

ARTICLE

CONSUMER PROTECTION IN THE  
AMERICAS: A SECOND WAVE OF  
AMERICAN REVOLUTIONS?

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I. INTRODUCTION AND SUMMARY

Currently, the Seventh Specialized Conference on Private International Law (known in Spanish by the acronym CIDIP-VII) of the Organization of American States (OAS)<sup>1</sup> serves as the forum for negotiating legal instruments, such as treaties or model laws, designed to protect consumer rights in the Western Hemisphere. Providing consumer protection in transnational commerce—what is now sometimes called cross-border business-to-consumer (or B2C) commerce, especially in the context of the increasing use of the Internet for consumer transactions—raises some very complex issues in traditional choice of law and other aspects of conflicts of jurisdiction; and since providing consumer protection through effective remedies depends on the existence of arrangements for resolving these issues, these complex, technical issues stand as a barrier to consumer protection for the OAS Member States. Currently, the CIDIP is considering a Brazilian choice-of-law proposal, a Canadian choice-of-law and jurisdiction-regulating proposal, and a set of U.S. proposals addressing international cooperation to sup-

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\* Professor of Law, the Columbus School of Law at the Catholic University of America. I thank Mariana Hernandez-Crespo and Robert Delahunty, the faculty advisors to this Symposium issue of the Law Journal of the University of St. Thomas School of Law, as well as the editors of the Law Journal, for the opportunity to make the remarks at the Symposium that served as the basis for this paper. As a former member of the Inter-American Juridical Committee (IJC) of the Organization of American States (OAS), after being nominated by the U.S. State Department and elected by the OAS General Assembly in Quito, Ecuador, in 2004, I feel obliged to present the customary disclaimer: nothing in this article represents the position of the IJC, the OAS, or any Member State.

1. The Specialized Conference is an organ of the OAS established to deal with technical issues, such as questions of private international law. See Charter of the Organization of American States art. 93, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. For a discussion of the history of the Specialized Conference and the role of the IJC, see Antonio Perez, *The Inter-American Juridical Committee and Private Law in the Americas (or a Road Map for Making the Best the Enemy of the Good)* Catholic Univ. of Am. Columbus Sch. of Law Legal Studies Research Paper Series, Paper No. 2007-3 (2007), available at <http://ssrn.com/abstract=1019297>.

press fraud and provide for domestic small-claims enforcement mechanisms. A technical review reveals that none of the current proposals, taken individually or together, will solve the technical impediments to effective consumer protection in the Western Hemisphere.

Success in this effort is crucial, however, for several reasons. First, effective consumer protection is arguably central to trade and development. Second, the development of a culture of consumerism will have important political, economic, and social benefits that may become important in Latin America's ongoing project of democratic consolidation and pursuit of social justice. Third, for relations between the United States and the OAS Member States, a leadership role by the United States offers an opportunity to transcend the political impasse between the policies of the Washington Consensus—largely promoting free trade and other forms of market liberalization—and emerging perspectives in Latin America that are less friendly to free trade and consumer sovereignty. The CIDIP process offers an opportunity for the United States to reformulate its trade agenda to appeal more directly to Latin American consumers' rights. Another way of putting this point is that U.S. policy needs to consider the duties of producer-exporters, and the lawyers who counsel them, to avoid in effect facilitating consumer fraud; instead, the governing laws should provide foreign consumers effective remedies.

This paper will describe the nature of the problem and the context for CIDIP negotiations. It will then articulate a set of reasons—across economic, political, and foreign policy dimensions—for why success in these negotiations is necessary. Next, it will turn to a technical review of the current proposals, explaining why they fail to address the problem. Finally, the conclusion suggests that the CIDIP process needs to be relaunched on different terms and explains how the United States could revise its proposals to make that happen, entailing increasingly more innovative proposals. Success will be predicated, however, on reconceptualizing the problem of international consumer protection as a problem in international trade and politics rather than a technical set of issues in private international law.

In short, the United States should promote a revolutionary new approach to the consumer protection problem in the Western Hemisphere<sup>2</sup> that could serve as model for change elsewhere, both as a matter of domestic political economy and, in time, the relationship between private international law and international trade.

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2. Perhaps calling this a "second wave of American Revolutions" is a misnomer, since, ironically, it is a call for far greater change in the actual political economy of the Americas than was experienced in Latin America during the initial wave of "revolutions" leading to independence. For canonical treatments of that era, see J.H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830*, at 325–402 (2006), and JOHN LYNCH, *THE SPANISH-AMERICAN REVOLUTIONS 1808–1826* (1973).

## II. THE PROBLEM OF CONSUMER PROTECTION IN INTERNATIONAL COMMERCE

The need for a revolutionary new approach becomes clear once one begins to understand the difficulty of the problem and the inadequacy of existing approaches. The consumer protection problem has been a particularly challenging task at CIDIP-VII, not only because of the difficulty of fitting this new topic into the specific institutional history and practices of the CIDIP process but also because of the problem's technical complexity and intractability. To begin to appreciate the difficulty of the task, it is best to take each of these dimensions in turn.

### A. *The CIDIP Process: The Negotiating Background and Context*

As a preliminary matter, there have been two important developments in the CIDIP process in the last decade that call into question whether new negotiating frameworks need to be developed to address the problem of consumer protection.

First, prior CIDIPs had focused on the elaboration of documents of a treaty form, which required the technical and drafting expertise of public international law experts, such as the members of the Inter-American Juridical Committee of the OAS.<sup>3</sup> With CIDIP-VI and CIDIP-VII, the OAS Member States began to employ the CIDIP process to draft model laws and other similar instruments, which required legislative drafting skills adapted to varying national contexts rather than treaty drafting skills.<sup>4</sup>

Second, until CIDIP-VI, CIDIP negotiations focused on the technical problems of international legal cooperation, such as international evidence taking and the traditional problems of choice of law (most notably, the CIDIP-V agreement at Mexico City for a convention on choice of law in international contracts, which enshrined the principle of party autonomy in choice of law in commercial contracts).<sup>5</sup> With CIDIP-VI and CIDIP-VII, the member states began to address subjects that entailed potential questions of distributive justice (as between different groups within societies and different groups across societies). For example, CIDIP-VI elaborated a draft model law on *garantías mobiliarias*, which would create a new property interest that could serve as collateral for lenders, in turn creating provisional credit and consequently reducing the cost of capital and increasing

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3. See Perez, *supra* note 1, at 2–23 (detailing the history of the IAJC's role in the CIDIP process).

4. See Perez, *supra* note 1, at 22–23.

5. See Org. of Am. States (OAS), Fifth Inter-American Specialized Conference on Private International Law, *Inter-American Convention on the Law Applicable to International Contracts* (Mar. 17, 1994), available at [http://oas.org/dil/CIDIPV\\_convention\\_internationalcontracts.htm](http://oas.org/dil/CIDIPV_convention_internationalcontracts.htm) (last visited Oct. 28, 2008)[CIDIP-V].

the likelihood of investment.<sup>6</sup> This substantive policy choice clearly will have distributive consequences in countries that choose to adopt these model laws. CIDIP-VII now turns, among other things, to the question of consumer protection, which has potentially similar distributive consequences. The entry of CIDIP-VI and CIDIP-VII into substantive policy areas, which have distributive justice and possibly international trade implications, thus take the CIDIP into areas with high policy content and beyond the traditional problems of international judicial cooperation traditionally addressed by the CIDIP process. Accordingly, both because of the form and the substance of the instruments to be negotiated in this new phase of the CIDIP process, the need for greater public participation in the negotiating process became apparent.<sup>7</sup>

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6. OAS, Sixth Inter-American Specialized Conference on Private International Law, *Final Act* (Feb. 8, 2002), available at <http://www.oas.org/dil/CIDIP-VI-finalact-Eng.htm> (last visited Oct. 28, 2008) (adopting OAS, *Model Inter-American Law on Secured Transactions*, available at [http://www.oas.org/dil/CIDIP-VI-securedtransactions\\_Eng.htm](http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm) (last visited Oct. 28, 2008)). The proposal essentially calls for the extension to the OAS Member States of securitization concepts pioneered in the United States, which over the last generation have created vast pools of capital by facilitating the enforcement of secured interests over movable, and even intangible, property interests. See Boris Kozolchik & Dale Beck Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J. L. & TRADE AM. 235 (2006). CIDIP-VII continues work in this area by proceeding to the development of an “electronic registry” in each Member State that adopts the CIDIP-VI model law. See OAS, Seventh Inter-American Specialized Conference on Private International Law, *AG/RES. 2065 (XXXV-O/05)* (June 7, 2005), available at [http://www.oas.org/dil/CIDIP-VII\\_res.2065.htm](http://www.oas.org/dil/CIDIP-VII_res.2065.htm) (last visited Oct. 28, 2008). The objective of this phase will be to enable lenders and borrowers across borders to use compatible and legally effective instruments in order to circumvent potential objections to the enforceability of interests created in one jurisdiction in other jurisdictions. See OAS, TOPICS FOR CIDIPs: REGISTRATION FORMS, [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_securedtransactions\\_registrationforms.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_securedtransactions_registrationforms.htm) (last visited Oct. 28, 2008).

7. Indeed, the OAS Secretariat appears to have acknowledged as much. For the first time in the CIDIP process, it posted on the OAS web page the texts of the specific proposals for consumer protection instruments submitted initially by the Member States and provided access to the site to nongovernmental experts designated by Member States. See OAS, CIDIP VII: WORKING GROUPS, [http://www.oas.org/dil/esp/derecho\\_internacional\\_privado\\_foros.asp](http://www.oas.org/dil/esp/derecho_internacional_privado_foros.asp) (last visited Oct. 28, 2008). That said, the process continues to have the character of relatively closed, or “private,” international law instruments, since the updated versions of these proposals and the comments made by each of the Member States on the proposals outside of the electronic discussion forum have not been made public. Cf. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (discussing in a domestic law context “private legislatures” such as the American Law Institute). The potential consequence of a lack of public participation in the negotiation process could eventually doom whatever instruments CIDIP-VII does adopt when Member States turn to the task of ratification and implementation. Of course, excessive nongovernmental participation could well have a paralyzing effect on the legislative process, as some believe may be happening today in the U.S. domestic law reform process. For example, the states have not adopted amendments to the Uniform Commercial Code proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL)—the quintessential “private legislature”—to address new technological problems, such as e-commerce and software licenses. See THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, SUMMARY: 2003 AMENDMENTS; UNIFORM COMMERCIAL CODE; ARTICLE 2 - SALES, available at [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-ucc22003.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucc22003.asp) (last visited Oct. 28, 2008); THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, A FEW FACTS ABOUT THE

In light of these conceptual difficulties, it should not have come as a surprise when, in December of 2006, Brazil hosted an inconclusive meeting of experts to review the various CIDIP-VII proposals. Experts from merely eleven countries attended the meeting. This small number of delegates did agree that it was important for CIDIP-VII “to provide legal protections for consumers in their relationship with suppliers, to provide economic benefits to consumers by increasing availability and choice and decreasing product costs, and to provide consumer confidence in the marketplace.” However, “a system of bracketing the text was not adopted”—which, in diplomatic practice, signifies that the negotiators have not even agreed on beginning to use a text as a basis for further negotiations—but it was agreed that “drafting should be perfected by [a] working group organized by the OAS.”<sup>8</sup> After the meeting, however, no working group was established by the OAS to seek to harmonize the proposals.<sup>9</sup> Instead, the United States, Brazil, and Canada submitted revised proposals to the Porto Alegre participants. It now appears that, after the Porto Alegre review process is complete, the proposals will be circulated to all of the OAS Member States. The OAS will then determine the next steps to complete the preparatory work.<sup>10</sup> When the preparatory work is complete, the date for the CIDIP-VII conference will be established.<sup>11</sup>

A brief outline of the various proposals is now in order. Brazil has introduced a draft convention on the law applicable to all B2C cross-border transactions. Article II(2) of the draft convention, as revised after the Porto Alegre meeting, provides that consumer contracts will be governed by the law where the consumer resides (if there is no choice of law in the contract)

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AMENDMENTS TO UCC ARTICLES 2 AND 2A, available at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc22A03.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp) (last visited Oct. 28, 2008) (showing no adoptions and introduction as a bill only in Oklahoma). But there is no reason to believe that such a “participation-surfeit” now threatens the CIDIP process. Thus, the use of electronic modes of communication to facilitate broader civil society participation in international law making is a welcome development, one for which the OAS Secretariat should be commended and one that ought to be expanded.

8. OAS, Seventh Inter-American Specialized Conference on Private International Law, *Explanatory Introduction to the Experts Meeting Carried Out by the OAS* (Dec. 2–4, 2006), available at [http://www.oas.org/dil/experts\\_meeting\\_porto\\_alegre\\_2-4\\_2006.pdf](http://www.oas.org/dil/experts_meeting_porto_alegre_2-4_2006.pdf).

9. See OAS, *Report on CIDIP-VII with Respect to the Negotiation of Legal Instruments Concerning Consumer Protection* (Feb. 23, 2007), compiled in OAS, *Annual Report of the Inter-American Juridical Committee to the General Assembly* 118 (Aug. 10, 2007), available at <http://www.oas.org/cji/eng/INFOANUAL.CJI.2007.ING.pdf> (prepared by Antonio F. Perez).

10. See Permanent Council of the Org. of Am. States, Comm. on Juridical & Political Affairs, *Report on the Meeting Concerning CIDIP-VII* (Jan. 18, 2007), available at [http://www.oas.org/dil/Report\\_Session\\_January\\_18\\_2007.pdf](http://www.oas.org/dil/Report_Session_January_18_2007.pdf).

11. See OAS, Seventh Inter-American Specialized Conference on Private International Law, *AG/RES. 2285 (XXXVII-O/07)* (June 5, 2007), available at [http://www.oas.org/dil/general\\_assembly\\_resolutions.htm](http://www.oas.org/dil/general_assembly_resolutions.htm) (follow “Thirty-Seventh Regular Session - Panama, Panama, June 2007” hyperlink).

and the law most favorable to the consumer (if there is a choice-of-law provision in the contract).<sup>12</sup>

Canada has introduced a model law on jurisdiction and choice of law. The Canadian proposal's primary purpose is to address electronic B2C cross-border transactions. The jurisdictional proposal contemplates worldwide jurisdiction for consumer transactions, which would presumably always enable the consumer to sue in his or her home jurisdiction or in any other jurisdiction in which the supplier's assets can be found. The Canadian proposal, like the Brazilian proposal for a treaty, would adopt the consumer's home law as the default law and would impose limits on party autonomy in choice of law as well as choice of forum. While the Brazilian proposal employs a substantive criterion (namely, the law most favorable to the consumer), article 7(3) of Canada's proposed model law employs a subjective criterion that turns on the behavior of the parties. It would allow the consumer to void a choice-of-court or choice-of-law clause in a contract and sue in his or her home forum and apply the home forum choice of law "unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing" in that state.<sup>13</sup>

The United States has proposed a draft legislative guide and model laws and rules on redress mechanisms designed to help consumers recover monetary damages suffered in consumer transactions. The U.S. proposal includes (1) a model law on a governmental consumer protection authority to provide redress and cooperation across borders against fraudulent and deceptive commercial practices; (2) a draft model law on simplified tribunals for small consumer claims; (3) a draft legislative guide for collective and/or representational dispute resolution and redress for common injuries to consumers; and (4) model rules for electronic arbitration of small B2C cross-border claims.<sup>14</sup>

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12. See Cláudia Lima Marques, *Insufficient Consumer Protection in the Provisions of Private International Law—the Need for an Inter-American Convention (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations* (2001), available at <http://www.oas.org/dil/AgreementsPDF/Inglesdocumento%20de%20apoyo%20a%20la%20convencion%20propuesta%20por%20br%20E2%80%A6.pdf> (providing a discussion of the rationale for the Brazilian proposal); see also Ricardo Morishita Wada & Cláudia Lima Marques, *The Brazilian Proposal for an Inter-American Convention on Consumer Protection in Terms of International Consumer Contracts* (offering the most recent explanation available by the Heads of the Brazilian Delegation to the CIDIP-VII of the rationale for the current formulation of the Brazilian proposal) (copy available at Legal Department, OAS).

13. OAS, *Choice of Law Rules for Consumer Contracts (Draft Model Provisions)* (Nov. 2006), available at [http://www.oas.org/dil/esp/Choice\\_of\\_Law\\_Rules\\_for\\_Consumer\\_Contracts%20nov\\_2006.pdf](http://www.oas.org/dil/esp/Choice_of_Law_Rules_for_Consumer_Contracts%20nov_2006.pdf); see also OAS, TOPICS FOR CIDIPs: JURISDICTION, available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_jurisdiction.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm) (last visited Oct. 28, 2008) (providing documents relating to the Canadian proposal, including earlier versions of the draft model law).

14. See OAS, TOPICS FOR CIDIPs: MONETARY RESTITUTION (2006), available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_monetaryrestitution.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_monetaryrestitution.htm) (last visited

It now appears, at least as of the time of this writing, that the negotiations are at an impasse.

### B. *The Complexity of the Consumer Protection Problem*

The reasons for this impasse relate largely to the complexity of the problem, which explains in part the disparate analytical approaches reflected in the Brazilian, Canadian, and U.S. proposals. This complexity has at least two dimensions: first, the ordinary problem for the vindication of small claims that troubles all states domestically; second, an additional set of problems that arise specifically in the context of cross-border B2C transactions, particularly mediated through use of the Internet.<sup>15</sup>

#### 1. *The Domestic Cost-Benefit Issue*

At its core, the problem the CIDIP-VII negotiators face is a problem facing the entire global community in the global cross-border supply of consumer goods, as the costs of cross-border supply decrease with improved communication and transport. Electronic communications facilitate searching for suppliers and purchasers and bargaining at lower cost. The delivery of intellectual property products electronically will also lead to greater and greater reductions of the cost of transport and performance in some areas, thus opening up new market opportunities for suppliers and consumers almost everywhere. That said, most consumer purchases are for relatively low-cost products or services. The value of such products or services almost never warrants using extremely expensive enforcement mechanisms characteristic of ordinary civil litigation in all countries.

This problem can be surmounted for claims that are virtually identical by lumping them together in a single lawsuit. This procedural device reduces the per claim cost of litigation so that the per claim benefits of such collective or class action litigation now exceed the per claim cost of such

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Oct. 29, 2008) (providing documents relating to the proposal of the United States, including earlier versions of the draft legislative guide); see also Michael Dennis, *Developing a Practical Agenda for Consumer Protection in the Americas*, XXXIV CURSO DE DERECHO INTERNACIONAL (forthcoming 2008).

15. Indeed, it is estimated that 85 percent of North American and 63 percent of Latin American Internet users have made online purchases and that the average number of online purchases made in the April 2005–May 2005 time frame was 4.3 in North America and 3.1 in Latin America. See James Belcher, *Latin America Online*, EMARKETER, Aug. 2006, at 1, 13, <http://www.imsincorporate.com/site/docs/laonline.pdf>. These are usually low-value purchases for items such as books, DVDs, clothing and shoes, and airline tickets. *Id.* at 11. In another study, AMIPCI found that 33 percent of the online purchases in Mexico were for around \$50 (400–1000 pesos), another 23 percent were between \$90 and \$270, and only 12 percent of purchases were for more than that amount. *Id.* at 13. Belcher concluded that this was a typical spread of purchase amounts, reflecting in part a “general distrust [by Latin American buyers] of making large purchases remotely.” *Id.* See generally Dennis, *supra* note 14.

litigation.<sup>16</sup> A focus on consumer fraud and deceptive practices also builds on the success the United States has had domestically in developing relatively effective mechanisms for circumventing the problem of low-value claims that do not warrant individual high-cost litigation by consumers. These mechanisms involve alternative institutions, such as class action procedures in private litigation and federal litigation on behalf of groups of consumers (i.e., *parens patriae*), which yield monetary awards that are then distributed pro rata to claimants.<sup>17</sup> The private class action procedure now appears to be finding favor in a number of OAS Member States as well,<sup>18</sup> a development that is also under consideration in Europe.<sup>19</sup> Accordingly, the private domestic class action procedure and government-sponsored action elements of the U.S. proposal may be adaptable to the contexts of other OAS Member States. Effective implementation of such proposals, however, would require further study of the institutional mechanisms currently available, or which would need to be developed in each of the Member States, to investigate and prosecute consumer fraud cases.

## 2. *The International Legal Transaction Cost Problem*

Yet, as search costs for international bargaining are falling with the rise of the Internet, it is not clear that consumers and producers have been able to manage the increasing back-end enforcement costs of international B2C commerce. When a foreign supplier is involved, additional barriers impair the consumer's ability to seek and obtain a remedy. It is possible that the foreign supplier will not be amenable to suit in the jurisdiction of the consumer, may not have assets in that jurisdiction that can be used to provide the consumer an effective remedy, or comes from a state that will not recognize and enforce a judgment from the consumer's home jurisdiction.<sup>20</sup> With these obstacles, the consumer who purchases from a cross-border supplier is without an effective remedy when that consumer has been a victim of duress or fraud or breach of contract or suffers some injury to person or

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16. For a cogent explanation, see Robert Cooter & Thomas Ulen, *LAW & ECONOMICS* 431–32 (5th ed. 2008).

17. See OFFICE OF GEN. COUNSEL, U.S. FED. TRADE COMM'N, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATORY AND LAW ENFORCEMENT AUTHORITY (2008), available at <http://www.ftc.gov/ogc/brfovrvw.shtm> (referencing suits for consumer redress under Section 19 of the FTC Act. 15 U.S.C. § 57b (2008)).

18. See Dennis, *supra* note 14, text accompanying notes 34–35 (discussing Mexican and Brazilian innovations).

19. See Laurel J. Harbour & Marc E. Shelley, Presenters to ABA Annual Meeting, Section of Litigation, The Emerging European Class Action: Expanding Multi-party Litigation to a Shrinking World 4 (Aug. 3–6, 2006), available at [http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT0707-HARBOUR-SHELLEY\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT0707-HARBOUR-SHELLEY_thumb.pdf) (reporting early discussion on possibility of European-wide class action proceeding for consumer contract claims to supplement existing authority for consumer associations to seek European-wide injunctive relief).

20. For a survey of these problems in a U.S. context, see generally GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (4th ed. 2007).

property because of the supplier's breach. Even if these problems are resolved, the question of securing enforcement at a cost that is not prohibitive to an individual consumer or class of consumers bringing a collective or class action remains, that is to say, a purely domestic cost-benefit problem. In short, any solution to the problem must address both the cost problem in litigation and cross-border enforcement problem without raising unduly new costs, such as increased legal uncertainty caused by experimenting with overly complex or unprecedented mechanisms that create new domestic or international implementation problems through untried concepts in jurisdiction, choice of law, or enforcement.

Now, in light of the foregoing, it should be clear that the consumer protection problem in cross-border B2C commerce raises complex problems of jurisdiction, choice of law, recognition and enforcement of judgments, alternative dispute resolution, and inter-governmental cooperation, in addition to the ordinary problem bedeviling the protection of consumer interests in small-claims situations.

### III. WHY DOES INTERNATIONAL CONSUMER PROTECTION MATTER IN THE OAS?

There are at least three powerful arguments for why the United States should work energetically for a solution to this apparently insuperable problem. The first argument is economic in character; the second argument looks to the domestic social and political consequences of improved consumer protection; and the third argument posits the potential foreign policy and international system benefits that could flow from a more aggressive U.S. effort in this area.

#### A. *The Economic Dimension*

The economic argument for addressing the consumer protection problem in international B2C trade follows from the character of the interests involved, which is largely what makes the problem so complex. Indeed, the complexity of the international problem is best viewed through the multiple prisms of consumer interests arising from transnational transactions. First, attention needs to be drawn to the distinction between vindicating consumers' interest in avoiding cross-border fraud (in addition to other grounds for invalidating contracts) and their distinct interest in enforcing cross-border performance rights. Second, the interest in enforcement needs to be balanced against the interest in avoiding excessive remedial measures that unduly discourage foreign suppliers from entering the domestic market. In addition to denying consumers potential supply, excessive remedies may also undercut the national interest in avoiding measures that operate as barriers to trade inconsistent with international trade norms. Third, there is an interest in optimal competition, for failure to force importers to internalize

fully their costs of production may well operate as an implicit subsidy to foreign suppliers, favoring them over domestic suppliers who must provide effective remedies. A fuller discussion of these interests, culminating in the trade law implications of that discussion, follows.

### 1. *Consumer Interests in Remedies*

First, consumers' interests include remedies for different kinds of claims. When their rights are violated, consumers are entitled to effective remedies. In the first instance, those rights include the right not to be victims of fraud, duress, or unconscionability in the formation of their contracts. For example, it is possible that standard form contracts can reflect unfair bargaining power, business compulsion, or duress so that consumers are victims of force; failure to provide sufficient information or ineffective consumer choice because of lack of capacity to understand the nature of the bargain may have effects comparable to those found in cases of pure fraud. Thus, fraud, duress, and unconscionability call into question whether the consumer should be held morally and economically accountable for his or her choices and whether bargains between suppliers and consumers truly reflect exchanges that increase the welfare of both parties, as they judge their own welfare. If the contract is invalid, at a minimum, the consumer ought to be entitled to have the status quo ante restored, which usually entails avoidance of the contract and restitution for both sides of the exchange, thus assuring the consumer return of the price paid less any gain in value.<sup>21</sup>

While the interest consumers have in valid procedures for making their contracts is important, as a practical matter their interest in the actual performance of their contracts is vastly greater. Enforcing the contract as made generally requires specific performance by the supplier or, depending on the legal system, a substitute remedy in the form of damages for nonperformance.<sup>22</sup> This usually entails a monetary equivalent of the value of the performance to the consumer, which is usually comprised of the cost of replacement, the incidental cost of finding a replacement, and the consequential loss of not having the full performance that was promised for the time during which it was not given. In principle, these latter costs are insignificant for most consumer items and can be disregarded because most consumer items are easily substitutable on the market.<sup>23</sup> Consequential losses may become significant in cases of significant injury to person or property;

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21. See generally JEFFREY FERRIELL & MICHAEL NAVIN, UNDERSTANDING CONTRACTS 678–79 (2004) (restitution when contract is unenforceable).

22. See generally E. Allan Farnsworth, *Comparative Contract Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 928–32 (Matthias Reimann & Reinhard Zimmermann eds., 2006) (noting a relative preference for substitutional relief in common law systems and a relative preference for specific performance in civil law systems).

23. See generally FERRIELL & NAVIN, *supra* note 21, at 597–604 (discussing general principles of contract damages).

but in these cases, the losses are more comparable to torts in common law jurisdictions and quasi-delictual liability in civil law systems.<sup>24</sup> These interests in consequential harm fall within a body of law that raises complex questions of national policy, which are sometimes studied and litigated under the rubric of products liability law.<sup>25</sup> Indeed, the parties do not appear to have addressed consequential harm in any of their proposals,<sup>26</sup> perhaps in recognition of the fact that international cooperation in tortious or quasi-delictual cases presents an even more difficult set of problems.<sup>27</sup> Accordingly, this article sets aside the question of the consumer's interest in compensation for consequential harm to person or property and is limited, therefore, to the issue of consumer claims for purely compensatory relief for losses on the bargain itself.

Thus, at a minimum, the consumer's direct interest in the cross-border transaction entails an interest in the validity and performance of the supplier's commitment. Practically speaking, this means ultimately the provision of a remedy, because only the credible threat of a remedy can assure that suppliers, whether foreign or domestic, will perform their contractual obligations adequately. The provision of effective remedies, however, requires the successful navigation of many steps in a complicated process. These steps include assuring legal clarity as to the rules that govern the transaction, which enable consumers to know the true value of what the suppliers promise to supply; providing a forum that is both procedurally adequate and reasonably inexpensive in relation to the remedy sought to resolve disputes as to validity and/or performance; and establishing reliable mechanisms for assuring the enforcement of the forum's decisions.

One can imagine dispute resolution procedures of varying degrees of effectiveness and cost, with different degrees of governmental involvement. At one extreme, highly judicialized processes could involve individual or class action litigation by private persons or governmental lawsuits on behalf of individuals. An intermediate approach would include partially privatized systems, such as arbitration, with a modest degree of judicial supervision to

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24. See generally Gerhad Wagner, *Comparative Tort Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1003, 1014–17 (Matthias Reimann & Reinhard Zimmermann eds., 2006) (discussing rule against compensation for “pure economic loss” in common law tort and civil law delictual responsibility).

25. See *id.* at 1032 (discussing “American Restatement and . . . EC Product Liability Directive” turn to strict liability regimes rather than fault-based tort or delictual responsibility).

26. See *supra* notes 11–13.

27. For example, the question of recognition and enforcement becomes even more complex when the tort elements of a consumer claim are considered, because of the foreign resistance to the enforcement of U.S. awards including punitive damages. See generally Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44 (2001) (discussing recognition and enforcement of judgments dimension). But see Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008 (discussing recent trends in foreign enforcement of U.S. awards including punitive damages).

address a limited class of errors. At the other extreme, highly privatized systems, such as dispute resolution systems that are now emerging in some countries, could involve intermediaries, such as credit card companies, that would provide immediate redress to individual consumers for their relatively low-cost claims. These intermediaries would then take upon themselves the right and duty to consolidate those claims and resolve disputes with suppliers. This service's cost could be borne by the suppliers, the purchasers, or both (since both benefit from the availability of credit *ex ante* and reliable compensation for consumer claims provided by the intermediary *ex post*). Whatever the precise set of mechanisms, the fundamental question is establishing the necessary institutional basis for consumer confidence.<sup>28</sup> Thus, whatever system or combination of systems states or groups of states choose, at a minimum the dispute resolution mechanism(s) should yield consumer confidence in prompt, adequate, and effective compensation for the consumer buying from a cross-border supplier. This idea is merely an extension of the parallel idea that a foreign investor's confidence *ex ante* that it will receive prompt, adequate, and effective compensation when the state expropriates that foreign investor's property is a central factor in its decision to invest, which is already a generally recognized principle in the Inter-American legal order.<sup>29</sup>

## 2. *Consumer Interests in Supply*

The problem of consumer protection also requires recognition that consumers have an interest in the widest and deepest possible choices in products, in addition to security of expectation in each individual transaction. Consumers' choices are the widest possible when all potential producers, including foreign suppliers, have access to the particular market, and the prices at which those goods and services are offered reflect the full cost of production, including the cost of providing effective remedies. On one hand, the absence of effective remedies against foreign suppliers harms consumers by operating as an implicit subsidy for foreign goods and services, leading consumers to purchase foreign goods based on a misperception of their true value. In this scenario, foreign suppliers receive the functional equivalent of a subsidy. By contrast, foreign suppliers bear the functional equivalent of a tax when choice-of-law rules or jurisdictional systems impose greater burdens on foreign suppliers than domestic suppli-

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28. For an analysis of the law, economics, and psychological dimensions of building consumer confidence in the e-commerce setting, see generally Pratim Datta & Sutirtha Chatterjee, *The Economics and Psychology of Consumer Trust in Intermediaries in Electronic Markets: The EM-Trust Framework*, 17 EUR. J. INFO. SYSTEMS 1, 12–28 (Nov. 30, 2008), available at <http://www.palgrave-journals.com/ejis/journal/v17/n1/full/3000729a.html#aff2>.

29. Cf. Opinion of the Inter-American Juridical Committee on Resolution AG/doc.3375/96 "Freedom of Trade and Investment in the Hemisphere" (Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act), ¶¶ 5(a)–(b), Aug. 27, 1996, 35 I.L.M. 1322, 1331 (1996).

ers, thereby harming consumers by forcing foreign producers to sell at artificially higher prices that do not reflect the true costs of production. In such a case, rules of private international law can operate as most-favored nation or national treatment violations or as disguised discrimination in international trade. Both subsidies and taxes applied without justification on foreign suppliers distort the incentives for foreign supply and deny consumers the level of foreign supply that serves their interests.<sup>30</sup>

At the same time, consumers' choices are deep when producers make available to consumers the maximum, efficient mixture of elements of value in a product reflecting the individual consumer's particular preferences, which means sometimes that a consumer might be willing to exchange less contract security for a lower initial price. Accordingly, consumers have an interest in assuring producers that the costs of vindicating consumer's interests in contract validity and performance are not excessive in relation to the benefits that suppliers will receive from participating in the consumer's markets. It is also essential that a supplier's costs in providing remedies in cases of invalidity and nonperformance correspond to the essential bargain between the parties that made the product or service available in that market. If bargains that reflect an agreement for less value at lower cost are unenforceable, eventually suppliers will simply not supply to that market on those terms, depriving at least some consumers of market access to lower value versions of goods and services at prices they can afford.

In determining the precise level of protection for consumers a particular state wishes to provide, therefore, a critical factor is the effect of the level of consumer protection on the likely behavior of foreign suppliers, both in absolute and relative terms. In absolute terms, the foreign supplier response may depend on the size of a consumer's home market, because foreign suppliers may well accept higher transactional costs for participating in a large market than they would in a smaller market. States with small markets need to pay particular attention to the risk that their choice-of-law rules, together with procedurally inadequate and costly dispute resolution mechanisms, may make the cost of participating in their market prohibitive for foreign suppliers in relation to the gains those suppliers can foresee from participating in those markets. Suppliers in states with small markets might suffer higher per unit costs than suppliers in states with large markets, because marketing and distribution in small markets may not allow suppliers to take advantage of increasing returns to scale in marketing, distribution, sale, and follow-on performance of warranty and other obligations that may follow a sale. States with larger consumer markets may have more

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30. Cf. Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.20(iv), L/6439-36S/345 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989) (finding a national treatment violation in the provision of discriminatory remedies); see generally JOHN H. JACKSON, WILLIAM DAVEY & ALAN SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 479–526 (4th ed. 2002).

freedom in this connection to experiment in ways that increase the costs for foreign suppliers, in effect exercising a degree of market power.<sup>31</sup> Thus, taking into account the relevant costs of consumer protection rules for its stakeholders, each state may reach its own independent judgment of the preferred level of consumer protection, particularly with respect to its interest in obtaining foreign supply for its consumers. Given the diversity of circumstances, therefore, one would expect to see different national standards for consumer protection. In the parlance of students of regulatory competition, by maximizing supply, diversity in national standards may reflect a beneficial race-to-the-top.<sup>32</sup>

### 3. *Consumer Interests in Optimal Regulatory Competition*

On the other hand, some forms of diversity in national standards may reflect harmful competition, leading to a race-to-the-bottom that yields inferior standards for all. A lower level of consumer protection in a particular market may result in increased foreign supply that reflects merely diversion of supply from states with higher levels of protection. The theoretical risk of competitive diversion might also increase in the future. With the rise of e-commerce, suppliers will have lower costs for finding potential purchasers in international markets, and both suppliers and governments will have greater access to information concerning the applicable consumer protection rules in each market. Accordingly, there will be a danger that suppliers will fail to supply markets with higher levels of consumer protection, putting pressure on those states to lower their levels of consumer protection. If so, then lower levels of consumer protection in some jurisdictions may be evidence of a competitive race-to-the-bottom in consumer protection law in which small-market countries with lower levels of consumer protection drive all states down to suboptimal levels of consumer protection.<sup>33</sup> In other words, consumers in different states may have divergent interests in the level of regulation they would prefer, depending on the degree to which regulatory competition in national standards operates as a race-to-the-top or as a race-to-the-bottom.

Because both the race-to-the-top hypothesis and the race-to-the-bottom hypothesis are merely theoretical possibilities, they deserve further study in

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31. See Paul R. Krugman, *Is Free Trade Passe?*, 1 J. ECON. PERSP. 131 (Fall 1987) (outlining strategic trade theory); see also ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 34–40 (Stephen D. Krasner ed., expanded ed. 1980) (arguing that Germany pursued foreign trade strategies during the period leading to the Second World War to maximize the dependency of foreign states on German exports and on access to the German markets).

32. See FRANK H. EASTERBROOK & DANIEL R. FISCHL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–18 (1991) (debating whether state corporation law is a “race for the bottom” and concluding that there may in fact be a “race for the top”).

33. See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663 (1974) (“Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards.”).

evaluating how states deal with the problem of assuring their consumer adequate access to foreign supply. In any particular case, the truth may lie in the middle.<sup>34</sup>

However, measuring whether national systems of consumer protection truly reflect a sound national policy choice or a race-to-the-bottom driven by substandard protection afforded by other countries may be extremely difficult in practice, because national systems vary in their characteristics for perfectly legitimate reasons. Whatever levels of consumer protection a particular country deems desirable needs to be achieved through a particular set of institutional arrangements. The precise mode of state regulation in the protection of the consumer to achieve the greatest consumer benefit at the least cost to taxpayers may reflect comparative institutional advantages available because of a particular country's history and institutional capabilities.<sup>35</sup>

For example, different institutional mechanisms can address both validity and performance questions either before or after the bargain. After the bargain, or *ex post*, they can be addressed through individual private litigation, collective or class action private litigation, public litigation by state agencies on behalf of consumers, or non-judicial mechanisms for dispute resolution such as mediation or arbitration. Before the bargain, or *ex ante*, they can be addressed through legislative or administrative intervention, such as mandating express proconsumer terms. One plausible generalization is that *ex ante* methods of regulation are more likely to be over-inclusive, thus preventing consumer transactions that are valid and will be performed; meanwhile, *ex post* methods of regulation are more likely to be under-inclusive, permitting some transactions that should be deemed invalid, or involve breach, to escape detection and remediation. The precise mix of *ex ante* and *ex post* modes of consumer protection may reflect different national situations concerning the risk of forgoing valuable contracts relative to the risk of not preventing harmful contracts. These factors might play an even larger role in explaining the level and kind of consumer protection afforded in a particular country than the role played by the level of protection in inducing foreign suppliers to shift to that jurisdiction.<sup>36</sup> In short, the interest of consumers in optimal competition in regulation begs a further set of questions

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34. See Lucian Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1440 (1992) (“[S]tate competition produces a race for the top with respect to some corporate issues but a race for the bottom with respect to others.”).

35. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (providing seminal work in so-called path dependency literature, under which preexisting institutional patterns either raise or lower transaction costs for social change).

36. See John C. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (1997) (analyzing the varying effects of *ex ante* and *ex post* enforcement in the context of the securities industry).

requiring expertise in comparative institutional law and economics and the harmonization of different national approaches for dealing with welfare tradeoffs between producers and consumers, which is essentially a problem of trade law.

Of course, a more comprehensive analysis would reveal an even larger set of factors. Nonetheless, it would appear fair to conclude that some forms of diversity in consumer protection may be desirable and reflect genuine welfare gains for consumer, while other forms of diversity may reflect collective action problems that produce welfare losses, not just for some states but also perhaps for all. Accordingly, states should pursue progress in international consumer protection through mechanisms that allow them to take into account their special situations without causing undue harm to the interests of other states, paying due regard to the factors that threaten welfare losses. That said, negotiators should evaluate the relevant factors in the context of addressing consumers' specific concerns: namely, the problem of high-cost litigation for low-value claims and the availability of international enforcement mechanisms, whether they come in the form of traditional enforcement of judicial judgments or other less conventional dispute resolution mechanisms.

#### 4. *The Trade Law Approach to the Consumer Protection Problem*

Even if theory does not provide a clear path forward for the CIDIP-VII negotiators in the area of consumer protection, powerful historical precedents suggest that the cross-border provision of effective remedies is best conceptualized as a trade problem, requiring trade law solutions calculated to ensure that international consumer welfare is furthered. The greatest free trade areas in modern history, the United States and the European Union (EU), both have included recognition and enforcement of member-state judgments in the genome of their political economy.<sup>37</sup> A multilateral solu-

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37. The Full Faith and Credit Clause of the U.S. Constitution of 1787 played a central role in transforming previously sovereign states into a federal union. Also, more recently, first under the Brussels-Lugano Treaty system of the European Economic Community (EEC) and then as implemented through a regulation adopted in 2001, which has direct effect in the states of the European Union (EU), recognition and enforcement of judgments is guaranteed in the new, supranational Europe. Compare U.S. CONST., Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . . ."), with Council Regulation 44/2001, §§ 16–18, 2001 O.J. (L 12) 1 (EU) (referring to mutual trust in the EU as the basis for the regulation). In these two cases, economic integration has presupposed increasing political integration. Moreover, both cases involved extremely high absolute levels of trade and interdependence that warranted recognition and enforcement of judgments as a vehicle for providing the legal certainty that enables cross-border investment. In this connection, as a practical matter, lower transportation costs in the United States and EU reduce the burden of foreign litigation, which in turn facilitates localizing all consumer claims in the courts of the consumer's home state. OAS states as a group do not benefit from similarly low transportation costs, although some grouping of those states might be similarly situated. Finally, in the case of both the United States and EU, commonly accepted concepts of procedural due process, under the U.S. Constitution's

tion to this problem may even be achieved under the auspices of the World Trade Organization (WTO).<sup>38</sup> In the meantime, subject to the theoretical argument that regional and subregional free trade expansion can operate as a so-called nonviolation nullification or impairment of benefits under WTO law,<sup>39</sup> there appear to be no legal barriers against efforts for regional and subregional measures that promote free trade and social justice through increased protection for international B2C commerce. Indeed, political and social benefits deriving from effective regional and subregional international consumer protection regimes might, in time, build support for a global solution.

### *B. The Sociopolitical Dimension*

Conceiving the consumer protection problem as essentially a trade issue runs the risk, however, of subjecting it to many of the objections that have been directed toward trade law solutions in other value-sensitive areas, such as labor and the environment. There is something deeply troubling about focusing on the economic character of consumer rights to the exclusion of all other considerations, but a trade-based approach to dealing with the problem of consumer protection relies precisely on the moral sentiments connected with the rights of consumers as a matter of basic human dignity, which in time a transnational political process will recognize and respect in the adoption of any precise set of institutional arrangements. Indeed, recognizing consumer rights as a matter of international trade law in the CIDIP process may well contribute to the furthering of a transnational political process that takes account of the human dignity of consumers.

#### *1. Human Dignity, Market Society, and Consumer Protection*

It should be indisputable that we should reflect seriously, especially in a Symposium issue of a law journal of a Catholic Law School such as St.

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Fifth and Fourteenth Amendments and parallel concepts in EU law, provide due process floors beneath which assertions of jurisdiction and enforcement of foreign judgments may not fall.

Accordingly, in the United States and EU, claims by one Member State that another Member State has failed to satisfy basic notions of justice would not usually provide a plausible pretext for a decision to resist recognition and enforcement that was actually motivated by naked protectionism. Thus, localizing jurisdiction for consumer claims in the OAS Member States in the home state of the consumer would require careful consideration of the costs and benefits, rather than a simple transplantation of practices that have been effective in the United States and EU.

38. See Perez, *supra* note 27 (arguing for a WTO solution to the recognition and enforcement of judgments problem).

39. See Report of the Panel, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (The Oilseeds Case)*, L/6627 (Dec. 14, 1989), GATT B.I.S.D. (37th Supp.) at 86 (1991). The *Oilseeds Case* accepted the proposition, which is now part of the law of the WTO, that trade preferences established pursuant to the EEC, which in themselves were GATT-legal measures, nonetheless deprived other states of trade benefits negotiated with the EEC, thus affording affected states a right to compensation.

Thomas, on the thought of Pope John Paul II in *Centesimus Annus*, his attempt to update the Church's teaching on the market, labor, and capitalism in the final days of the Cold War:

A given culture reveals its overall understanding of life through the choices it makes in production and consumption. It is here that *the phenomenon of consumerism* arises. In singling out new needs and new means to meet them, one must be guided by a comprehensive picture of man which respects all the dimensions of his being and which subordinates his material and instinctive dimensions to his interior and spiritual ones. If, on the contrary, a direct appeal is made to his instincts—while ignoring in various ways the reality of the person as intelligent and free—then *consumer attitudes* and *life-styles* can be created which are objectively improper and often damaging to his physical and spiritual health. Of itself, an economic system does not possess criteria for correctly distinguishing new and higher forms of satisfying human needs from artificial new needs which hinder the formation of a mature personality. *Thus a great deal of educational and cultural work* is urgently needed, including the education of consumers in the responsible use of their power of choice, the formation of a strong sense of responsibility among producers and among people in the mass media in particular, as well as the necessary intervention by public authorities.<sup>40</sup>

This Papal Encyclical builds on Catholic intellectual tradition reaching back into the centuries in precapitalist social contexts, of course, but it does not reflect a rejection of capitalism or market society as such. Some have argued that this element of Catholic social thinking reflects corporatist theories of political economy prevalent in Europe at the beginning of the last century, which accorded greater attention to the interests of producers.<sup>41</sup>

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40. Pope John Paul II, *Centesimus Annus*, No. 36 (May 1, 1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html) (internal citations omitted) (“It is not wrong to want to live better; what is wrong is a style of life which is presumed to be better when it is directed towards ‘having’ rather than ‘being’, and which wants to have more, not in order to be more but in order to spend life in enjoyment as an end in itself.”).

41. See James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *YALE L.J.* 340, 356 (2007) (claiming that Catholic thought in the last century favored a corporatist social order, which Whitman finds compatible with a “producerist” perspective rather than a “consumerist” perspective); *cf. id.* at 342–45 (citing such strange bedfellows as Hugo Chavez and John Rawls, among others, on the global threat posed by U.S.-style consumerism; and arguing that comparative lawyers need to analyze the tension between so-called producerist and consumerist political economy, because it is this conflict in worldview that explains the difference between how European and U.S. legal orders balance producer and consumer interests); *id.* at 397 (resurrecting neo-Marxist debates that appear to continue to have purchase in academic circles but fortunately have dissipated since the end of the Cold War; and noting that a “consumerist” conception of identity understands rights from a universalist perspective, while a “producerist” conception of identity understands rights through the lens of the particular situations of the producer group involved). It is somewhat ironic, then, that Whitman sees the Catholic intellectual tradition as favoring the so-called producerist view of rights when the Catholic intellectual tradition seeks,

Yet, as the text plainly reveals, John Paul II's critique is directed at a perversion of capitalism and market society that tends to objectify the person, treating him or her as a mere economic unit, seeking to maximize welfare understood in purely hedonistic terms.

Nevertheless, the cautionary tone of the Papal statement on consumerism is, at some level, consistent with views from the far left and far right expressing similar doubts about the corrosive effects of market society—in what one political economist and intellectual historian, Albert Hirschman, has called the self-destruction thesis.<sup>42</sup> The central dichotomy Hirschman drew, at least for purposes of this paper, is between the so-called sweet or *doux-commerce* thesis and the so-called self-destruction thesis.<sup>43</sup> Favoring the self-destruction thesis, left and right thinkers rebelled against market society—with Marx, on one hand, arguing that the internal logic of capitalism would bring about “an ever-more numerous and more class-conscious and combative proletariat,” and, on the other, conservatives such as Bolingbroke fearing that “all social bonds were dissolved through money.”<sup>44</sup>

Under the *doux-commerce* thesis, by contrast, long associated with the thought of Montesquieu, David Hume, and Adam Smith, market society is conducive to good manners, opposition to violence, frugality, punctuality, and probity.<sup>45</sup> According to Hirschman, the *doux-commerce* thesis seemed to have the greatest resiliency in the context of international trade studies, noting, “[o]nly with regard to international trade was it still asserted from time to time, usually as an afterthought, that expanding transactions would bring, not only mutual material gains, but also some fine by-products in the cultural and moral realms, such as intellectual cross-fertilization and mutual understanding and peace.”<sup>46</sup> Thus, under this view, market society arguably has positive spillover effects not only in promoting the classical virtues, but also in facilitating the emergence of the cultural resources necessary for effective democracy—namely, social solidarity and political empowerment.

## 2. *Consumer Protection and Democratic Empowerment*

A recent account of the rise of consumerism's role in the prerevolutionary English colonies finds evidence for these theoretical claims, arguing that the rise of consumer culture generated multidimensional, positive spil-

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in general, to understand rights as universal claims that are not grounded on any particular mode of political economy or cultural setting.

42. See ALBERT O. HIRSCHMAN, *Rival Views of Market Society*, in RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 105, 106–24 (1986).

43. *Id.* (subtly exposing the failure of communication between different schools of thought and the cycling of ideas, and arguing instead for the construction of second-order language that would enable proponents of the *doux-commerce*, self-destruction, and related theses to communicate more productively).

44. *Id.* at 112.

45. *Id.* at 107–09.

46. *Id.* at 118.

lover effects, which, in turn, made possible the American Revolution against the British Empire. Historian T.H. Breen implicitly associates himself with the multidimensional variant of the *doux*-commerce thesis, arguing that the bourgeois private virtues were furthered by the myriad consumption decisions that consumers made every day in the prerevolutionary period.<sup>47</sup> Yet within these bourgeois virtues were the seeds of a new, collective politics, for political protest through boycotts and related decisions gave new social meaning to consumption decisions and required the formation of political practices that built trust and solidarity along the Atlantic seaboard.<sup>48</sup> In short, consumer activity during the American Revolution was not merely private activity. Given its acceptance in recent scholarship,<sup>49</sup> as well as a premise for policymaking in some international governmental fora,<sup>50</sup> it seems plausible to consider these spillover effects in relation to the current problem of consumer protection in the Americas.

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47. T.H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* 210 (2004) (“While it is true that colonists who appeared in the public journals demanded public virtue, they did not define virtue in the same way as the republican theorists who, we are told, played such a central role in the coming of revolution. . . . The virtuous consumer did not reject the market, much less capitalism, but he or she had the strength of character to appreciate that private vices such as buying more than the purchaser could afford might compromise the larger public virtue of the community.”); *see also id.* at 360 n.46 (citing his own work, Breen calls the revolution a “Lockean moment,” clearly contrasting his position with that of one of the leading scholars of the so-called republican synthesis school, Professor Pocock, who called the revolution a “Machiavellian moment,” emphasizing instead the ideological role played by the civic humanist conception of public virtue in the American Revolution). This is not to say that Breen fails to acknowledge the traditional elements of the *doux*-commerce thesis in bettering the individual. *See id.* at 186 (“It would be misleading, however, to leave the impression that provincial farmers did not appreciate the close relationship between consumption and production. . . . [O]rdinary men and women were willing to work harder so that they would have more household resources to spend on manufactured goods.”).

48. *Id.* at xv–xvi (“[T]he colonists’ shared experience as consumers provided them with the cultural resources needed to develop a bold new form of political protest. In this unprecedented context, private decisions were interpreted as political acts; consumer choices communicated personal loyalties. . . . Within the structures of voluntary associations formed to enforce non-importation of British manufactures, men and women found that they could judge for themselves whether or not other Americans were in fact fulfilling pledges of mutual support. Failure to comply exposed possible enemies who publicly demonstrated by their continued purchase of imported goods that they could not be counted on during a crisis. A strategy of political resistance centered on the marketplace quickly transformed myriad private acts of consumption into self-conscious public declarations of resistance.”).

49. Some scholars have taken note of T.H. Breen’s argument that consumer decision making can be infused with moral purpose. *See, e.g.,* Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 *BROOK. L. REV.* 827, 907 (2004) (citing T.H. Breen’s earlier work, *Narrative of Commercial Life: Consumption, Ideology, and Community on the Eve of the American Revolution*, 50 *WM. & MARY Q.* (3rd Ser.) 471, 486 (1993)); Douglas Kysar, *Sustainable Development and Private Global Governance*, 83 *TEX. L. REV.* 2109, 2156 n.218 (2005).

50. *See, e.g.,* U.N. Dep’t of Econ. & Soc. Affairs, *United Nations Guidelines for Consumer Protection (as expanded in 1999)*, ¶¶ 42–43 (2003), available at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) (employing the concept of “sustainable consumption” in clear recognition of the fact that consumption decisions can be located in the overall political and moral context of planetary survival).

If so, it is important to recognize, as Breen argues, that not only can consumption be a morally laden fact, but it also can evince and enable the exercise of political power. Breen writes,

The commercial assumptions of the day certainly did not persuade Americans that they were the hapless victims of dark market forces beyond their control. Indeed, these arguments sanctioned an active engagement with a world of trade, for within this new system consumption presented itself as an opportunity enthusiastically to be embraced. . . . The British respected the colonists—at least in theory—precisely because the Americans had demonstrated themselves to be loyal consumers. And thus, by demanding so many manufactured articles, they inevitably reinforced a growing feeling of empowerment within a commercial empire.<sup>51</sup>

Under this view, the experience of individual empowerment also stimulates self-respect and resistance. Thus, Breen adds,

[C]ommonplace notions about reciprocity provided the colonists with potent intellectual resources that could under certain political conditions generate resistance rather than encourage accommodation. The literature of consumption flattered the Americans; it reminded them how much strength they had within a new, rapidly growing empire of goods. The colonists were bound to conclude that if, in fact, American consumption played such a significant role in the prosperity of the mother country, then any interruption of that trade was likely to discomfort England's rulers. . . . Within the empire of goods, these Americans reluctantly concluded that they were no longer receiving value for money.<sup>52</sup>

Arguably, then, recognition of their own power will begin to enable Latin American consumers to challenge the deep-seated sense of fatalism and powerlessness that seems for many to be characteristic of Latin American culture.<sup>53</sup>

At the same time, consumer action could reinforce two critical features of democratic self-governance—representative government reflecting electoral triumph and a role for nongovernmental organizations as participants in the political process—that are receiving increased attention in Latin America.<sup>54</sup> Breen notes,

Subscriptions [to the boycott] taught middling people that *the public* was not simply a rhetorical device. It described the will of

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51. BREEN, *supra* note 47, at 99.

52. *Id.* at 100.

53. See generally MICHAEL REID, *THE FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL* 41–48 (2007).

54. *Id.*; see also OAS, *Inter-American Democratic Charter* (Sept. 11, 2001), available at [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm) (calling for “periodic, free, and fair elections” in Article 3 and the promotion of “civil society organizations” in Article 27).

the majority. Numbers mattered. No one involved in these innovative procedures consciously set out to make colonial political culture more democratic. But whatever their goals may have been, organized non-importation rewarded ordinary consumers angered by recent parliamentary policy with a voice in public affairs, and once they discovered that they counted for something, they found it hard to return to an older, deferential system of political expression.<sup>55</sup>

He also notes, drawing attention to the role of civil society, that the press played a special role in identifying merchants who failed to subscribe to the boycotts and to implement the commitments they made.<sup>56</sup> While freedom of the press clearly was in part instrumental in boycott enforcement, rather than merely as a value in itself, the rise of a free press is for Breen part of a larger transformation in the rise of civil society as a political actor. For in connection with the rise of a free press, Breen notes, “In modern political terms one might conclude that ‘non-governmental organizations’ had assumed authority over the enforcement of non-importation throughout colonial America.”<sup>57</sup> This complex understanding of democracy—as incorporating electoral politics, rule of law, and civil society features—is precisely the multidimensional approach reflected in the recent OAS Inter-American Democratic Charter.<sup>58</sup>

Finally, at an ideological level, strengthening consumer rights can support the very purpose that democratic self-government serves in the liberal, bourgeois tradition. Breen writes that this emphasis on consumer choice was connected to the overarching philosophy of human rights in which the American Revolution was clothed, making it possible to “conceive of the pursuit of happiness as something more exalted than a vulgar concern for economic self-interest.”<sup>59</sup> Understood as a human right, then, consumerism inexorably leads to a demand for greater domestic political accountability. In this respect, creating better legal regimes for consumers to vindicate their rights (the supply side of rights, if you will) and building a greater sense of entitlement and empowerment among consumers (the demand side of rights, if you will) changes the political equilibrium between the political class and citizens. The argument is akin to Hernando de Soto’s insight that

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55. BREEN, *supra* note 47, at 267; cf. BARRY STRAUSS, *THE BATTLE OF SALAMIS: THE NAVAL ENCOUNTER THAT SAVED GREECE—AND WESTERN CIVILIZATION* (2004) (showing the impact of the rise of the Athenian fleet, calling for large numbers of relatively impoverished sailors, in the creation of Athenian democracy).

56. See BREEN, *supra* note 47, at 260.

57. *Id.* at 254.

58. See REID, *supra* note 53, discussed in Antonio F. Perez, *Mechanisms for the Protection of Democracy in the Inter-American System: Lockean vs. Aristotelian Constitutions*, 33 *CURSO DE DERECHO INTERNACIONAL* 217–40 (2006), available at <http://ssrn.com/abstract=1014425>; cf. REID, *supra* note 53, at 43 (framing the conflict as between political orders founded on the thinking of Locke and Rousseau).

59. BREEN, *supra* note 47, at 190.

the creation of property rights in the informal economy in many Latin American societies, thereby freeing up concealed capital, is essentially a political task involving the transfer of power from developing country elites to the masses working and building in these illegal economies.<sup>60</sup>

Yet another way of understanding the need for enhanced international consumer protection suggested by public choice literature is that effective international competition in consumer protection could have salutary spillover effects in improving domestic governance generally.<sup>61</sup> To be precise, domestic political actors may well compete efficiently in the international political market for supplying protection to consumers at affordable prices without excessive negative externalities, which is sometimes called a theory of regulatory competition.<sup>62</sup> Because providing protection to consumers—in wholly domestic transactions and even more so in international transactions—is not a costless activity, one would expect well-functioning governments in regulatory competition with each other to provide different levels of protection depending on the relevant sets of costs. A positive explanation of lower levels of protection might, as described in Part III(A) of this article, be that discounting the interests of some consumers in contract validity and contract performance flow from national policies that subordinate consumer protection through enforcement to the greater goal of expanding market opportunities for consumers. A more negative explanation of lower levels of protection might flow from the possibility that suppliers may not be willing to commit to more credible remedies utilizing the institutional options available in the consumer's home country. That said, these negative supplier concerns might not be unrealistic or illegitimate if there are genuine deficiencies in the quality of legal institutions in the consumer state. Such concerns could include transparency in the roles of the government or private parties in those procedures given the risk of disguised discrimina-

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60. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) (arguing that democracy and free markets are mutually supporting). *But see* FAREED ZAKARIA, *THE FUTURE OF FREEDOM* (2003) (arguing that excess democratization in developing societies undercuts the capacity of local elites to make and enforce policies that facilitate long-term growth); AMY CHUA, *WORLD ON FIRE* (2003) (arguing that free market economic policies in developing but ethnically heterogeneous societies perversely undermine democracy by accentuating ethnic cleavages).

61. See generally GORDON TULLOCK, ARTHUR SELDON & GORDON BRADY, *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* (2002). In addition, the demand for consumer protection rules might be greater in large states. States with large consumer markets might also have sufficiently large consumer groups and the capacity to organize in the political process that the rules these states choose would be more likely to reflect a reasonable balance between domestic consumer and domestic supplier interests. It is widely believed by students of comparative politics that, because the per unit costs of organizing in the political process are greater for consumers than for producers, legislation is more likely to reflect the interests of producers rather than consumers.

62. See Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 31–65 (Richard Epstein & Michael Greve eds., 2004) (analyzing the question of international regulatory competition in a field analogous to consumer protection, i.e., harm to consumers from restraints in trade and monopolization).

tion in international trade. Thus, it is not always clear that diversity of consumer protection is rational and reflects the true interests of consumers, suppliers, and states in evaluating the relevant costs and benefits of consumer protection; it could simply reflect domestic governance failure that creates unnecessary costs in inducing foreign supply to the domestic market.<sup>63</sup>

In that case, a foreign supplier's unwillingness to employ those institutions may actually be beneficial for consumers in that jurisdiction in the long term, because it will create competitive pressure for improved performance by that country's institutions. The fact that consumers in other countries will receive better, more-enforceable contract commitments in providing remedies, as well as increased foreign supply, would draw attention to relative failures in institutional performance and might have the salutary effect of helping to build a culture of consumer empowerment demanding domestic political reform, along the lines Breen described.<sup>64</sup> In countries that do not supply higher levels of mandatory protection, such a culture of empowerment elsewhere may well place additional pressure on governments that have substandard domestic legal institutions to improve those institutions as a means for inducing foreign suppliers to lower their prices and increase their supply to consumers in that state. Indeed, a variety of outcomes in levels of consumer protection might even create domestic pressure not only for the correction of market failures but also for the correction of governance failures, which increasingly are becoming matters of international concern. Accordingly, the domestic political consequences of increased attention to consumer rights could, as described below, affect the international political process as well.

### 3. *Human Dignity, Democratic Empowerment, and Foreign Policy*

One can argue that it is a foreign policy interest of the United States, then, as part of its promotion of democracy generally, to encourage precisely the proconsumer international regulatory competition that will yield prodemocratic domestic spillover effects. The domestic pressure for institutional reform that flows from interjurisdictional regulatory competition could receive a welcome assist if external forces, such as the U.S. government, differentiate their treatment of states in terms of the degree to which

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63. See generally *supra* notes 31–34 (discussing the competing “race-to-the-bottom” and “race-to-the-top” accounts of international regulatory competition from a purely economic, rather than noneconomic spillover, standpoint).

64. Similarly, low-cost dispute resolution mechanisms might have the salutary effect of lowering supplier overhead costs, enabling small business more effectively to participate in markets and thus empowering individual producers as well as individual consumers, which also will have political implications for the distribution of power in some societies. For the classical sociopolitical conception of antitrust policy as the protection of “small dealers and worthy men,” see *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897), and *United States v. Aluminum Co. of America*, 148 F.2d 416, 427–29 (2d Cir. 1945).

they provide effective consumer protection. Such pressure might counter-balance defects that prevent domestic political processes from choosing an appropriate level of consumer protection. Intervention along these lines will necessarily entail offering foreign policy and trade benefits and imposing appropriate costs. That approach, however, directly raises the question of the current ideological struggle now occurring in the OAS about the relationship between democracy and competing conceptions of political economy.

C. *A Foreign Policy Dimension—How the United States Can Do Well by Doing Good*

There should be consensus that to face the challenges of the moment, the United States desperately needs to be perceived as “doing good” in Latin America. For there is a risk that a new anti-Washington Consensus is emerging in Latin America, holding that avoiding premature democratization, as in China, facilitates economic development and, by parity of reasoning, premature liberalization and privatization, as in Russia, undercuts democratic transition by reducing the legitimacy of liberal capitalists.<sup>65</sup>

1. *The Challenge*

The *Economist*'s longstanding Latin America correspondent, Michael Reid, notes that the collapse of the Argentine economy played a central role in delegitimizing the Washington Consensus in Latin America.<sup>66</sup> That said, Reid argues that the problem with the Washington Consensus, which was sometimes labeled a doctrinaire form of neo-liberalism by its critics, was actually that it was wrongly delegitimized by the collapse of the Argentine economy in 2001. In fact, argues Reid, the IMF's and World Bank's understanding of the Washington Consensus policy framework was much broader than how it was caricatured, focusing as much on state building as free market reform.<sup>67</sup> Moreover, the demise of the Argentine economy was caused, not by “free market reforms, but a fiscal policy incompatible with the exchange-rate regime, and a lack of policy flexibility.”<sup>68</sup> Under this

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65. See REID, *supra* note 53, at 138–141, 300–01.

66. See *id.* at 7.

67. See *id.* at 127–32. Reid quotes John Williamson's formulation in a paper published by the International Institute of Economics in 1990. There, Williamson offers a detailed and sophisticated set of principles, including guidances on budget deficits, public expenditures, financial liberalization, exchange rates, tax reform, tariffs, foreign direct investment, privatization, regulations, and property rights. In sum, this checklist for World Bank and IMF policy review of developing economy government was not limited to doctrinaire market access without regard to the task of state building. See *id.* at 134–35. Whether IMF and World Bank practice actually implemented this sophisticated agenda is a question outside the scope of this essay.

68. See *id.* at 132.

view, Argentine internal mismanagement, rather than the Washington Consensus policies as such, doomed the Argentine economy.<sup>69</sup>

Setting aside the allocation of blame for the collapse of the Argentine economy, even Reid recognizes that many Latin American countries, including Argentina, had broken with the Washington Consensus, leading to the collapse of the Fourth Summit of the Americas held in November 2005 at Mar del Plata, Argentina, and, for the time being at least, of any further efforts to bring to fruition the proposed Free Trade Agreement for the Americas (FTAA).<sup>70</sup> If *Miami Herald* columnist Andres Oppenheimer is to be believed, however, politics and fate had to intervene to ensure the demise of the FTAA. It appears Argentina's President decided to derail the summit only after Argentine soccer star Diego Maradona joined the Venezuelan President—who until that moment seemed to be diplomatically isolated in his opposition to continued free trade talks—in a massive rally excoriating the proposed FTAA.<sup>71</sup> If so, the Maradona incident reveals the deepest fundamental reason for the collapse of the FTAA—the rise of Hugo Chavez.

This article is not the place to debate the nature of the political challenges posed by Chavism and the so-called Bolivarian Revolution, although its relation to historic forms of Latin American populism, such as Peronism, is a matter of continuing study.<sup>72</sup> The point is that Venezuela is now conducting a foreign policy that challenges the U.S. political position in the region, the U.S. understanding of democracy as expressed in the Inter-American Democratic Charter,<sup>73</sup> and its related commitment to free trade in the OAS.

## 2. A Possible U.S. Response

The politicization of many OAS debates, fortunately, thus far does not appear to have infected the CIDIP process. It is in the CIDIP process, however, where the United States can begin to restore the credibility of the Washington Consensus approach, “rebranded” to include the domestic institutional reform dimension as it was originally conceived.<sup>74</sup> And irrespective of whether it produces specific results in the CIDIP process, developing stronger consumer cultures in Latin America is in the long-term interest of the United States, not only with respect to its role in Latin America as a

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69. Others hold that the problem in implementing the Washington Consensus policies was an international governance failure and a lack of accountability and transparency at the World Bank and IMF. See, e.g., JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

70. See REID, *supra* note 53, at 309.

71. See ANDRES OPPENHEIMER, *SAVING THE AMERICAS* 184–85 (2007).

72. See Susanne Gratius, *The “Third Populist Wave” of Latin America*, FRIDE, Oct. 2007, available at <http://www.fride.org/publication/281/the-third-populist-wave-of-latin-america>.

73. See OAS, *Inter-American Democratic Charter*, *supra* note 54.

74. See REID, *supra* note 53.

supplier, but also its interest as a global consumer in developing consumer protection as a global norm.<sup>75</sup>

Thus, a more active and proconsumer U.S. engagement in the CIDIP process can show the commitment to values all Americans can share, from Alaska to Tierra del Fuego. These values include the economic right of consumers to freedom from fraud and to fair value through enforcement. These economic rights can be framed in terms of the social and political values that a vibrant consumer culture can further—social solidarity through group action and, therefore, support for greater transparency and intolerance of governmental corruption, which is the political equivalent of private fraud. Indeed, an argument for increased attention to consumer rights then can be seen as the transnational analogue to Hernando de Soto's argument for creating property rights in the informal economies of Latin America, yielding a transfer of power that will place the United States on the side of the angels.<sup>76</sup>

In sum, a multidimensional strategy linking human freedom in consumption and politics, on one hand, with producer and governmental accountability, on the other, presents a public diplomacy face for a new foreign policy that, arguably, will be not only effective and prudent but also right.

#### IV. HOW TO GET IT RIGHT—A NEW U.S. LEGAL STRATEGY

Lawyers, as Hernando de Soto points out, are not really very good at thinking outside the box on this kind of issue, largely because we are usually too wedded to the status quo.<sup>77</sup> Even if we could agree on the underlying policy rationale for increased U.S. support for consumer protection in cross-border B2C commerce, and even if we could further agree on the public diplomacy through which such a reinvigorated strategy should be pursued (as part of a larger ideological engagement in the OAS), we still need an operational legal strategy. The elements of a sequenced, and increasingly creative, new U.S. legal strategy might look like the following.

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75. Indeed, in the world economy of the next century, and even today given growing imports from developing countries, U.S. interests are increasingly aligned with those of consumers throughout the world. See Peter Trooboff, *Judgments Enforcement*, NAT'L L.J., Nov. 19, 2007, available at <http://www.cov.com/files/Publication/f9d68436-6261-4c1f-bbbe-5b91f05c8295/Presentation/PublicationAttachment/00bd703f-8009-49cc-9c19-61b0c58a6d23/Judgments%20Enforcement.pdf> (proposing a recognition and enforcement of judgments agreement with China to protect U.S. consumers from defective Chinese products). Whatever may have been the case in the past, the United States today is not like the First British Empire, whose mercantilist foreign policy of indirect imperial control of New World consumers was the lynchpin of British economic success. See generally BREEN, *supra* note 47.

76. See DE SOTO, *supra* note 60.

77. See DE SOTO, *supra* note 60, at 197–201.

### 1. *Substantive Law Expansion*

The United States should immediately expand its current proposal to address not only the problem of cross-border B2C fraud but also to address contract performance questions, thereby covering the full range of substantive consumer contract enforcement interests (other than claims for consequential harm that are tortious in nature). Admittedly, in the United States, federal jurisdiction for government-sponsored consumer claims is limited to claims arising from supplier fraud or other deceptive practices,<sup>78</sup> since substantive contract law claims are usually committed to the regulatory authority of individual states under the U.S. system of federalism.<sup>79</sup> There is no constitutional reason why international consumer claims cannot be made the subject of federal law, however, since international claims affect international commerce, which is subject to federal regulation, and this theory has been invoked to justify the ratification and implementation by the United States of the Convention on the International Sale of Goods.<sup>80</sup> Thus, even if the federal government lacks legal authority to implement an expanded proposal at this time, a commitment in good faith to seek additional authority from Congress at the appropriate time is neither unprecedented nor undoable.

### 2. *Party Autonomy Subject to Nondiscriminatory Mandatory Law*

The proposal should protect contract freedom, including party autonomy in choice of law and choice of forum.<sup>81</sup> The proposal should acknowledge, however, the proper place for mandatory protective provisions of the law of the consumer's domicile, regardless of where and how the consumer

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78. As the FTC's own website describes its mission, the FTC focuses on transnational fraud and cooperation in international and domestic policy development, but this does not include enforcement of consumer claims in contract performance in transnational cases. See FED. TRADE COMM'N, INTERNATIONAL CONSUMER PROTECTION, <http://www.ftc.gov/oia/consumer.shtml> (last visited Oct. 29, 2008) ("Globalization is one of the central consumer protection developments of the 21st century, commanding the attention of businesses, consumers, law enforcers, and policy-makers around the world. The FTC pursues the development of an international market-based consumer protection model, which focuses on protecting consumers from significant harm while maximizing economic benefit and consumer choice. The FTC is working toward its goals by participating in an international cooperation network to combat cross-border fraud and by promoting effective market-oriented consumer protection and privacy policies."); FED. TRADE COMM'N, THE US SAFE WEB ACT: PROTECTING CONSUMERS FROM SPAM, SPYWARE AND FRAUD; A LEGISLATIVE RECOMMENDATION TO CONGRESS (2005), available at <http://www.ftc.gov/reports/us-safeweb/USSAFEWEB.pdf> (discussing international cooperation in suppressing spam and spyware as a species of fraud).

79. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (interpreting U.S. Constitution as requiring the federal judiciary to apply state common law, including state contract law, in the absence of a federal statute regulating interstate commerce).

80. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>.

81. See Perez, *supra* note 1.

sales contract is concluded, when the product or service is delivered in the consumer's home country. At the same time, with respect to nonmandatory provisions of the consumer's home law, consumers and producers should be free to choose the applicable law.<sup>82</sup> In this connection, as a matter of national discretion to protect their own consumers, states could then adopt appropriate rules to govern the possibility of oppressive standard form contracts as mandatory rules—so long as they were equally applicable to all foreign suppliers and domestic suppliers in accordance with relevant international trade principles assuring most-favored-nation and national treatment. Avoiding protectionism should thus become an explicit and sustained element of U.S. consumer protection policy, assuring that consumer rights protection does not become a disguised restriction of international trade, a smoke screen for protectionism.

### 3. *Enforcement of Alternative Dispute Resolution (ADR) Awards*

To the extent that the United States pursues proposals for individualized ADR procedures for consumer claims, and to the extent the arbitral awards that issue from such procedures are not enforceable under applicable arbitral conventions, the United States should propose additional treaty-based enforcement obligations for those consumer arbitration awards.

### 4. *Recognition and Enforcement of Judgments Agreements*

To the extent judicial fora, including class action procedures (or their civil law analogues) to solve the problem of low-value claims with high-enforcement costs, serve as the domestic legal mechanism for vindicating cross-border B2C rights, the United States should promote recognition and enforcement of those class action judgments agreements, which admittedly will be a difficult task. The difficulty of negotiating a multilateral recognition and enforcement of judgments treaty, even one limited to the OAS Member States, became clear in the recent failed effort at the Hague Conference on Private International Law to negotiate a global convention on jurisdiction and recognition and enforcement of commercial judgments,

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82. There appears to be some doubt as to whether the Mexico City Convention, CIDIP-V, *supra* note 5, actually would permit party autonomy in choice of law in a case when enforcement of such an agreement would operate to deny a consumer the protection of the consumer protection law of his or her domicile. Compare Harold S. Burman, *International Conflict of Laws, the 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s*, 28 VAND. J. TRANSNAT'L L. 367, 382 (1995) (U.S. delegation member appearing to take no position), with Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 392 (1995) (private sector U.S. delegation member appearing to assume consumer contracts excluded), and Mo Zhang, *Party Autonomy and Beyond: An International Perspective on Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 545–52 (2006) (arguing that exclusion of consumer contracts would be inconsistent with EU's Rome Convention, upon which Mexico City Convention was modeled, which excludes consumer contracts only through express language).

which ultimately excluded consumer transactions. Indeed, the exclusion of consumer transactions from the scope of the proposal was a harbinger of the ultimate failure of the negotiators to achieve agreement on the global recognition and enforcement of judgments of any kind.<sup>83</sup> Therefore, the negotiators abandoned that ambitious effort in favor of a narrower proposed global convention for the enforcement of choice-of-court clauses, which was intended simply to place choice-of-court clauses on an equal footing with agreements to arbitrate that have become enforceable under the New York Arbitration Convention.<sup>84</sup> The larger lesson from that process was that the EU Member States were unwilling to give up the opportunity available to them under current law to apply so-called exorbitant bases of jurisdiction against non-EU persons doing business in Europe when the same forms of jurisdiction are not applicable against EU persons. This situation operates as a form of protectionism that raises the costs to non-EU persons of doing business with EU persons, relative to the costs borne by EU persons in competition with them.<sup>85</sup> Other issues also complicated that negotiation, of course, but the failure of the United States to secure trade reciprocity in judgments recognition has led to an American Law Institute proposal calling for tit-for-tat reciprocity in judgments recognition in the United States<sup>86</sup>—contrary to the dominant tendency in current U.S. practice, which is to give foreign judgments recognition and enforcement in the United States based on comity, albeit subject to due process criteria.<sup>87</sup> Despite its obvious relation to free trade, this proposal continues on the track of treating the problem as a classic problem in interjurisdictional cooperation, a

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83. Compare HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6–20 JUNE 2001: INTERIM TEXT art. 8 (2001), available at [http://www.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf) (including consumer contracts), with HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULT OF THE WORK OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT ch. I, art. 1(2)(a) (2003), available at [http://www.hcch.net/upload/wop/genaff\\_pd08e.pdf](http://www.hcch.net/upload/wop/genaff_pd08e.pdf) (specifically excluding consumer contracts).

84. Compare United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf), with United Nations Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98) (not yet entered into force).

85. See Perez, *supra* note 27.

86. For a summary of the ALI proposal to include a reciprocity requirement, see THE AM. LAW INST., PUBLICATIONS CATALOG, [http://www.ali.org/index.cfm?fuseaction=Publications.ppage&node\\_id=82](http://www.ali.org/index.cfm?fuseaction=Publications.ppage&node_id=82) (last visited Sept. 23, 2008). The ALI proposal was rejected, however, by the NCCUSL, so that the proposed reciprocity requirement has not been forwarded to the states and Congress. See Peter Trooboff, *Judgments Enforcement*, NAT'L L.J., Oct. 17, 2005, available at [http://www.hcch.net/upload/bibl37\\_pt.pdf](http://www.hcch.net/upload/bibl37_pt.pdf).

87. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Uniform Foreign Money Judgments Recognition Act, (1962), available at [http://www.law.upenn.edu/bl/archives/ulc/fnact99/1920\\_69/ufmjra62.pdf](http://www.law.upenn.edu/bl/archives/ulc/fnact99/1920_69/ufmjra62.pdf) (containing no reciprocity requirement). For state legislation containing a reciprocity requirement, contrary to the Uniform Act's recommendation, see Perez, *supra* note 27, at 61 n.83.

coordination problem in private international law, through treaty forms traditionally used to deal with such problems.

##### 5. *Recognition and Enforcement as Explicit Trade Agreement Amendments*

As the foregoing discussion makes clear, the substantive problem can be reconceptualized as a trade problem calling explicitly for a trade law set of solutions, namely, inclusion in free trade agreements. The idea would be that failure to recognize and enforce foreign judgments would operate as the violation of a trade rule, giving rise to a right to compensation.<sup>88</sup> The critical bureaucratic point, within the U.S. government, is that this would call for transferring primary responsibility for the management of international negotiations for consumer protection from the State Department to the Office of the U.S. Trade Representative.

This treaty form is not without risks. There is a danger that such an approach could be seen as an attempt to revive, with additional carrots, the failed FTAA project, which in the current context may be seen as yet another “hegemonist” U.S. project.<sup>89</sup> In fact, bilateral efforts, at least in the case of an agreement between a large economy and a smaller economy, risk the exercise of relative market power by that larger country.<sup>90</sup> This was in part the strategic rationale for the multilateralization of global trade bargaining processes and rule making found in the General Agreement on Tariffs and Trade after the end of World War II culminating eventually in the WTO.<sup>91</sup> Moreover, attempting to create an international legal obligation through a series of bilateral agreements, either as a traditional private international law treaty or as an amendment to current free trade agreements, may yield more trade diversion than trade creation. This is a well-known concern about bilateral and regional free trade agreements. The idea here is that, if the United States were to enter into a bilateral recognition and enforcement of judgments agreement with one country, trade between that

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88. See JACKSON ET AL., *supra* note 30, at 273–76.

89. I thank the Symposium’s keynote speaker, Professor Jorge Dominguez, for his insightful question in which he suggested the possibility of trying to develop institutional mechanisms for the protection of consumers through bilateral or regional free trade agreements. In fact, I have previously argued that such a solution might be possible on a multilateral basis through the WTO. See Perez, *supra* note 27. In response to Professor Dominguez’s thoughtful question, I noted the possibility that, in the current state of Inter-American political relations, the use of bilateral agreements by the United States to achieve this result might be perceived as an attempt by the United States to continue to exercise hegemonic power in the Western Hemisphere. I should acknowledge, however, that in 2005, before the breakdown of FTAA talks during the Fourth Summit of the Americas in Mar del Plata, Argentina, I advanced the idea suggested by Professor Dominguez’s question. See Perez, *supra* note 1, at 333–34.

90. See HIRSCHMAN, *supra* note 31.

91. See Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Function*, in INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983) (noting the resurgence of bilateralism in trade as relative U.S. power increases).

country and third countries and between the United States and third countries might be diverted, rather than reflect new trade between the United States and its treaty partner.<sup>92</sup> This might not be a good policy result, irrespective of whether it survives WTO legal review.<sup>93</sup>

In sum, OAS Member States might perceive the United States as hegemonic if it were to seek multilateral trade solutions to this problem. Yet, the United States will in fact be more able to exercise hegemonic power, as well as achieve suboptimal trade results from a welfare maximization perspective, if it seeks to negotiate solutions bilaterally with smaller powers. Such are existential dilemmas of great powers.

## V. CONCLUDING THOUGHTS

On balance, then, even though it is theoretically appealing to seek to resolve what is essentially a trade problem through a trade agreement, the current Inter-American sensitivities about the FTAA dictate that the United States should employ the trade agreement approach only if all other options—both regionally and bilaterally, for negotiating judicially-enforceable recognition and enforcement agreements—fail. If the United States must turn to trade agreements, then it should pursue bilateral trade agreements or, alternatively, amendments to regional free trade agreements, such as the North American Free Trade Agreement. It might be hoped that, as these bilateral and regional FTA negotiations proceed, in time the political sensitivities arising out of the failed FTAA might diminish; this in turn might facilitate an OAS-wide arrangement that would reduce unnecessary trade diversion within the Western Hemisphere. Whatever the form of the trade agreement, the role of the U.S. State Department in conducting public diplomacy should not be ignored. Otherwise, the United States will not reap the full rewards its new, post-CIDIP negotiating agenda should in theory provide. It is not often that states have the opportunity to do well by doing good. Pope John Paul II, both actor and philosopher, might have been amused.

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92. See JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950) (positing that the central economic question in whether to create a customs union is the ratio of trade-creation to trade-diversion).

93. See JACKSON ET AL., *supra* note 30, at 447–78 (discussing WTO limits on the creation of customs unions and free trade areas under GATT Article XXIV).