

Verbraucherzentrale
Bundesverband e.V.



Federation of German
Consumer Organisations

Consumer Interests and Sustainable Development in International Trade Law

Policy Brief

**Publisher: Federation of German Consumer Organisations (vzbv),
Markgrafenstrasse 66, Pillbox, 10969 Berlin, Germany; www.vzbv.de
Tel. (+49)-30-25800-0; Fax: (+49)-30-2500-218; e-mail: info@vzbv.de**

September 2003

**Prepared by
Ecologic – Institute for International and European Environmental Policy
Pfalzburger Str. 43-44, 10717 Berlin, Germany, www.ecologic.de
Tel. +49 30 86880-0; Fax: +49 30 86880-100; Office@Ecologic.de**

TABLE OF CONTENT

PREFACE	3
1 INTRODUCTION.....	4
2 CONSUMER INTERESTS AND SUSTAINABLE DEVELOPMENT	5
3 INTERNATIONAL LEGAL PROTECTION OF CONSUMER INTERESTS IN SUSTAINABLE DEVELOPMENT	7
4 CONSUMER INTERESTS AND WTO LAW.....	7
4.1 THE ROLE OF CONSUMER INTERESTS IN GENERAL WTO LAW	8
4.2 TRADE MEASURES TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT	8
4.3 LABELLING (CONSUMER INFORMATION).....	9
4.4 INVESTMENT	9
4.5 AGRICULTURE	10
4.6 SERVICES.....	11
5 GENERAL CONCLUSIONS	11

Preface

Consumers are one side of the coin, the demand side, and all trade should ultimately be to their benefit. Since everyone consumes, consumer interests have a wide popular appeal and high political salience. Called 'consumer sovereignty', the freedom to choose if to consume and what to consume is an assumed right in economic theory that underpins the political philosophy on which market economies are based. The freedom to express values and preferences in the choice of products and services is the market equivalent of free and fair multi-party elections in democracy. In spite of this, we find that consumer interests and rights, and the requirements of consumer policy are only weakly reflected in international trade bodies and law.

This brief is an argument for a broad definition of consumer policy, one that is not restricted to merely economic consumer protection. Rather, consumer interests come in different forms, beginning with fundamental interests, such as food, drink, clothing, health care and shelter (survival). Once these are satisfied, economic consumer interests concerning price, quality, choice, and redress are coupled with societal consumer interests, i.e. consumer interests relating to an intact ecological and social environment. Societal consumer interests form the bridge to classical political interests, and they are closely intertwined. At the same time they are genuine consumer interests, even though consumer policy has traditionally concentrated on economic consumer interests.

In an era of increasing globalisation, vzbv, the Federation of German Consumer Organisations considers promotion and protection of consumer interests a very important challenge at international level. In order to initiate a systematic and comprehensive analysis of this challenge, vzbv has mandated an investigation of the protection of consumer interests in international law. This investigation was carried out by Ecologic, the Institute for International and European Environmental Policy. This policy brief presents the essentials of the study's analysis and the conclusions, focusing on concrete recommendations for WTO law. The full version of the study will be available in print and electronic form on vzbv's home page (www.vzbv.de).

Professor Edda Müller
Executive Director of vzbv
September 2003

1 Introduction

Although sustainable development has been gaining increasing recognition in international law, the protection of consumer interests in this context has lagged behind. This short paper seeks to identify these interests in the context of sustainability, assesses the extent to which international law –especially WTO law– supports these interests, and proposes recommendations on improving this situation.

Consumers have a vital role to play in achieving sustainability. Their purchasing preferences can trigger fundamental changes in the manner in which goods and services are produced and used. At the same time, the ability of consumers to engage depends, to a large degree, on the extent to which a society is sustainable.

Therefore, international law can protect consumer policy interests in sustainable development in two ways. One is to ensure that the state, as the guardian of national societies and guarantor of basic rights and conditions, is provided with the legal tools necessary to develop appropriate laws and policies to protect consumer interests and achieve sustainable development. The second is to ensure that international law does not infringe on the ability of consumers to give effect to preferences aimed at sustainability.

Section two identifies and connects the different consumer interests to the concept of sustainable development and also shows the main policy fields of sustainable consumption. Section three provides for a short overview of the international instruments for the protection of consumer interests. Sections four and five analyse the implications for international trade law offering a number of recommendations with regard to the integration of sustainable consumption into specific areas of international trade law, such as labelling, investment and agriculture as well as more global recommendations for changes in the WTO system.

2 Consumer Interests and Sustainable Development

Although consumer issues consist of a wide range of topics, consumer interests can be clustered into three levels: **fundamental**, **economic** and **societal interests**:

- **Fundamental interests** relate to the opportunity to participate in consumption. The subject of fundamental interests centres on the access to consumption and fair and equitable distribution of those goods that are essential for survival, e.g. water, food, or medicine. Fundamental consumer interests also include health, i.e. the interest that the consumer's health is not damaged or endangered by the products and services he or she consumes.
- **Economic interests** are often referred to as "classic" consumer interests. While fundamental interests focus on the access to the market, economic interests relate to consumer protection within the market. The foremost interest in this respect is the maximisation of benefit on the consumer's side with regard to the goods and services purchased. This also includes the best possible product quality at the lowest price.
- **Societal interests** relate to the interest consumers have in their wider ecological and social environment. While it is undoubted that consumers want to live in an intact ecological and social environment, it is not as clear that they will make their purchasing decisions in such a way as to promote environmental protection, poverty eradication or labour rights. For a majority of consumers a gap still remains between everyday life in which economic considerations are still to a large extent predominant, and the degree of awareness for the support of societal interests. The consumer who decides to buy ecologically or socially beneficial goods or services will also benefit the public welfare or society as a whole, but in many cases the direct economic profit for the consumer himself remains immeasurable. Conversely, the consumer who buys ecologically or socially harmful goods, such as those produced by child labour, is unlikely to feel the societal consequences of this purchasing decision.

Due to this "market failure", regulation is necessary to ensure that the societal interests of consumers will be realised in practice. In a liberal market and democratic society the state represents the only authority that bears the legitimate right to regulate the market. Accordingly, a state is required to act in favour of anticipated and generally disadvantaged societal interests or public welfare, while avoiding an undue restriction of rights and freedoms within the market. This requires weighing and balancing conflicting interests according to the principle of proportionality. The State must find a corrective measure that promotes one interest, such as consumer protection, without over-restricting the pursuit of another. Accordingly, the types of measures can differ considerably. Although in some cases it appears adequate to restrict or prohibit a certain behaviour by law or mandatory standards, e.g. the production of certain goods harmful to consumers' health or environment, in others it can simply establish a framework or incentives in order to achieve a self-regulation by the market itself, e.g. through subsidies to make environmentally friendly goods more competitive or through informative labelling schemes.

The **concept of sustainability**, which is recognised at international level, **provides a feasible approach** for states to change consumption patterns in the described manner. According to this concept, the overall objective with regard to the change of consumption and production patterns is that states:

"promote social and economic development within the carrying capacity of ecosystems" (WSSD Plan of Implementation [2002], para.14) **while taking "account of the needs of the present without compromising the ability of future generations to meet their needs"** (Brundtland Report, "Our Common Future". World Commission on Environment and Development. New York. Doc.-No. A/42/427, p. 24 and 54).

In accordance with these requirements the participating states at the World Summit on Sustainable Development (WSSD) in Johannesburg, 2002, declared:

"We recognize that [...] changing consumption and production patterns [and ...] are overarching objectives of, and essential requirements for sustainable development." (Johannesburg Declaration on Sustainable Development, para.11).

The essence of sustainability is a holistic, global as well as long-term approach to balance and concord conflicting interests with regard to consumption. The WSSD Plan of Implementation therefore calls for the development of a "10-Year Framework of Programmes in support of regional and national initiatives to accelerate the shift towards sustainable consumption and production to promote social and economic development" (WSSD Plan of Implementation [2002], para. 14). As outlined in the documents adopted in Rio and Johannesburg, as well as in the UN Guidelines for Consumer Protection (as expanded in 1999) sustainable consumption primarily aims to promote fundamental and societal interests since they are the most disadvantaged in a free market economy.

Accordingly, a number of principles and actions for promoting sustainable consumption can be drawn from these documents: For the support of fundamental interests the "*Principle of Common but Differentiated Responsibility*" is of utmost importance. It takes account of the fact that, although all states bear a common responsibility with regard to the general objective to bring about a shift toward sustainable consumption, the industrialised countries should be the driving force and "*take the lead*" in fulfilling this responsibility whereas developing countries are given more time to comply as they should, with the assistance of the industrialised countries, primarily concentrate on satisfying the basic needs (poverty eradication) of their population (Rio Declaration, Principle 7; Agenda 21, para. 4 (lit. a-c); UN-Guidelines for Consumer Protection, sec. II 4).

In this context, sustainable consumption further focuses on the issue of *access to essential goods and services*, i.e. a right to food, water, medicines and energy and the integration of poverty eradication in all policy fields (WSSD Plan of Implementation [2002], para. 16.). Concerning societal consumer interests, sustainable consumption includes efforts to further cleaner production and consumption schemes, in particular an increase in eco-efficiency, i.e. optimisation of resource use and minimisation of waste, and cleaner production to reduce risks to human health through preventive strategies and processes (Agenda 21, para. 4.15, para. 4.17 (lit. d, e), para. 4.18 (lit. b) and para. 4.18 (lit. a)).

Another element of sustainable consumption is internalisation of environmental costs in the calculation of prices, as it mandates that the polluter should bear, in principle, the costs of pollution he causes (*Polluter-Pays Principle, Rio Declaration, Principle 16, WSSD Plan of Implementation, para. 14 (lit. b) and 18 (lit. b)*). Finally, the *UN Guidelines for Consumer Protection* particularly emphasise the necessity for consumer information, e.g. through labelling schemes and education, as well as an “*internationalisation*” of consumer protection, i.e. through international co-operation, also in the form of so-called “*Type II partnerships*”, stakeholder participation and standardisation by international bodies to improve product quality and safety, such as the *Codex Alimentarius Commission (UN Guidelines for Consumer Protection, para. 57)*.

3 International Legal Protection of Consumer Interests in Sustainable Development

Many consumer interests are reflected in international law. Economic interests are represented in international trade law, as continuous liberalisation widens the choices of products and enhances price competition. Fundamental consumer interests are reflected in international law, especially in the Human Rights Conventions, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) that provides, *inter alia*, a right to food and shelter, but also in respect of protection from harmful substances, e.g. the Stockholm Convention on Persistent Organic Pollutants (POPs). While the human rights rules are not easily enforceable, either in terms of substance or in terms of enforcement machinery, the agreements that address harmful substances set out a variety of techniques to ensure implementation. These include the use of the “*Precautionary Principle*”, export and import controls, prior informed consent (PIC), and the reliance on labelling

However, international law does not yet go far enough to ensure that consumer interests are supported in an integrated and effective manner. Rather, the current legal framework is a patchwork, with gaps, and where interests other than consumer interests have tended to predominate. Apart from the deficiencies in such policy areas as international environmental or social policy, the largest problem is that the legal protection of societal consumer interests risks being undermined by some aspects of WTO law.

4 Consumer Interests and WTO Law

International trade law is increasingly important as consumers are able to globalise their choices. In addition, it is an important source of opportunities and constraints on State behaviour, particularly as the WTO agenda includes far more than just the movement of goods and services across international borders. However, the current WTO regime also contains ambiguities and tendencies that can threaten or impede the protection of consumer interests in sustainable development.

4.1 The Role of Consumer Interests in General WTO Law

The Preamble to the WTO contains a commitment to sustainable development. Although a preamble statement is not, strictly speaking, legally binding, it is part of the context in which a treaty is interpreted. Indeed, the commitment to sustainable development has guided the WTO Appellate Body in some of its rulings. Nonetheless, despite this statement, and the commitment to sustainable development contained in the Ministerial Declaration adopted at the Doha Ministerial Conference, the concept has yet to be mainstreamed in the organisation.

There is no reference to consumer rights in the WTO Agreements. This is a serious omission. There is place for such references in the GATT, the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Recommendations:

1. The WTO should take steps to mainstream the concept of sustainable development in its operations.
2. The WTO Agreements should be amended so that consumer interests are reflected in the appropriate places.

4.2 Trade Measures to Protect Human Health and the Environment

There are many cases where states need to protect their consumers through trade measures. The WTO allows for such measures, in the GATT (as exceptions) and in the SPS agreements; however, the interpretation of these provisions is crucial to ensuring that the proper scope is given to them. Key terms in the WTO Agreements, such as "necessary", "like products", "arbitrary and unjustifiable discrimination", "risk assessment", and "international standards" define the extent to which states and individuals can act to harness trade in support of sustainable development.

So far, WTO jurisprudence has addressed only disputed measures taken unilaterally by States. There is an inference to be drawn from these rulings that measures taken under Multilateral Environmental Agreements (MEAs) will be WTO-compatible. The political discussions so far, however, do not clearly support this view. Indeed, WTO members seem reluctant to ensure a robust and equitable engagement with MEAs on an institutional level, and there is no consensus on how to accommodate trade measures in MEAs.

The SPS Agreement contains a presumption that trade measures based on international standards are in conformity with it. If a state does not, however, refer to international standards, such as to those from the *Codex Alimentarius* Commission (CAC) of the WHO, but deviates from these, this will automatically bestow the burden of proof upon the state that uses them. In this case, the state must prove that the regulation on the grounds of those standards is based on a sound risk assessment. Although certainty is not required there must be evidence for a risk that the product damages human health. The WTO Dispute Settlement Body (DSB) "jurisprudence" has up to now declined to acknowledge the precautionary principle as a general principle governing the SPS agreement.

Recommendations:

1. WTO rules should be accommodated with other international rules that support sustainable development. This includes MEAs but may also include other international instruments, such as those under the WHO, ILO or international human rights bodies. The relationship between MEAs and WTO law is a specific agenda point in the Doha Agenda and under this mandate Member States should ensure that MEA secretariats have a standing as observers during the negotiations, such that they can also make appropriate interventions.
2. The Precautionary Principle is an important rule for the prevention of risks, particularly in areas where a long-term effect cannot be easily qualified, e.g. in the case of GMO technologies. It therefore has to be recognised within the WTO rules.

4.3 Labelling (Consumer Information)

A number of instructive implications can be drawn from the recent jurisprudence of the WTO/DSB, such as from the “*Sardines*” case. It should be noted that the jurisprudence only concerned mandatory regulations. A label based on a voluntary standard might not be subject to such stringent scrutiny, since the requirements for standards are less stringent than for regulations. There are not many international standards on eco-labelling, although they exist for organic food and some general guidance may be provided by ISO 14020-14025 standards, which relate to certain types of environmental labelling. If no international standards exist for a particular product, there is still scope for countries to develop standards relating to eco-labelling. There is an ongoing debate in the WTO as to whether the TBT disciplines allow labelling for “non-product production and processing methods (PPMs)”, which are PPMs that are not detectable in the end product. Following on from this debate, there are serious concerns as to whether mandatory process-based labelling of genetically modified food is legal under WTO law.

Recommendations:

1. As there is still a degree of uncertainty clarification is needed that measures to inform consumers about the quality of products, including the sustainability of the methods of production, do not violate WTO law. This clarification should be included in both the GATT and the TBT Agreements. It applies equally to mandatory and voluntary labelling systems.
2. Private, independent voluntary certification and labelling programmes should be considered outside the scope of the TBT Agreement.

4.4 Investment

Since foreign direct investment is so important to national development, current proposals on investment liberalisation in the WTO are controversial. Experience under disputes involving NAFTA Chapter 11 suggests that investment liberalisation rules can be used against the ap-

plication of regulations in support of sustainable development. In particular, expansive notions of “expropriation” can affect the legitimate entitlements that states have to protect their citizens and the environment.

Recommendation:

The development of an international agreement on investment in the WTO should only take place if the WTO rules and institutional practices take better account of consumer interests in sustainable development. In any event, such an agreement should ensure that governments have sufficient scope to develop regulations that adequately protect their consumers and enhance sustainable development. Until this is clarified further, WTO parties would do better to adjust any necessary aspects of the TRIMS Agreement, rather than to embark on a major legislative exercise at this point.

4.5 Agriculture

While WTO law is supposed to provide for free markets, in agriculture it has up to now served to protect European and American markets against competition from abroad. This has led to “dumping” in other markets as local producers have to match prices that are kept artificially low. Export subsidies hinder development and poverty eradication, i.e. the satisfaction of fundamental needs, in the developing countries and are therefore unsustainable. The differentiated treatment of the developing countries has not yet been sufficiently taken into account in the trade agenda. This also includes, besides the issue of export subsidies in the industrialised countries, also the issue of market access of developing countries to markets in the industrialised countries. In addition, non-trade measures, such as environmental concerns, have also not been in the focus of the debate. This is of particular importance for the issue of domestic support. Although some claim that domestic support should, in parallel with export subsidies, be phased, it requires a differentiated approach. In as much as the gradual phase-out of export subsidies is necessary to increase the competitiveness of agricultural products from the developing countries, states should still, to some extent, retain the right to support sustainable production methods, e.g. the production of organic food while unsustainable PPM should be gradually reduced.

Recommendations:

1. Reforms of the Agreement on Agriculture (AoA) should be assessed to ensure that they do not infringe on basic consumer rights to adequate food
2. Governments should introduce targets and timetables to meet the commitments in the AoA and the Doha Declaration to phase out export subsidies and reduce tariffs in developed countries while domestic support for sustainable production methods, e.g. direct payments made upon the condition of obedience to environmental or animal welfare standards, should be exempted from challenges under WTO rules.
3. The elaboration of a “development box” as part of the AoA should be considered, which would ensure that developing countries can use subsidies in a manner that supports sustainability.

4.6 Services

The issue of state measures which provide access to essential goods and services also has implications on the General Agreement on Trade in Services (GATS). Services are defined very broadly as "*any services in any sector except services supplied in the exercise of governmental authority*". As many governments outsource their services or engage in public-private partnerships, this definition may result in the liberalisation of key sectors, such as the water sector. This results in a considerable loss of control. The states are left, in case of a challenge, to refer to Article XIV that contains a general exceptions clause that is modelled on GATT Article XX, although there is no equivalent to GATT Article XX(g).

Recommendations

1. The GATS Agreement should be amended so as to ensure that the right to regulate is stated in the body of the treaty, so as to operationalise the statement in the preamble.
2. The definition of services "provided in the exercise of government of authority", in Article 1.3, should be clarified to ensure that the provision of essential public services is exempt from the GATS.
3. The term "necessary" in GATS Article VI.4 should be interpreted in accordance with its plain meaning in the context of the treaty, as suggested by recent rulings by the Appellate Body in interpreting this term in Article XX GATT. In so doing, it should be applied only to liberalisation offers by Members in accordance with the positive list mechanism under the GATS, rather than applying it across the board to any services in WTO members.
4. GATS Art. XIV should be modified to justify measures on the basis of consumer or environmental protection.

5 General Conclusions

Three general conclusions can further be drawn from the above-mentioned:

1. International law on consumer interests in sustainable development needs to be strengthened, *inter alia*, through law making that fills gaps and enhances the effectiveness of existing instruments and the development of an appropriate institutional framework.
2. The WTO needs to take better account of consumer interests, by reflecting them in the application of its rules and in ensuring that its operations are in conformity with these interests.
3. The WTO has to recognize the right of consumers to be informed about aspects that are relevant for the sustainability of products and services, specifically as regards social and ecological aspects of the production chain.
4. The development of international rules, standards, and procedures that support consumer interests requires meaningful participation of consumer organisations. Rules of procedures for the relevant international bodies, such as the WTO and the CAC, should formalise this participation in a manner that brings in consumer perspectives appropriate to the institutional context, while ensuring that the outcomes are efficient and effective.