied from between 40 and 72 percent, albeit with different samples and methodologies. Data on the impact of licensing and qualification requirements on trade in services is limited, but one study showed that while barriers to services trade in general reduced that trade, burdensome licensing requirements actually increased services trade, perhaps because they encouraged trade across borders rather than foreign direct investment. In particular, banking standards, such as for accounting and transparency, increased trade. Nevertheless, the authors predict gains from fewer services regulations: the EU Services Directive to reduce impediments to intra-EU trade is estimated to increase total trade in commercial services by 28 percent.

The nonagricultural goods sector is ripe for liberalization, too. As an example, the WTO cites a study finding that harmonizing the EU electronics sector standards with international norms will increase U.S. exports to the EU, perhaps more so than standard tariff reductions.⁴⁸

The WTO study recommends international cooperation and the common development of regulations to improve trade. But insofar as common standards are adopted by many countries (called "harmonization" in the jargon), importers unable to meet that standard will be increasingly locked out of markets. That may especially disadvantage exporters from developing countries if they can't afford the technology needed or achieve the scale economies necessary to spread the higher costs of compliance.⁴⁹

A World Bank study of firms in selected developing countries estimated that a one percent increase in compliance costs increas-

A group of agricultural economists estimate that the COOL regulations would decrease national welfare by about \$212 million per year.

Regulations affecting trade have become more prominent.

es variable production costs by between 0.06 and 0.13 percent, and that the fixed costs of compliance are approximately \$425,000 per firm, or about 4.7 percent of average value added.⁵⁰ The study also pointed out that developing countries usually must adapt to rich country standards rather than the other way around, and that developing country firms typically must bear the costs of meeting standards themselves, their national governments not having the resources to establish testing and certification laboratories and so on.

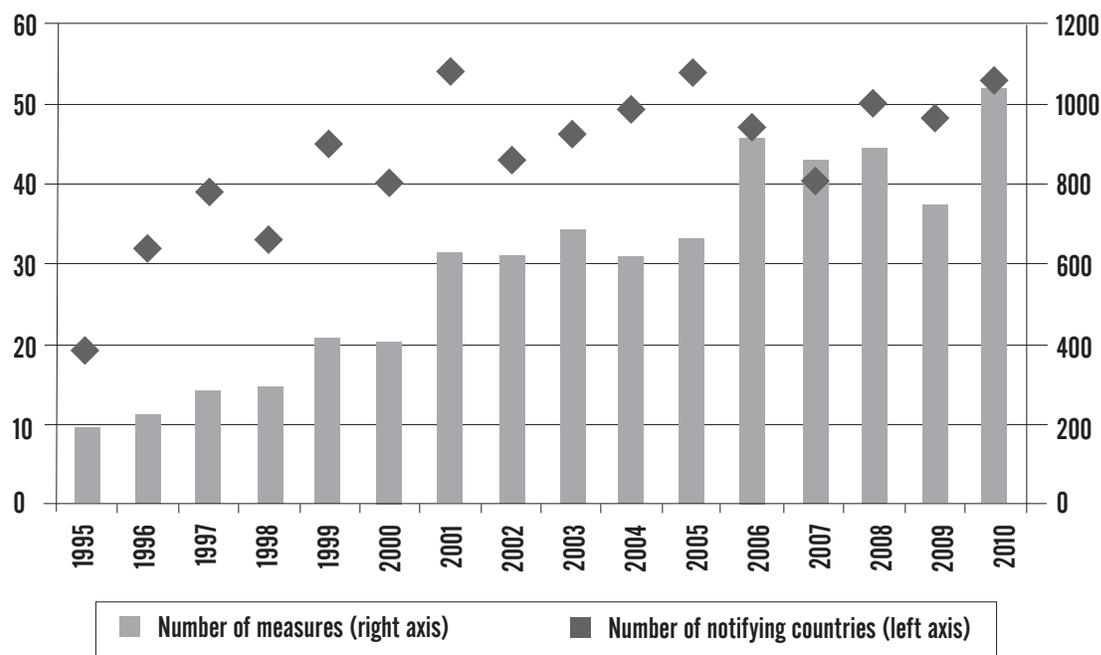
The disproportionate disadvantage suffered by developing country producers is empirically supported. One study showed that SPS and TBT barriers do not have a significant impact on bilateral trade between OECD countries but have a statistically significant negative impact on exports from

poorer countries into the OECD countries, especially the EU.⁵¹

Clearly, regulations are costly, even more so if they are really just protectionism in disguise. Procedures and institutions are needed to minimize the damage they can inflict and to prevent their blatant abuse.

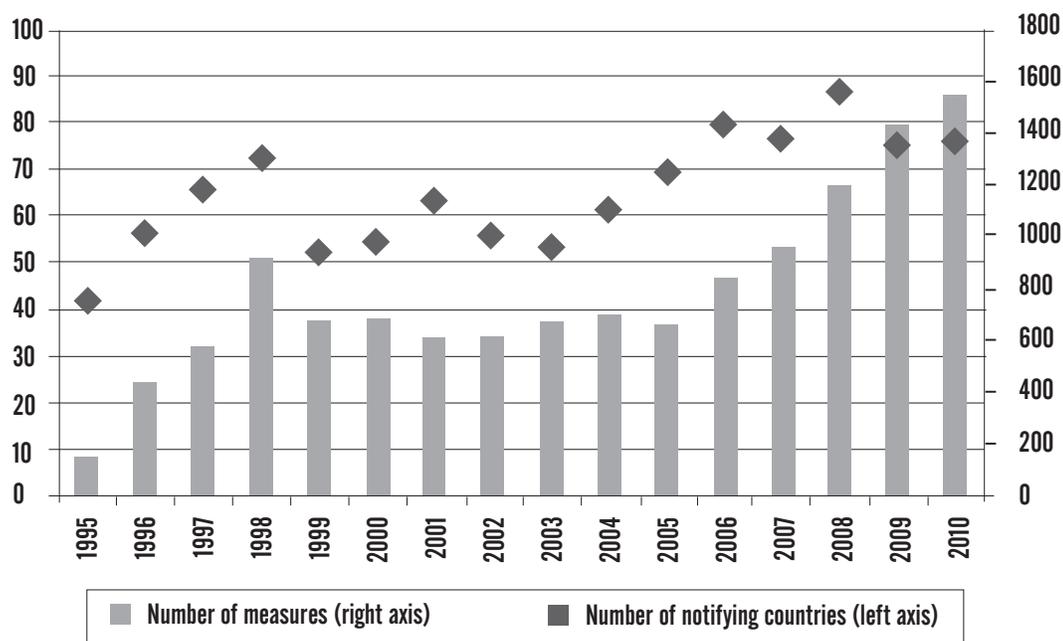
One mechanism by which the WTO tries to keep a lid on regulatory protectionism is by insisting that members publicize regulations that affect trade. That discourages members from implementing blatantly protectionist policies that would bring international embarrassment. Data on regulations collected by the WTO also helps us to see how regulations affecting trade have become more prominent. Figures 1 and 2 show the upward trend of SPS measures and TBT notifications by WTO members since 1995.⁵²

Figure 1
Sanitary and Phytosanitary (SPS) notifications, 1995–2010
(number of notified measures and number of notifying countries per year)



Source: Reproduced from Marc Bacchetta and Cosimo Beverelli, “Non-tariff Measures and the WTO,” VoxEU, posted July 31, 2012, <http://www.voxeu.org/article/trade-barriers-beyond-tariffs-facts-and-challenges>.

Figure 2
Technical Barriers to Trade (TBT) notifications, 1995–2010
 (number of notified measures and number of notifying countries per year)



Source: Reproduced from Marc Bacchetta and Cosimo Beverelli, “Non-tariff Measures and the WTO,” VoxEU, posted July 31, 2012, <http://www.voxeu.org/article/trade-barriers-beyond-tariffs-facts-and-challenges>.

The United States is responsible for hundreds of these measures. Between January 2010 and June 30, 2012, the United States made 520 notifications to the TBT Committee (of which 337 were addenda or corrections) and 537 notifications of SPS measures (92 of which were corrections, 13 “emergency” measures and 432 regular notifications). Notwithstanding these openness efforts, over the same period, three WTO dispute settlement proceedings related to TBTs (Clove cigarettes; COOL; and Tuna-Dolphin II) were taken against the United States.⁵³

Although no SPS disputes were initiated against the United States in the review period, other WTO members have raised concerns about American SPS measures, especially the FDA Food Safety Modernization Act and its implementing regulations. China cited the SPS Agreement in its dispute settlement case against U.S. barriers to poultry. The United States in turn has used the offices of the WTO to object to measures taken by several WTO members.⁵⁴

Regulatory Protectionism Is against the Law

If politics is the germ that spreads the costly disease of regulatory protection, then law is the cure. International rules administered by the WTO represent agreement among the governments of the world that domestic pressure for protectionism is too powerful to be resisted alone. The WTO agreements prohibit nearly all forms of protectionism, including through domestic regulation and product standards. The rules are crafted to provide a balance between the need to prevent disguised protectionism and the desire of member governments to regulate their domestic economies.

Critics of U.S. involvement in the WTO and the resulting acceptance of trade disciplines exaggerate the impact of trade rules on U.S. regulatory autonomy and national sovereignty. As a member of the WTO, the United States has pledged only to avoid protectionist and unfairly discriminatory regu-

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GATT obligations are tempered by exceptions designed to ensure that trade laws do not interfere with efforts to legislate on issues of public health or morals.

lation, not all regulation that impacts trade. Moreover, U.S. courts are not permitted to give effect to WTO law or judicial decisions against the United States. Congress maintains its role as the ultimate decisionmaker on U.S. trade policy regardless of the international obligations of the United States.

Congress may retain boundless discretion to skirt these rules, but the administrative agencies that set the bulk of American regulatory policy are limited by a number of legal restrictions that directly or indirectly implement international trade disciplines. Some of these restrictions are trade related, but most of them are merely mechanisms to ensure good governance and due process.

There is a potential consequence for violating international trade law. If the United States maintains a policy inconsistent with international rules despite an adverse ruling from the WTO's dispute settlement mechanism, complaining members will be permitted to suspend their own obligations toward the United States in equal measure. A suspension of concessions in this manner, usually through raising tariffs on politically sensitive products, has a remarkable impact on the make up and quantity of domestic political forces aligned against the impugned policy.

International Rules

While the international trading regime furthers many putative goals, the rules accomplish a simple, core mission—to reduce protectionism. They do this by requiring governments to channel trade barriers into transparent and negotiable tariffs. Other forms of protectionism are prohibited. Border measures like quotas are banned outright, and internal measures such as taxes or regulations are limited by the principle of nondiscrimination.

WTO rules require “national treatment” of imports so that they are not treated less favorably than domestic goods. GATT Article III:4 states:

The products of the territory of any contracting party imported into the territory of any other contracting par-

ty shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Like products are those that compete against each other in the marketplace, and *treatment no less favorable* is that which accords “effective equality of opportunity” to imports.⁵⁵ Nevertheless, imported like products may be treated differently, and even singled out for special treatment, as long as the different treatment does not harm the “conditions of competition.”⁵⁶

All GATT obligations are tempered by a set of general exceptions designed to ensure that trade laws do not interfere with governments' efforts to legislate on issues of public health or morals. Even the exceptions, however, apply only to nondiscriminatory measures. GATT Article XX states, “Subject to the requirement that such measures are not applied in a manner which would constitute . . . a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.” Article XX essentially allows health and safety regulations that have an unequal impact on imports so long as they are necessary.

Members of the WTO must also abide by the TBT Agreement and the SPS Agreement, which were finalized in 1994. These agreements add more specific disciplines that provide further clarity and balance.

The TBT Agreement aims to ensure that governments implement standards, regulations, certification, and testing procedures in a manner that does not create unjustifiable and unnecessary obstacles to international trade.⁵⁷ After all, a plethora of regulations can make life very difficult for exporters, especially those who sell in many different markets.

Measures covered by the TBT Agreement include product labels to provide consumers with information, or certain specifications that a product must meet for it to be sold legally in a certain country. The agreement elaborates on the general exceptions of the GATT by requiring that these measures not be more trade restrictive than necessary to meet “legitimate objectives.” Legitimate objectives, according to the agreement, include “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”⁵⁸ The TBT Agreement also recognizes that procedures used to test whether a product conforms to a relevant standard should not discriminate between domestic and imported goods in a manner that confers advantage.

The SPS Agreement applies only to measures meant to protect human, animal, and plant life and health. It acknowledges that countries will have different attitudes towards risk and different ideas about what levels of risk are acceptable, and it makes allowances for those differences. However, the right to apply standards is not unconditional. Members’ regulations must have a scientific justification, which in this context means physical/natural science, not political science.⁵⁹

The SPS and TBT agreements build on the concept of national treatment spelled out in the GATT. SPS measures should be imposed only to the extent necessary to achieve the desired level of consumer protection and not as a disguised restriction on international trade. Imports may be treated differently only if doing so is necessary to meet the member’s desired level of consumer protection. A similar allowance exists under the TBT Agreement. Technical regulations governed by that agreement may treat like products differently as long as the difference in treatment is the result of a “legitimate regulatory distinction.”⁶⁰ This allows flexibility in applying standards while still targeting protectionist discrimination.

Domestic Safeguards

To some extent, avoiding protectionist regulation merely requires common sense.

Overregulation is costly, and ensuring that regulations are based on scientific evidence and are not needlessly restrictive is a side-effect of good governance. Indeed, agency rulemaking in the United States, the primary source of regulatory direction, is subject to just such requirements.

Attention to WTO rules could prevent protectionist pressure from affecting agency rulemaking. Most regulations are written by administrative agencies pursuant to a broad statutory mandate from Congress that gives them substantial discretion in shaping the substance of particular standards. The agency rulemaking process is highly formalized and legalistic, however, and agencies are required by various laws to consider certain issues or balance certain interests before adopting any regulation.

Science-based risk management is an essential part of food safety and environmental regulation in the United States. Agencies like the FDA, Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) have long been required to base their regulations on objective scientific evidence. The purpose of this requirement is twofold. First, it promotes more effective outcomes and improves the efficiency of agency resources to address matters of public health.⁶¹ Second, it introduces an apolitical element into policy-making that can be judicially enforced.⁶²

Risk assessment proved useful in demonstrating the protectionist nature of the new catfish inspection program mandated by the 2008 farm bill. Although Congress ordered the USDA to regulate domestic and international catfish farms, much of how it would accomplish that goal was left to the agency to decide. It conducted a risk assessment as required by law and found insufficient evidence to justify the inspection regime, and that, in any event, catfish posed little risk even without inspection.⁶³

However, the current approach to science in regulation is far from perfect. Critics point out that agencies have found ways to use scientific evidence selectively to achieve desired re-

Attention to WTO rules could prevent protectionist pressure from affecting agency rulemaking.

Political influence and discretion can still overpower the regulatory process.

sults. They also decry the deferential standard of review courts employ when judging the adequacy of agency science.⁶⁴ Despite these limitations, requiring agencies to base decisions on scientific evidence has had an overall beneficial effect on the content of regulations.

Also important to the federal regulatory regime for the past 30 years has been the use of cost-benefit analysis. Under executive order, any rule promulgated by an agency that exceeds a certain impact threshold in dollar terms must undergo a cost-benefit analysis by the Office of Information and Regulatory Affairs (OIRA). Although the zeal of application and methodology employed have varied from one administration to another, every president since Ronald Reagan has utilized cost-benefit analysis to rein in or justify agency action.

The Obama administration extended the OIRA review mechanism by executive order in 2012 to promote “international regulatory cooperation.” The goal of Executive Order 13609 is to help the administration and individual agencies identify potentially unnecessary divergences between regulations in different countries. Regulations in other countries might serve the same goal but require companies to do so in different ways. The order recognizes that having to comply with redundant or incompatible regulations is a barrier to trade and that such differences should be avoided if a harmonized rule would be just as effective.

Despite these safeguards, political influence and discretion can still overpower the regulatory process. One egregious example occurred in relation to the COOL regulation. The final rule was decided according to formal procedures during the final months of the second term of President George W. Bush. As soon as the Obama administration was installed, the new secretary of Agriculture, Tom Vilsack, sent a letter to the beef industry suggesting “voluntary” compliance with a stricter set of rules that were not included in the final rule. In a bald-faced repudiation of objective rulemaking and rhetorical coherence, the Secretary’s letter threatened to make the voluntary rules mandatory if he found that industry was not meeting them.⁶⁵

Suspending Concessions

Protectionist regulation persists despite domestic and international safeguards. Sometimes Congress ignores the international obligations of the United States, and when the political pressure is strong enough, agencies find a way to bend the rules.

When the domestic safeguards fail, the last guardian of U.S. public interest is the international dispute settlement system at the WTO. If a WTO member believes that another member is violating WTO obligations and diplomatic efforts have failed to resolve the dispute, the aggrieved member may file a complaint with the WTO’s Dispute Settlement Body. After an initial consultation phase, an independent panel of trade law experts is assembled to adjudicate the claim. That panel’s decision may be appealed to the Appellate Body, a permanent group of distinguished jurists.

If the complainant is victorious in its claim, the respondent is given an opportunity to repeal the offending measure within a reasonable period of time. Once that time has expired, the complainant may seek permission to “suspend concessions or other obligations” up to a dollar amount equal to the harm it is suffering as a result of the respondent’s WTO-illegal practice.

In most cases, the retaliation takes the form of increased tariffs on goods that the complainant imports from the offending respondent. The victorious complainant has discretion to choose which products to target. The goal is to achieve the maximum level of domestic political opposition to the offending measure by spreading the consequences to politically powerful export industries currently benefiting from low-tariff trade.⁶⁶

Make the Existing Rules More Effective

Current WTO Rules Are the Right Ones

The WTO rules on product standards and trade-impacting regulations offer a thoughtful balance that guards against disguised protectionism without prescribing members’

regulatory management of their economies. As discussed above, the rules focus on unjustifiable discrimination, scientific foundation, transparency, and international cooperation. They leave room for countries to regulate whatever products they like and regulate them differently as long as the difference is supported by objective, scientific evidence.

Adherence to the rules does not impose any limit on nonprotectionist regulation or impose upon the sovereign power of the U.S. government. Rather than complain about the rules, policy advocates would serve their agendas more effectively if they embraced the positive aspects of regulatory discipline. Even a loss before the WTO dispute settlement mechanism provides an opportunity to lobby for better regulation.

The three recent adverse rulings against the United States on technical regulations provide good examples of how the process is working well. In each case—clove cigarettes, tuna-dolphin, and country-of-origin labeling—the lack of compliance could equally be explained by too little regulation as by too much. Banning menthol cigarettes would end the discrimination against clove cigarettes; imposing stricter requirements on tuna fleets outside the Eastern Tropical Pacific would end the discrimination against Mexican tuna; and mandating disclosure of more detailed information about origin might justify the burden imposed on Canadian cattle. Of course, removing the regulations would also satisfy U.S. obligations, and it would do so in a way that is more befitting a free society.

While it is important to see past the arguments of the WTO's habitual detractors and special interests opposed to trade liberalization, it is equally imperative that U.S. negotiators not undermine the existing system through bilateral and regional negotiations. Tinkering with specific regulations through trade agreements to make them less protectionist shows that the parties are willing to water down regulations when it suits certain special business interests. The main value of existing WTO rules is that they help depoliticize the regulatory process—a much more

laudable goal than simply ensuring preferential access to otherwise protected markets.

Any regional or bilateral efforts to combat regulatory protectionism should concentrate on harmonization. Arbitrary differences between regulatory regimes with the same goals serve no legitimate benefit and needlessly insulate markets. That is not to say that all regulatory pluralism is to be avoided; on the contrary, jurisdictional differences in regulation stimulate competition among governments. That competition provides one of the most effective checks on incompetent and unjust regulatory overreach. But harmonized regulations that facilitate trade by integrating markets are surely not protectionist.

Strengthen Domestic Implementation

Paying closer attention to the need to avoid protectionism in the policymaking process could help the United States keep its regulations free of protectionist influence and prevent international friction. Ideally, this would occur at the initial legislative stage with Congress accepting WTO obligations in good faith. Barring that unlikely scenario, there are still other steps in the lawmaking process where trade rules can improve the content of U.S. regulation.

Despite its current limitations, objective depoliticization of agency rulemaking does make a difference in the fight against regulatory protectionism and should be expanded in meaningful ways. The Obama Administration's Executive Order 13609 calling for international regulatory cooperation is a good idea, but the concept should be taken a step further.

Requiring agencies to consider and evaluate the impact of a proposed regulation on international trade could limit the incidence of protectionism. Agencies setting food safety measures already undertake the scientific assessment required by the SPS Agreement. These agencies and others should further undertake to assess whether a less trade restrictive alternative could also meet regulatory goals. Requiring agencies to identify al-

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ternative policies that meet regulatory goals and then to analyze the trade restrictiveness of each proposal would make it difficult to impose WTO-inconsistent regulations. The requirement might not always prevent the establishment of discriminatory standards, but by adding an apolitical element, it would pressure the agencies to justify their actions on legitimate grounds. Agencies that ignore the requirement or choose an inferior policy should be subject to effective legal challenge by adversely affected private parties.

Another way to boost the political influence of trade rules while reducing the political power of bootleggers would be to improve legislative transparency. One way to do this would be to expand the availability of independent review of potentially protectionist regulation. All too often regulations are presented as “necessary” to protect consumers and/or the environment, without much discussion of the costs of those policies to consumers and importers. A fuller analysis and discussion of the tradeoffs involved in setting regulations that restrict trade would lead to better policies.

The Government Accountability Office (GAO) and the Congressional Research Service are two existing and credibly independent offices within the federal government that, along with the Office of Management and Budget, actively review and analyze existing or proposed laws. These or a similar institution can provide an important check by informing policymakers about a regulation’s negative impact on trade or international relations as well as its effectiveness at addressing the problem it was designed to address.

Indeed, the agencies have already proved their worth in this regard. The GAO has played an important role in combating the protectionist catfish inspection program, for example. With the primary task of preventing waste of government resources, the GAO issued a report titled “Seafood Safety: Responsibility for Inspecting Catfish Should Not Be Assigned to USDA,” pointing out that the new inspection regime would not improve food safety for domestic or imported

catfish.⁶⁷ Specifically, the GAO report determined that while the regime would cost \$14 million per year to implement, there was no evidence that it would reduce the incidence of salmonella in catfish.⁶⁸ The GAO recommended maintaining the current inspection system and advised Congress to repeal the provisions of the 2008 farm bill establishing the new regime.⁶⁹

How to Avoid Protectionist Bootleggers

A main reason for the political success of disguised protectionism is that decisionmakers are inadequately suspicious of potential bootlegger influence in the substance of policy proposals. There are a few red flags that should signal to legislators and regulators the existence of a protectionist motive. Support by the regulated industry and the lack of a plausible argument for market failure are signs that the impetus behind the regulation is not to improve consumer welfare but to pick winners and losers among competing business interests.

Red Flag: Domestic Industry Support

Sometimes industry support is obvious because of public lobbying, but other times it is the substance of the law that reveals bootlegger influence. When the source of the influence is most hidden, the purported regulatory goal is at its highest risk of being subordinated or even eliminated. When the progressive activists pushing for the regulation are either oblivious to or unconcerned by the influence their industry adversaries wield, the resulting law can be difficult for a neutral observer to justify.

A stark example of this outcome is demonstrated by the ban on flavored cigarettes championed by the tobacco control lobby for preventing the evil tobacco companies from enticing kids to smoke. As discussed, the law banned all flavored cigarettes—except menthols. The exception was added not because proponents saw menthol cigarettes

as less important to ban but because doing so was necessary in order to get the bill through Congress.

The menthol exception almost completely eliminated any impact the ban would actually have on the cigarette market. Clove cigarettes were enjoyed by less than 1 percent of smokers before the ban.⁷⁰ Advocates of the new law focused on how the ban would apply to candy and soda flavored cigarettes, but no such product existed at the time the ban went into effect.

What the anti-tobacco lobby claimed as a huge success did absolutely nothing to prevent smoking and a lot to anger Indonesia, the almost exclusive supplier of clove cigarettes. Most importantly, the law did no harm at all to U.S. tobacco companies, the primary target of progressive anti-smoking campaigners. On the contrary, the ban on clove cigarettes removed a persistent competitor from the marketplace to the benefit of established domestic manufacturers.⁷¹

Supporting a policy that complied with trade obligations would have been especially beneficial to this law's advocates. There are many different ways to reduce the prevalence of smoking, and the anti-tobacco movement has employed many of them over the years with considerable success. In this case, though, the tobacco control lobby was played for fools.⁷² They expended considerable time and treasure to pass a landmark bill banning cigarettes that their big tobacco nemesis doesn't make and hardly anyone smokes. They shouldn't blame international trade rules for undermining their initiative; they should thank the WTO for giving them a chance to reopen the debate and press for a more effective policy.

While the clove cigarette ban demonstrates how a protectionist motive, when accommodated by activists looking for any level of success, can derail progressive efforts, the Mexican truck ban shows how activists can be completely co-opted by protectionists and used as a tool for a purely self-interested agenda. The Teamsters Union vehemently opposed allowing trucks driven by Mexicans to deliver goods throughout the United

States. The protectionist motive is obvious, but the Teamsters were able to cover their objections with an air of legitimacy by claiming that Mexican trucks were less safe than American trucks. The resulting bootleggers-and-Baptists coalition between safety advocates and truckers succeeded in convincing Congress to keep Mexican trucks out of the United States despite a clear proscription of such a ban in the NAFTA agreement as well as tariff retaliation by Mexico.

What makes this coalition particularly frustrating is that trucks driven by Mexicans are not at all less safe than those driven by Americans. In fact, a pilot program instituted for the purpose of gathering evidence to prove Mexican trucks were a hazard showed that Mexican trucks were no more dangerous than their American counterparts.⁷³ Again, activists were used as a tool to provide apparent legitimacy to a policy designed by an industry seeking economic protection.

Instead of fighting the trade rules as an impediment to their agenda, social and environmental activists should recognize the value of those rules in ensuring more effective outcomes. Hitching your cause to the powerful money of wealthy, self-serving interests to gain political clout is a sellout that provides short term and illusory gain but sacrifices both ideological integrity and long term effectiveness.

Protectionism is generally not a policy goal of the modern progressive movement, and the bootleggers-and-Baptists model has not worked out well for activists whose goals often get compromised when the interests of protectionists alter the regulatory outcome. The value of the alliance is much greater for the protection-seeking industry that gets altruistic cover for its monopolistic schemes than for the progressive do-gooders who have to settle for the second or third best option in their quest for political success.

Red Flag: No Plausible Market Failure

Another red flag that should alert the public and policymakers to protectionist motivation is the lack of a plausible argument for market failure justifying regulation.

Activists' goals often get compromised when the interests of protectionists alter the regulatory outcome.

There is no reason why dolphin-safe tuna and sustainable logging need government support while fair-trade coffee and kosher food thrive in the free market.

There is no economic case for imposing mandatory standards to make the primary characteristics of a product more appealing to consumers. Economists widely recognize the superior power of free-market competition to serve consumer interests, so regulations designed to achieve that goal should be closely scrutinized. Interference in the market is quite likely to serve the special interests of certain producers, particularly the interests of domestic producers over their foreign competition.

One stark example of this phenomenon is the mandatory country of origin labeling for beef. Proponents of the labeling regime consist primarily of U.S. beef producers who benefit from the added expense the law imposes on downstream processors who purchase cattle that was born or raised in Canada. To support the program, its proponents produced a study showing that Americans care where their beef comes from.⁷⁴

If consumers really cared where their beef came from, they would be willing to pay more for beef that contained origin labels. Otherwise, a mandatory standard would not be necessary. COOL advocates in the beef industry point to surveys that demonstrate a preference among U.S. consumers for U.S.-origin beef.⁷⁵ But other studies have shown that the preference does not actually impact consumer choices at the grocery store.⁷⁶ The law removes the choice from consumers who weren't willing to pay more for beef with an origin label (if they had been, ranchers would not have needed to compel them), and forces processors to buy U.S. cattle through skewed prices. The result is higher beef prices for consumers, more business for U.S. cattle ranchers, and an end to integrated supply chains that benefit businesses and consumers on both sides of the border.

The catfish inspection program offers another example of a purely protectionist regulatory scheme. If Vietnamese pangasius were actually more dangerous to consumer health than U.S.-raised catfish, fewer consumers would buy it. It should come as no surprise that consumers don't want to be poisoned

by the food they eat, but no one has suggested that market failure prevents the price of Vietnamese pangasius from reflecting any potential health risk.

Imposing a more aggressive inspection regime burdens foreign producers who are less able to adjust to the peculiarities of U.S. regulatory oversight and less invested in the market than U.S.-based companies. As noted by the GAO, the new inspection regime provides no benefit to consumers through increased food safety.⁷⁷ It merely protects less-efficient domestic producers from consumers' preference for safe foreign fish over safe, more-expensive domestic fish.

Even for standards that also further non-protectionist ends, free market solutions are often better at achieving these "legitimate" goals. Many protectionist standards are fueled by the surging popularity of environmental and social causes, but political support for such causes generally parallels increased awareness among consumers and greater demand for products that are produced in particular ways. The market would likely be more than happy to meet that demand without government encouragement.

There is no reason why dolphin-safe tuna and sustainable logging need government support while fair-trade coffee and kosher food thrive in the free market. The overwhelming popularity of the dolphin-safe label shows how much consumers care about the issue and belies the argument that any intervention is needed. But government-mandated standards or labels can also prevent more responsive or effective approaches by preventing competition among standards.

By deciding what a dolphin-safe label on tuna cans means about how the tuna were caught, the regulation not only invited protectionism but made it more difficult to provide more accurate or nuanced information to consumers. Moreover, a uniform statement of dolphin safety may have prevented the emergence of an "enhanced dolphin safety" product if the uniform label precluded charging a price premium. Similarly, advo-

cates of buying only fair-trade coffee disagree about exactly what the term means, and having the government choose a particular meaning would only stymie internal efforts to strengthen and define the term.

Currently, tuna caught in the Eastern Tropical Pacific that is not authorized to use the dolphin-safe label is, nevertheless, caught using methods approved under the Agreement on the International Dolphin Conservation Program, while tuna that satisfies the dolphin-safe criteria may be captured using fish-aggregating devices that raise concerns about all manner of aquatic bycatch. Which level of protection is sufficient to satisfy consumer demand for ethically captured tuna? We don't know because consumers are prohibited by law from receiving that information on product labels.

In the end, the best way to ensure consumer safety and product quality is to eschew government intervention altogether. Consumers in a free market drive producers to make the best products at the best value in a way that is more efficient and fairer than top-down regulation. Countrywide, mandatory product standards worsen the quality of consumer products and limit economic growth and prosperity by stifling competition among producers. The free market approach not only liberates and empowers consumers, it easily complies with international obligations and avoids intergovernmental economic disputes.

For some regulations that have nonprotectionist goals, there is no free market answer, because the "legitimate" goal is an illiberal imposition on consumer choice. Again, the clove cigarette ban provides an excellent example. For tobacco control advocates, the goal is not to have better quality products or to prevent negative environmental impact—the goal of a cigarette ban is to control people for their own purported good.

Any cigarette ban, like other forms of prohibition, is incompatible with the ideals of a free society. The dangers of smoking are well-known, and its popularity has waned considerably in recent decades, but smoking

tobacco tastes and feels as good as it always has, and many find the risks acceptable. The ban under scrutiny in the WTO case covered only foreign-made cigarettes, because the U.S.-made menthol cigarettes were too popular. A remarkably large portion of international trade disputes involve taxes or other restrictions on vice products like tobacco and alcohol, where local businesses are able to protect themselves from governments' nanny impulses by channeling regulatory energy toward foreign goods. Any ban or tax that treats two equally harmful products differently should be immediately suspect, from both trade and regulatory perspectives.

Conclusion

Protectionism serves special interests at the expense of the general public no matter what form it takes, and while combating protectionist regulation is not as easy as lowering tariffs, the policy justification is the same. Despite the existence of international rules confirming the need for policymakers to avoid protectionist contamination of product standards, public choice theory and ample evidence suggest that vigilance is still needed. As long as domestic political interests have an incentive to lobby the government for protection from foreign competition, by stealth if necessary, politicians and bureaucrats will be under pressure to bend if not break the rules and to dismiss the interests of consumers.

There is no simple policy solution to regulatory protectionism. We must keep in place and respect the international rules that impose discipline upon political decisionmakers. Improving transparency and further depoliticizing the regulatory process can make a difference by ensuring compliance with those disciplines. But ultimately, the best defense is skepticism. Policymakers, commentators, and the public must be more willing to look past altruistic defenses of regulatory proposals to find the true winners and losers. When the winner is not consum-

The free market approach empowers consumers and complies with international obligations.

ers, then it must serve other ends; when the end is consumers, the regulation is probably unnecessary anyway.

Notes

1. Alan O. Sykes, "Regulatory Protectionism and the Law of International Trade," *University of Chicago Law Review* 66, no. 1 (Winter 1999): 3.
2. Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms" Small Business Administration Office of Advocacy, contract no. SBAHQ-08-M-0466, September 2010, <http://archive.sba.gov/advo/research/rs371tot.pdf>. Even if they do not show up in conventional "size of government" statistics such as government spending as a percentage of GDP, or as line items in the federal budget, regulations impose costs on the economy.
3. George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* 84, no. 3 (August 1970): 488–500.
4. Donna Roberts, Timothy E. Josling, and David Orden, "A Framework for Analyzing Technical Trade Barriers in Agricultural Markets," U.S. Department of Agriculture Economic Research Service, Technical Bulletin no. 1876, March 1999, <http://usda.mannlib.cornell.edu/usda/nass/general/tb/tb1876.pdf>.
5. Mark J. Robertson, "The Fairy Tale of U.S. 'Dolphin Safe' Labelling: False Claims, Unintended Consequences," *Bridges Trade BioRes Review* 6, no. 1 (May 2012).
6. Robert E. Baldwin, *Nontariff Distortions of International Trade* (Washington: Brookings Institution, 1970): 2.
7. Exponent Engineering and Scientific Consulting, Center for Chemical Regulation and Food Safety, *Catfish Risk Profile*, July 2010.
8. *Wall Street Journal*, "Stringing Up Gibson Guitar," November 25, 2011, <http://online.wsj.com/article/SB10001424052970204443404577054370383139472.html>.
9. Raffi Khatchadourian, "The Stolen Forests: Inside the Covert War on Illegal Logging," *New Yorker*, October 6, 2008.
10. *Wall Street Journal*, *Corruption Currents* (blog), "Business Groups Specify 'Conflict Minerals' Issues," November 26, 2012, <http://blogs.wsj.com/corruption-currents/2012/11/26/business-groups-specify-conflict-minerals-issues/>.
11. David Aronson, "How Congress Devastated Congo," *New York Times*, August 8, 2011, <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>.
12. "FMCSA Official: U.S.-Mexico Pilot Program in Trouble," *Commercial Carrier Journal*, May 23, 2012, <http://www.cjdigital.com/fmcsa-official-u-s-mexico-pilot-program-in-trouble/>.
13. Dan Griswold, "Attempt to Limit Mexican Trucking in U.S. Masks Union Agenda," *Los Angeles Daily Journal*, December 20, 2012.
14. "After Lawsuit Filed, Bush Allows Comments on Plan to Open U.S. Roads to Mexico-Based Trucks," Public Citizen, May 5, 2007, http://www.citizen.org/autosafety/article_redirect.cfm?ID=16746.
15. Russ Roberts, "How Safe Is that Trucker in the Window?" March 5, 2001, <http://www.econlib.org/library/Features/Robertstruck.html>.
16. Paul J. Nyden, "Teamsters Oppose New Border Crossing Standards for Mexican Truckers," *Charleston Gazette*, March 10, 2012, <http://sundaygazette.com/News/Business/201203100075>.
17. Alexander Moens and Amos Vivancos Leon, "MCOOL and the Politics of Country of Origin Labeling," The Fraser Institute, June 6, 2012.
18. World Trade Organization (WTO), *United States—Certain Country of Origin Labelling (COOL) Requirements*, Report of the Appellate Body, WT/DS384/AB/R and WT/DS386/AB/R, paras. 341–350.
19. They don't. Rita Rubin, "FDA Panel: Menthol Cigarette Ban Good for Public Health," USA Today, March 18, 2011, <http://usatoday30.usatoday.com/news/health/story/health/story/2011/03/FDA-stops-short-of-menthol-cigarette-ban/45047298/1>.
20. They aren't. "American Youth Continue to Show Strong Cigarette Brand Preferences" American Legacy Foundation, June 6, 2007, <http://www.prnewswire.com/news-releases/american-youth-continue-to-show-strong-cigarette-brand-preferences-57899092.html>
21. WTO, *United State—Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body, WT/DS406/AB/R, para. 182.
22. *Ibid.* para. 225.

23. John Zarocostas, "U.S. Loses Appeal on Saving Sea Turtles," *Journal of Commerce*, October 14, 1998, 1A, 3A.
24. World Trade Organization, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, paras. 165, 172.
25. Earth Island Institute, "WTO Decision Sacrifices Dolphins and Consumers," Press Release, International Marine Mammal Project, <http://earthisland.org/marinemammal/index.php/immreports/wto-decision>.
26. World Trade Organization, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body, WT/DS381/AB/R, para. 298.
27. Bill Watson, "WTO Correctly Calls the U.S. to Task for Lying about Dolphins," *Forbes.com*, May 23, 2012.
28. K. William Watson, "Protectionist Denial and Bribery," *Cato@Liberty*, June 4, 2012, <http://www.cato.org/blog/protectionist-denial-bribery>.
29. Rob Hotakainen, "As Trade Rulings against U.S. Mount, Backlash Builds against WTO," *McClatchy Newspapers*, November 29, 2013, <http://www.thenewstribune.com/2012/11/28/2383355/as-trade-rulings-against-us-mount.html>.
30. World Trade Organization, "World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence," World Trade Organization, Geneva, http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.
31. U.S. Department of Agriculture, Statement by Secretary Mike Johanns Regarding U.S. Classification by OIE, May 22, 2007, http://www.usda.gov/wps/portal/usda/usdahome?contentid=2007/05/0149.xml&navid=NEWS_RELEASE&navtype=RT&parentnav=LATEST_RELEASES&deployment_action=retrievecontent.
32. *Inside U.S. Trade*, "Critics of Draft U.S. Tobacco Proposal in TPP Poised to Renew Efforts," January 25, 2013, <http://insidetrade.com/201301252422624/WTO-Daily-News/Daily-News/critics-of-draft-us-tobacco-proposal-in-tpp-poised-to-renew-efforts/menu-id-948.html>.
33. WTO, *Clove Cigarettes*, WT/DS406/AB/R, para. 181.
34. *Ibid.*
35. Alessandro Nicita and Julien Gourdon, "A Preliminary Analysis on Newly Collected Data on Non-Tariff Measures," United Nations Conference on Trade and Development, Policy Issues in International Trade and Commodities Study Series no. 53 (New York and Geneva: United Nations, http://unctad.org/en/PublicationsLibrary/itcdtab54_en.pdf).
36. Ronald Fischer and Pablo Serra, "Standards and Protection," *Critical Perspectives on the Global Trading System and the WTO*, ed. S. Henson and J. Wilson, (location: Edward Elgar, 2005), <http://www.acp-eu-trade.org/library/files/Fischer%20R.%20and%20Serra%20P.%20%E2%80%93%202000%20%E2%80%93%20Standards%20and%20Protection.pdf> BAD LINK; Stéphan Marette and John C. Beghin, "Are Standards Always Protectionist?" Working Paper 07-WP 450, Center for Agricultural and Rural Development, Iowa State University, June 2007, <http://www.card.iastate.edu/publications/DBS/PDFFiles/07wp450.pdf>; Katia Berti and Rod Falvey, "Does Trade Weaken Product Quality Standards?" Bond University Globalisation and Development Centre paper no. 29, April 2009, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1028&context=gdc>.
37. Marette and Beghin.
38. Marc Bacchetta and Cosimo Beverelli, "Non-tariff Measures and the WTO," *VoxEU*, posted July 31, 2012, <http://www.voxeu.org/article/trade-barriers-beyond-tariffs-facts-and-challenges>.
39. John C. Beghin and Mark Melatos, "The Trade and Welfare Impact of Australian Quarantine Policies: The Case of Pigmeat," *World Economy* 35, no. 8, pp. 1006–1021, August 2012.
40. Roberts, Josling, and Orden.
41. Congressional Budget Office, *Cost Estimate, S. 510 Food Safety Modernization Act*, August 12, 2010, <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/117xx/doc11794/s510.pdf>.
42. Ron Knutson and Luis A. Ribera, "Provisions and Economic Implications of FDA's Food Safety Modernization Act," AFPC Issue Paper 11-1, Agricultural and Food Policy Center, Texas A&M University, January 2011, <http://www.afpc.tamu.edu/pubs/1/554/IP%2011-01.pdf>.
43. Sven M. Anders and Julie A. Caswell, "Standards-as-Barriers versus Standards-as-Catalysts: Assessing the Impact of HACCP Implementation on U.S. Seafood Imports," *American Journal of Agricultural Economics* 91, no. 2, pp. 310–21.
44. Informa Economics, Update of Cost Assessments for Country of Origin Labeling—Beef and Pork (2009), June 2010, <http://www.informaecon>.

- com/COOLStudyUpdate2010.pdf).
45. Wendy A. Johncheck, Parke E. Wilde, "Market and Welfare Impacts of COOL on the U.S.-Mexican Tomato Trade," *Journal of Agricultural and Resource Economics* 35, no. 3, pp. 503–521, December 2010.
46. Keithly G. Jones, Agapi Somwaru, and James B. Whitaker, "Country of Origin Labeling: Evaluating the Impacts on U.S. and World Markets," *Agricultural and Resource Economics Review* 38, no. 3 (December 2009): pp. 397–405.
47. World Trade Organization, "The Trade Effects of Non-tariff Measures and Services Measures," Part II:D in *World Trade Report 2012: Trade and Public Policies: A Closer Look at Non-tariff Measures in the 21st Century* (Geneva: World Trade Organization), July 2012, http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2d_e.pdf
48. Ibid.
49. Richard E. Baldwin, "Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System" in *Brookings Trade Forum: 2000*, ed. Susan M. Collins and Dani Rodrik, (Washington: Brookings Institution Press), 2001.
50. Keith E. Maskus, Tsunehiro Otsuki, and John S. Wilson, "The Cost of Compliance with Product Standards for Firms in Developing Countries: An Econometric Study," World Bank Policy Research Working Paper no. 3590, May 2005, <https://openknowledge.worldbank.org/handle/10986/8961>.
51. Anne-Célia Disdier, Lionel Fontagné, and Mondher Mimouni, "The Impact of Regulations on Agricultural Trade: Evidence from the SPS and TBT Agreements," *American Journal of Agricultural Economics* 90, no. 2 (May 2008): 336–50.
52. Bacchetta and Beverelli.
53. World Trade Organization, "Trade Policy Review: United States of America," December 18 and 20, 2012, WT/TPR/S/275, http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm.
54. Ibid.
55. General Agreement on Tariffs and Trade, *United States—Section 337 of the Tariff Act of 1930*, Report by the Panel, para. 5.11.
56. World Trade Organization, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R and WT/DS169/AB/R, para. 137.
57. Agreement on Technical Barriers to Trade (TBT), preamble.
58. Ibid., article 2.2
59. World Trade Organization, *Japan—Measures Affecting Agricultural Products*, Report of the Appellate Body, WT/DS76/AB/R, February 22, 1999, paras. 76–80.
60. WTO, *Clove Cigarettes*, WT/DS406/AB/R, para. 182.
61. Eleanor D. Kinney, "Administrative Law and the Public's Health," *Journal of Law, Medicine, and Ethics* 30 (2002): 212, 219.
62. Alan Charles Raul and Julie Zampa Dwyer, "Regulatory *Daubert*: A Proposal to Enhance Judicial Review of Agency Science by Incorporating *Daubert* Principles into Administrative Law," *Law and Contemporary Problems* 66, no. 7, 2003.
63. U.S. Department of Agriculture, "Risk Assessment of the Potential Human Health Effect of Applying Continuous Inspection to Catfish," July 2012, pp. 9–11.
64. Raul and Dwyer, pp. 9–12, 26–33.
65. Letter from Thomas J. Vilsack, U.S. Department of Agriculture, February 20, 2009. "The Department of Agriculture will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary action. Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress."
66. See e.g., United States Diplomatic Cables Leak, Craig Stapleton, December 14, 2007. France and the WTO ag biotech case. WikiLeaks. WikiLeaks cable:07PARIS4723. In this cable, the U.S. ambassador to France recommended "that we calibrate a target retaliation list that causes some pain across the EU since this is a collective responsibility, but that also focuses in part on the worst culprits. The list should be measured rather than vicious and must be sustainable over the long term, since we should not expect an early victory."
67. U.S. General Accountability Office, "Responsibility for Inspecting Catfish Should Not Be Assigned to USDA," May 2012.
68. Ibid., pp 20–21.
69. Ibid.
70. Faisal Maliki Baskoro, "WTO Torpedoes U.S. Ban on Importation of Kretek," *Jakarta Globe*, September 4, 2011, <http://www.thejakartaglobe.com/business/wto-torpedoes-us-ban-on-importation-of-kretek/463309>.

71. Jacob Sullum, "All for Philip Morris: Politicians Stand Up to Big Tobacco by Protecting the Leading Cigarette Maker," *Reason*, February 21, 2007.
72. For an opposing view, see Todd Tucker, "U.S. Measures to Reduce Teenage Smoking Deemed WTO Violation," *Eyes on Trade*, September 6, 2011, <http://citizen.typepad.com/eyesontrade/2011/09/wto-opens-door-to-teen-tobacco-addiction.html>.
73. Hon. Mortimer L. Downey III, Hon. James T. Kolbe, and Hon. Kenneth M. Mead, U.S.-Mexico Cross-Border Trucking Demonstration Project, "Independent Evaluation Panel Report to the U.S. Secretary of Transportation," October 31, 2008, <http://www.fmcsa.dot.gov/documents/cross-border/Ind-Eval-Panel-Rpt-US-Mexico-Cross-Border-Demo-Proj-10-31-08.pdf>.
74. J. VanSickle et al., "Country of Origin Labeling: A Legal and Economic Analysis," International Agricultural Trade and Policy Center, May 2003.
75. "Country of Origin Labeling for Beef," R-CALF USA 2007 Stamped Factsheet, <http://www.r-calfusa.com/COOL/20070206%20R-CALF%20Stamped%20Factsheet%20COOL.pdf>;
76. See Fraser-CEI MCOOL Report pp. 16-19 for a thorough review of COOL behavioral studies.
77. U.S. General Accountability Office, pp 20-21.

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