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Against Global Governance in the WTO

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# Against Global Governance in the WTO

John McGinnis and Movsesian L. Movsesian

## Abstract

This essay argues that the World Trade Organization should not become a forum for global governance in non-trade matters. It responds to those, like Professor Andrew Guzman, who believe that the WTO's success suggests that the organization should be transformed into a forum for "cross-issue" regulatory bargains among member nations on issues, ranging from the environment to human rights, that are not easily resolved in existing international fora. We show that the current focus of the WTO - the reduction of barriers to international trade and the resulting promotion of private contracts - does not require the organization to face the agency problems inherent in regulatory structures. By contrast, global regulatory "deals," even more than domestic legislation, may serve as vehicles for interest-group transfers. We also explain how the WTO's rigorous enforcement mechanism might actually inhibit cross-issue bargaining among member nations. Substantive regulatory bargains would necessarily increase the discretion exercised by WTO dispute settlement tribunals. This increased discretion would entail a lack of predictability that could well be intolerable for WTO members, particularly developing countries. We end by arguing that the WTO can best contribute to the long-run improvement of regulatory standards by deepening its commitment to reducing barriers that prevent trade among the nations of the world.

## Against Global Governance in the WTO

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### I. INTRODUCTION

In "Global Governance and the WTO," Professor Andrew Guzman has done an impressive job of articulating a vision of the World Trade Organization (WTO) that many international lawyers share.<sup>1</sup> In this vision, the WTO's mission should be expanded beyond its present task of facilitating tariff reductions and preventing covert protectionism. Rather, the WTO should take on substantive authority in a wide variety of non-trade areas, including the environment, labor, human rights, and public health. Unlike many people who share this vision, Guzman

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<sup>1</sup> Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. [PAGE #] (2004).



takes the time to describe how it might best be accomplished. He advocates specialized WTO departments and periodic "Mega-Rounds" in which members make cross-issue regulatory bargains. Unless members agreed otherwise, these regulatory bargains would be subject to the WTO's Dispute Settlement Understanding (DSU).

The availability of the dispute settlement system is a major element of Guzman's proposal.<sup>2</sup> Guzman argues that the mechanism could serve as an important credibility-enhancing device that would encourage members to make beneficial cross-issue bargains. While Guzman believes that members should be free to avoid the application of the DSU to their new bargains if they wish, the unavailability of the mechanism as an enforcement device would rob Guzman's proposal of much of its force. In the absence of the DSU, one might as well seek out international fora other than the WTO for the harmonization of global rules.

As its title suggests, Guzman's article is ultimately a call for world government by the WTO. In this necessarily brief response, we describe some of the more important theoretical and practical problems that Guzman's proposal presents. First, in Part II, we address the matter of cross-issue bargaining in the WTO. While cross-issue bargaining can create gains for parties to a contract, substantive regulatory deals may be vehicles for "amoral" wealth

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<sup>2</sup> For discussions highlighting the importance of the dispute settlement system to Guzman's proposal, see *id.* at 23 - 24, 39 - 41, 42 - 52, 62, 78 - 79, 109.



transfers among interest groups.<sup>3</sup> Unlike the present WTO, which works to minimize the influence of one particular form of interest group--protectionists--the transformed organization would facilitate agreements that empower special interests.

In Part III, we discuss the potential of the dispute settlement system as a credibility-enhancing device. We demonstrate why the dispute settlement system might actually discourage cross-issue bargains by vesting extraordinary discretion in WTO tribunals. This discretion would entail an intolerable lack of predictability for WTO members, particularly given the sensitivity of the matters involved. We explain why developing countries would be especially chary of signing on to such a regime, and show how extending the dispute settlement system to cover a variety of non-trade issues might upset the sensitive dynamic in which exporters work to assure national compliance with WTO obligations.

Finally, in our conclusion, we briefly address another possible model for the future of the WTO, one that we have previously described at length.<sup>4</sup> Rather than transform itself into a global government--a World Trade, Economic, Environment, Human Rights, Labor, and Public Health Organization--the WTO should stick to its limited but important role: reducing barriers to trade among nations.

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<sup>3</sup> Jonathan R. Macey, *Transactions Costs and the Normative Elements of the Public Choice Model: An Application of Constitutional Theory*, 74 VA. L. REV. 471, 472 (1988).

<sup>4</sup> John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).



## II. CROSS-ISSUE BARGAINING IN GUZMAN'S WTO

The first major element of Guzman's proposal is his call for transforming the WTO into a forum for cross-issue negotiation. Guzman would like to change the WTO from an institution that focuses primarily on reducing national barriers to trade into one that facilitates national bargaining on a variety of non-trade topics, including the environment, labor, public health, and human rights. Guzman envisions a series of specialized departments within the WTO that would serve as fora for "Departmental" negotiating rounds in designated subject matters.<sup>5</sup> These departments would be staffed by experts, appointed by national governments but apparently with a large degree of autonomy, who would negotiate agreements and prepare new global regulations. Guzman also envisions periodic "Mega-Rounds" in which nations would make deals that transcend departmental lines,<sup>6</sup> for example, rounds in which some nations agree to lower trade restrictions in return for other nations' concessions on the environment or labor.

The underpinnings of Guzman's proposal lie in "political bargaining" theory.<sup>7</sup> As the name suggests, political bargaining theory attempts to apply the insights of contract theory to intergovernmental negotiations.<sup>8</sup> Just as private parties can increase their preference satisfaction by expanding the scope of their bargains, governments can enhance the

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<sup>5</sup> Guzman, *supra* note 1, at 12 - 13.

<sup>6</sup> *Id.* at 13 - 14.

<sup>7</sup> ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 51 (2000).

<sup>8</sup> *Id.* at 53.



potential for reaching beneficial agreements by addressing independent issues simultaneously, a practice commonly known as "logrolling."<sup>9</sup> For example, because their interests are too far apart, developing and developed countries might not be able to reach independent agreements on either agricultural subsidies or environmental regulations. Nonetheless, they might be able to reach a compromise that covers both subjects: developed countries might forgo some agricultural subsidies in exchange for developing countries' agreement to somewhat higher environmental standards. Thus, cross-issue bargaining might make both sides better off.<sup>10</sup>

Political bargaining theory has much to offer the discussion of international institutions. But one should not casually equate private contracts with public regulatory bargains.<sup>11</sup> Because private contracts generally enhance the preferences of the parties, legal mechanisms that reduce transaction costs to such contracts are likely to be beneficial.<sup>12</sup> Regulatory bargains, by contrast, are not as likely to be efficient in terms of nations' true preferences. Such bargains are much more likely to represent "amoral" wealth transfers among different groups of citizens:<sup>13</sup> there is a considerable danger

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<sup>9</sup> See *id.* at 120 - 21.

<sup>10</sup> See David W. Leeborn, *Linkages*, 96 AM. J. INT'L L. 5, 12 - 13 (2002) (discussing "strategic linkage").

<sup>11</sup> On the basic distinction between private and public bargains, see Macey, *supra* note 3, at 472.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* By "amoral" we mean transfers that do not have a plausible moral justification. Transfers from

that many such bargains would represent deals by special interests in various nations at the public's expense. Legal mechanisms that reduce transaction costs to such bargains thus are not as unambiguously beneficial.

The genius of the WTO lies precisely in its capacity to promote private, cross-border contracts rather than regulatory bargains that can amount to wealth transfers among interest groups. Three of the organization's features help assure this. First, the WTO has a limited focus: promoting international agreements to reduce tariff and non-tariff barriers. Such agreements promote private contracting and, according to the theory of comparative advantage, increase nations' aggregate wealth.<sup>14</sup> The WTO's narrow focus thus helps assure that the international agreements it facilitates will be good for each nation's net welfare and will not require much monitoring by national governments and their citizens.

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consumers to some otherwise undeserving producers' group would be a paradigm example.

<sup>14</sup> It is true that some WTO rules, like the anti-dumping provisions, permit interference with free trade, but even these rules generally limit the interference that would exist in the organization's absence. See AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, *in* ANNEX 1A TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Apr. 15, 1994, *reprinted in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 147.



Second, as presently constructed, the WTO acts to mitigate one of the most characteristic *domestic* wealth transfers. The WTO constrains the ability of domestic interest groups to obtain protective tariffs--a historical bane of democratic politics. Under the WTO regime, members reduce tariffs on a reciprocal basis. As a result, the benefits that exporters derive from lower tariffs abroad depend upon the willingness of the exporters' own government to lower its tariffs with respect to foreign products. The reciprocity regime thus creates incentives for exporters to enter the domestic political struggle and blunt the power of the protectionist interest groups at home, providing virtual representation for the public's interest in free trade.<sup>15</sup> Under this view, the WTO is a regime that facilitates democratic choice within individual states even as it increases aggregate wealth by decreasing tariff barriers.<sup>16</sup>

Third, the WTO's relatively light administrative structure limits the danger that the organization will become a vehicle for wealth transfers. Governments can easily monitor whether other nations comply with tariff reductions and nondiscrimination requirements. Exporters directly benefit from such provisions and thus have incentives to bring

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<sup>15</sup> See McGinnis & Movsesian, *supra* note 4, at 545 (noting that producers who enjoy a comparative advantage gain new markets when foreign countries reduce tariffs, which creates an incentive for such producers to lobby for lower tariffs in their own countries).

<sup>16</sup> *Id.* at 546.



violations to their governments' attention. Moreover, enforcing tariff reductions and attendant agreements to remove trade restrictions does not require granting the WTO wide substantive discretion.<sup>17</sup> Thus, special interests cannot easily use WTO mechanisms, such as the DSU, to obtain rents.<sup>18</sup>

In contrast, transforming the WTO into a forum for regulatory bargains could encourage the adoption of rules that do not facilitate private contracts and do not benefit nations' citizens as a whole. For example, interest groups could easily take advantage of the substantive discretion that regulatory bargains would necessarily confer on WTO officials. Even domestic regimes typically provide substantial discretion to those who interpret and implement regulatory requirements, and "global governance" of the sort Guzman envisions would require more discretion than domestic regulation for at least two reasons. First, any global regulatory regime would have to take into account the often dramatically different circumstances of member states. Second, the consensus requirement would make reaching agreement on the details of a regulatory regime more difficult

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<sup>17</sup> For further elaboration on this topic, see *id.* at 566 - 72.

<sup>18</sup> Rent is classically defined in this context as "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use." James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 3 (James M. Buchanan et al., eds. 1980).



in the WTO than in the domestic context.<sup>19</sup>

Guzman's proposal would thus require substantial discretion to be lodged in WTO tribunals, a matter we discuss below.<sup>20</sup> One should note, however, that drafting discretion enjoyed by "departmental" experts also would provide an opportunity for interest groups to exercise deleterious influence over the content of global regulations. Interest groups have substantially more power at the global than at the domestic level. Average citizens find the international process even more opaque than domestic lawmaking and thus would have more difficulty monitoring those charged with fashioning global

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<sup>19</sup> The consensus requirement would also make it difficult for members to "overrule" an Appellate Body decision, a fact that Guzman acknowledges. See Guzman, *supra* note 1, at **104**.

<sup>20</sup> Guzman expressly disavows a commission model in which WTO bureaucrats would have authority to implement the new regulations. See *id.* at **90 - 91**. As a result, he argues, his proposal avoids the danger of interest-group capture. While the absence of a commission surely reduces the danger of interest group capture, it does not do all that much to eliminate it. As we explain below, Guzman's proposal necessarily entails substantial discretion on the part of WTO tribunals. If these tribunals exercise large substantive discretion--for instance, to formulate a precise balance between environment and trade--interest groups would likely exert power through their governments on appointments to the tribunals. For more on the problem of discretion in the dispute settlement process, see *infra* at **19 - 20**.



regulatory policy.<sup>21</sup> Moreover, the global scale of regulation allows greater rents for interest groups. If business groups could obtain international intervention in their favor, they could disable a world's worth of competitors.<sup>22</sup>

In addition, departmental staffers themselves may have interests that diverge from the interests of their appointing authorities.<sup>23</sup> Given the technical and esoteric nature of much of their work, staffers may eventually constitute a distinctive class with a distinctive interest--growing the regulatory apparatus of the WTO--that does not reflect the goals of domestic governments, let alone the general public.<sup>24</sup> Moreover, because developing countries have relatively fewer personnel and resources to devote to the project, departmental staff from the developed

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<sup>21</sup> See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L. L. & BUS. 681, 699 - 702 (1996 - 97) (explaining that citizens face higher costs monitoring international rules than domestic rules).

<sup>22</sup> Cf. Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1337 - 38 (1994).

<sup>23</sup> See Jose E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 150 (2002) ("Trade insiders, like other bureaucratic agents, may develop their own agendas at the expense of the state principals that most of them serve.").

<sup>24</sup> For discussion of the rise of a network of international regulators, see Anne Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept. - Oct. 1997, at 183, 189.



world are likely to exercise disproportionate influence, a disparity that will only exacerbate the distrust that developing countries already feel toward the WTO, a matter we discuss further below.

Guzman responds to these concerns by noting that national governments, which would have the ultimate decision about entering into any new global regulatory agreements, remain accountable to their citizens, and by stressing the unanimity requirement for action in the WTO.<sup>25</sup> Neither of these responses is entirely persuasive. National governments themselves operate under the influence of interest groups and might well enter into global deals that help those interests at the expense of the general public. Again, because these global deals would arise in remote alien fora, citizens would have less ability to monitor them. Guzman's proposal thus would turn the WTO from a Madisonian organization that checks the power of protectionist groups into one that empowers such groups at a global level.

The consensus requirement tempers this danger but would not prevent it; every nation has protectionist groups to pay off and regulatory bargaining would permit the logrolling of their disparate interests within the WTO. Moreover, the unanimity rule may create regulatory lock-in problems--once made, the regulations would be quite difficult to change.<sup>26</sup> The consensus requirement would thus exacerbate a difficulty that exists in all

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<sup>25</sup> Guzman, *supra* note 1, at 81 - 82.

<sup>26</sup> See John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 552 (2003) (discussing lock-in problems).



international harmonized regulatory regimes: the stifling of jurisdictional competition that leads to regulatory innovation demanded by the fast-paced modern world.

Thus, given the large agency costs and other problems of international regulation, we believe that the WTO should not be a forum for the substantive regulatory bargains that Guzman envisions. This is not to say that international regulatory regimes never would be appropriate--they may be, in limited circumstances involving spillovers--only that Guzman has not shown that the WTO is a promising venue for their negotiation.<sup>27</sup> It would be difficult for the WTO to set up constitutive rules that would limit its jurisdiction to the relatively small set of international regulations that make sense.<sup>28</sup> Particularly given the practical problems of

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<sup>27</sup> We do think that the scope for international regulation is far less than Guzman seems to believe. Because of interest group influence and the reduction of regulatory competition, international regulation to resolve externalities may cause more welfare losses than gains. See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. INT'L. L.J. 381, 394 - 95 (2000).

<sup>28</sup> Domestic regimes create constitutional mechanisms such as the enumeration of limited powers, separation of powers, and bicameralism to limit the danger of amoral wealth transfers. See Macey, *supra* note 3, at 494 - 95. The international system lacks these reticulated governance mechanisms and institutions, like our Supreme Court, with the legitimacy to enforce them.



formulating global regulations and the dangers they would pose to the DSU, which we discuss below, we do not believe that Guzman has shown that it is best to undertake international regulation in the WTO rather than in some other context.

Guzman argues that his model follows on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which already represents an expansion of the WTO into substantive, non-trade regulation.<sup>29</sup> But, as economists have argued, substantive intellectual property protections may be more suitable for inclusion in the WTO than other standards because a variety of factors, most particularly their very close connection to trade and their amenability to dispute resolution, distinguish them from other substantive regulations.<sup>30</sup> Moreover,

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<sup>29</sup> Guzman, *supra* note 1, at **14**. Guzman also argues that the WTO has "substantive rules on . . . health and safety, environmental regulation, and more," *id.* at **110**, but does not specify the content of such substantive rules. We have argued previously, to the contrary, that the WTO generally permits nation states to choose their own substantive regulations subject only to certain procedure-oriented tests that attempt to ferret out protectionist regulations. McGinnis & Movsesian, *supra* note 4, at 573 - 83.

<sup>30</sup> See Keith E. Maskus, *Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection, and Core Labor Standards* (Jan. 2000), Institute for International Economics, available at <http://www.iie.com/publications/wp/2000/00-1.htm>

(last visited May 1, 2004). Maskus argues that

the TRIPs Agreement fits within the tradition of protecting the property of aliens against expropriation, a venerable rule of international law.<sup>31</sup> Finally, even in domestic regimes like our own, there is a tradition of protecting intellectual property from the center while leaving other regulations to subsidiary institutions.<sup>32</sup> This historical practice suggests that the balance between the need for centralized regulation and the danger of amoral wealth transfers is different with respect to intellectual property than with respect to other substantive regulation.

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competition standards may be another candidate for inclusion in the WTO, but these issues could be addressed through antidiscrimination rules that would simply deepen the national treatment principle that is already part of the WTO regime. See McGinnis, *supra* note 26, at 581 - 85.

<sup>31</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1) (1987) (generally requiring compensation for the expropriation of intellectual property). See also Jerome H. Reichmann, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 356 (1997) (suggesting the TRIPS Agreement is an extension of this principle).

<sup>32</sup> The U.S. Constitution not only granted the federal government authority to remove trade barriers through the Commerce Clause but also to harmonize intellectual property rights. See U.S. CONST. art. 1, § 8, cl. 8. In contrast, before the New Deal, the U.S. Constitution was not interpreted to grant the federal government general authority over health, safety, or labor regulations.

As a practical matter, too, the TRIPs Agreement stands apart from other attempts to expand the WTO into substantive regulation. Further progress in the trade regime could not have been made if exporters of intellectual property knew their property would be taken upon export; these exporters would have had no interest in having tariffs reduced abroad if their goods could simply be pirated.<sup>33</sup> Yet intellectual property exporters were key in battling against protectionist groups, such as textile producers, in the developed world. The TRIPs Agreement was thus central to the "grand bargain" of the Uruguay Round that made the WTO possible.<sup>34</sup> In contrast, members of the WTO today seem reluctant to add new subject matters to the organization.<sup>35</sup>

Finally, we should say a word about Guzman's proposed departmental structure. Guzman believes that separate subject-matter departments--departments of environment, labor, and the like--would facilitate Mega-Rounds by elucidating issues and resolving certain topics ahead of time.<sup>36</sup> The advantages, however, would likely be fewer than Guzman imagines. Whatever agreements the parties reach about substantive standards in Departmental Rounds, the

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<sup>33</sup> See John H. Barton, *The Economics of TRIPs: International Trade in Information-Intensive Products*, 33 GEO. WASH. INT'L L. REV. 473, 484 (2001).

<sup>34</sup> See Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77, 78 - 79 (2002) (discussing this "grand bargain").

<sup>35</sup> We discuss this matter *infra* at note 60 and accompanying text.

<sup>36</sup> Guzman, *supra* note 1, at 20 - 23.



critical point would still occur in the Mega-Rounds, during which parties would have to decide how to balance trade and other concerns. Because, by definition, the Departmental Rounds would not have authority to consider such cross-issue balancing, they could do little to assist this ultimate endeavor or to determine which precise cross-issue bargains would be added to the agenda of any particular Mega-Round.

Moreover, departmental staffers would likely seek to aggrandize their positions by influencing negotiations in other departments.<sup>37</sup> Guzman recognizes this concern, but argues that the boundaries among departments would be "self-enforcing"<sup>38</sup> because member states would be in a position to mediate jurisdictional conflicts. As we have explained, however, given the high costs of monitoring, staffers will likely have a large degree of day-to-day autonomy from national governments and interests that diverge from those of their appointing authorities. Controlling staffers' activities thus would be a burdensome task, especially for developing countries that lack resources to devote to the project.

### III. THE LIMITS OF THE DSU AS A CREDIBILITY-ENHANCING DEVICE

Unless they agree otherwise, the members' new regulatory agreements would be subject to the DSU.<sup>39</sup>

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<sup>37</sup> Guzman envisions at least informal contacts among experts in different WTO departments. See *id.* at 65 - 66.

<sup>38</sup> *Id.* at 21 n.43.

<sup>39</sup> *Id.* at 23 - 24.



Guzman believes that the dispute settlement system can serve as a credibility-enhancing device for members' regulatory commitments. The availability of a rigorous third-party enforcement mechanism would enhance members' confidence in the durability of their regulatory bargains, thus increasing members' "ability . . . to make welfare-increasing deals."<sup>40</sup> The prospect of losing the many advantages of these deals would discourage members from leaving the new organization in response to adverse rulings by panels or the Appellate Body.<sup>41</sup>

The idea that third-party enforcement can induce beneficial bargaining is an important part of the contracts literature.<sup>42</sup> Unfortunately, significant obstacles stand in the way of applying this insight to an expanded WTO. Indeed, given the enlarged substantive jurisdiction that Guzman envisions, one would expect a strong enforcement mechanism actually to inhibit bargaining among member states.

To see why this is so, recall that nations have widely divergent policy preferences on regulatory matters because of their differing political, cultural, and economic backgrounds. To take account of these differences under Guzman's model, nations would have two choices. They could either hammer out detailed agreements that reconcile their varying demands, or they could draft broad agreements that leave substantial discretion to later adjudicators.

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<sup>40</sup> *Id.* at 41.

<sup>41</sup> *See id.* at 56 - 59.

<sup>42</sup> *See, e.g.,* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 562, 568 (2003).



Because negotiating detailed agreements on these sensitive matters would entail substantial transactions costs, particularly given the WTO's unanimity rule, nations would not favor that option.<sup>43</sup>

But the second option, the one that Guzman apparently endorses, would likely make members uncomfortable as well. Third-party dispute settlement can enhance the credibility of parties' commitments only where the parties trust the adjudicative process.<sup>44</sup> In the WTO context, members must have confidence that WTO tribunals will objectively assess the facts of members' disputes and enforce members' bargains as written, without adding to members' obligations or adopting expansive or idiosyncratic interpretations. Otherwise, the "effectiveness" of the process itself will be an obstacle to reaching

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<sup>43</sup> One could also explain this point using the concept of bounded rationality. Reconciling the competing circumstances and demands of member nations in the context of cross-issue bargaining would be an extraordinarily complex endeavor. As a result, the negotiators would likely adopt cognitive shortcuts, such as vague standards that leave substantial substantive discretion in later adjudicators. See Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1342 (2003) (explaining how lawmakers' bounded rationality might lead them to prefer standards to bright-line rules).

<sup>44</sup> See Schwartz & Scott, *supra* note 42, at 562 (explaining how lack of "enforcement rules and honest courts" in certain countries weakens the credibility of promises that local parties make to outside investors).



agreement, as members rationally would avoid binding themselves ex ante to a coercive mechanism that threatens to produce biased or unpredictable results.

The difficulty with Guzman's proposal is that it necessarily would confer extraordinary discretion on WTO tribunals that would undermine the predictability of the dispute settlement process. As we have explained, the agreements that the tribunals would be called to interpret are likely to be broadly worded documents that provide substantial room for interpretive judgment. As Guzman himself recognizes, gaps and new issues would be inevitable.<sup>45</sup> Since one of Guzman's objectives is to reconcile trade with other values, such gaps will almost surely give the tribunals discretion to engage in relatively open-ended balancing among objectives.<sup>46</sup> Members could never be certain that the bargains would be interpreted as they expect. Indeed, members could easily conclude that the risk of unpredictable and unfavorable exercises of discretion by WTO tribunals would outweigh the benefits of the new agreements.

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<sup>45</sup> See Guzman, *supra* note 1, at 104.

<sup>46</sup> By increasing the range of possible positions in a dispute, such open-ended, cross-issue balancing might also complicate the problem of vote "cycling" in the Appellate Body. For more on how vote cycling in multi-member appellate tribunals can lead to unstable decisions, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815 - 17 (1982); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 172 - 74 (2001).



Developing countries would be particularly chary of signing on to such a regime. These countries, which often have views at odds with Western notions of environmental and labor protections, already harbor suspicions about pro-Western bias in the WTO.<sup>47</sup> Granting WTO bureaucrats greater discretion would only exacerbate the problem. Developing countries could easily foresee the danger that, over time, WTO tribunals would transform broad treaty language about the environment or labor into detailed requirements backed up by the threat of retaliation. Moreover, because developing countries often lack the litigating resources that developed countries enjoy, they may rationally fear an inability to present their case successfully.

Thus, the prospect of an "effective" dispute settlement system may actually retard, rather than encourage, cross-issue bargaining by member states. Moreover, expansion may undermine the legitimacy of the dispute resolution process. WTO tribunals would necessarily rule on the proper balance between the competing demands of trade and important non-trade values like public health and human rights. Because the WTO lacks the ties of history, culture, and, most importantly, democratic accountability that tend to support domestic governments, local populations are unlikely to see WTO rulings on such sensitive matters as legitimate.<sup>48</sup> Thus, rather than promote members'

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<sup>47</sup> See Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 128 (2002).

<sup>48</sup> See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the*

compliance with the new global regulatory regime, WTO rulings on substantive questions could actually encourage a nationalist backlash that makes such compliance less likely.

Guzman addresses some of these concerns, but the solutions he advocates are unpersuasive. For example, Guzman recognizes that requiring members to subject their new agreements to the WTO's dispute settlement system may inhibit bargaining.<sup>49</sup> He argues, therefore, that the mechanism should operate only as a default rule: members should be free to exclude the application of the dispute procedures to new agreements.<sup>50</sup> But this solution robs Guzman's proposal of much of its force. If the WTO's "effective" dispute settlement system were not available to enforce the new regulatory bargains, harnessing the organization as a forum for cross-issue negotiations would lack one of its salient rationales. Nations could always find some other supranational institution, like the United Nations, to host their discussions. Moreover, as Guzman himself notes, without dispute resolution and the prospect of sanctions it authorizes, nations may have little incentive to comply with parts of the cross-issue agreements they find burdensome. As we observe below, nations often do not comply with agreements they sign on human rights and other issues. The dispute settlement system thus presents something of a

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*History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 816 - 17 (1999).

<sup>49</sup> Guzman, *supra* note 1, at 49.

<sup>50</sup> *Id.* at 50.



dilemma for Guzman. Subjecting the new agreements to the DSU may inhibit bargaining, but allowing nations to opt out of WTO enforcement greatly undermines Guzman's argument for turning to the WTO in the first place.

Guzman also addresses the danger of excessive discretion on the part of WTO adjudicators. For example, he recognizes that, as trade experts, panelists and Appellate Body members may display a systematic bias in favor of trade as opposed to other values. In resolving disputes under a new trade-and-environment treaty, for example, the adjudicators might routinely slight the environmental values that the treaty tried to advance. To address this problem, Guzman argues that the pool of potential adjudicators should include experts "in all relevant fields."<sup>51</sup> Indeed, "the best panelists would probably have knowledge of more than one" substantive area.<sup>52</sup>

In response to the claim that excessive discretion would render WTO rulings less democratically legitimate, Guzman advocates a kind of judicial restraint. He argues that WTO adjudicators, who are less accountable than their domestic counterparts, should avoid using the dispute settlement process as a vehicle for free-form

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<sup>51</sup> *Id.* at 75 - 76.

<sup>52</sup> *Id.* at 76. Guzman recognizes that not every individual panelist can be expected to have such breadth of knowledge: his focus is on the expertise of the pool of panelists as a whole. See *id.* at 76 n.126.



policymaking.<sup>53</sup> They should stick to interpreting WTO agreements and resist the temptation to supplement those instruments with the requirements of other treaties or customary international law.

Once again, Guzman's proposed solutions seem unpersuasive and somewhat in tension with one another. While broadening the range of panelists' expertise might ameliorate pro-trade bias, it would do nothing to make WTO dispute resolution more predictable. Indeed, stocking WTO panels with policy mavens would, in all likelihood, render dispute resolution less faithful to the parties' original bargains. The more that panelists were chosen for their substantive expertise, rather than their proficiency in trade law, the more likely they would be to act as beneficent guardians, imposing their own visions of the "best" balance between trade and non-trade values, rather than as humble interpreters of legal documents.

Thus, Guzman's call for an increased diversity of substantive expertise on the part of panelists is at odds with his laudable concern for judicial restraint. Moreover, given the technological gap between the developed and the developing world, the experts Guzman envisions likely would come disproportionately from the West: they would have Western educations, Western credentials, and Western notions about the linkages between trade and other values. The predominance of such experts among the pool of panelists would only increase the unease developing countries would feel about their prospects

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<sup>53</sup> See *id.* at 95 - 96.



for a sympathetic hearing.

An additional argument militates against expanding the coverage of the dispute settlement system. One important reason why the WTO's dispute settlement process has been so successful is its capacity to enlist the efforts of exporters in an offending country. Once the Dispute Settlement Body has ruled that a member's law violates WTO requirements, the complaining country may retaliate by raising tariffs on that member's exports. The threat of retaliation creates incentives for exporters in the target country to lobby for the removal of the WTO-inconsistent measure.<sup>54</sup>

Applying the WTO's dispute settlement procedures to a large variety of non-trade subjects might compromise this dynamic. Exporters could find themselves the targets in a multitude of matters that would seem quite tangential to their concerns. They might suffer WTO-sanctioned retaliation because of their government's anti-pollution policies, minimum-wage laws, or rules about capital punishment. If exporters came to feel that the WTO was imposing burdens on their products in order to advance an expanding list of non-trade values, they might well reduce their efforts to lobby for the maintenance of the WTO regime. The regime as a whole would no longer be as beneficial to them as it was before.<sup>55</sup>

Finally, even if all these problems could be

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<sup>54</sup> See Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 10 (2003).

<sup>55</sup> See McGinnis, *supra* note 26, at 589.



surmounted, the capacity of the dispute settlement system to deal with sensitive matters like the environment and labor remains doubtful. Enforcement of WTO obligations in the dispute settlement system depends on the ability and willingness of members to identify violations and bring complaints against nations that violate their commitments. But members would find it much more difficult to monitor whether other members were complying with substantive regulatory standards than whether other members were honoring tariff reductions and nondiscrimination principles. Moreover, even if members know of violations by others, members may lack appropriate incentives to bring actions. After all, nations rarely attempt seriously to enforce, through sanctions or otherwise, other nations' compliance with existing human rights and labor standards.<sup>56</sup> It is unclear why amalgamating such issues into the WTO would provide more appropriate incentives for action.<sup>57</sup> And of course, if members choose to avoid enforcement of their new obligations through the DSU, as Guzman believes they should be free to do, the advantages of placing the new agreements in the WTO

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<sup>56</sup> See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002) (noting that noncompliance with obligations of human rights treaties "appears to be common").

<sup>57</sup> Insofar as nations have new kinds of incentives, they will often come predominantly from industries that will be directly advantaged by trade sanctions, thus confirming that expansion of the WTO may retard its core purpose of removing trade barriers.

would be greatly diminished.

#### IV. CONCLUSION

Guzman appears to believe that the only alternative to his proposal is stagnation at the WTO. We have another model for progress that we have outlined in more detail elsewhere.<sup>58</sup> Instead of adding new regulatory issues that are not closely connected to trade, the objective of the WTO should be to broaden the scope of tariff reductions and non-discrimination rules that facilitate private transactions around the globe. This approach would permit nation-states to be the major fora for the expression of non-trade values. So long as they honor tariff reductions and do not discriminate against foreign goods and services, nations could set their own policies for their own jurisdictions.<sup>59</sup> This would be a better way to inject non-trade values into political governance.

The Doha Round is largely following our prescription by focusing on broadening the range of goods and services to which free trade principles apply. Tellingly, negotiators are in the process of jettisoning the notion of binding regulations on the most controversial non-trade subjects (some of the so-called "Singapore issues"), such as competition

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<sup>58</sup> McGinnis & Movsesian, *supra* note 4.

<sup>59</sup> For the reasons that the WTO appropriately does not countenance imposition of such policies extraterritorially, see McGinnis & Movsesian, *supra* note 4, at 583 - 88.



rules, on which a few members, primarily European nations, were insisting.<sup>60</sup> Even without such subjects, much scope for bargaining for the reduction of barriers to private contracts remains. The United States and other developed nations can eliminate industrial tariffs and agricultural subsidies in return for developing nations' agreement to open up markets in services and to cut tariffs on goods with respect to which developed nations have a comparative advantage. WTO members can continue to refine prohibitions against discriminatory treatment that blocks imports, providing WTO tribunals with the elements of a procedure-oriented jurisprudence that limits substantive discretion. The economic growth created by expanded trade would provide WTO members with more resources to address social problems according to their own values; members would remain free to collaborate on the relatively few issues where spillovers could be addressed successfully. This program represents a surer--if more indirect and incremental--path, not only to economic prosperity, but to improvements in the environment, labor, public health, and human rights around the world.

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<sup>60</sup> See *European Trade Chief Calls for Global Framework by May*, AGENCE FRANCE PRESSE, Feb. 26, 2004, available at 2004 WL 71449914 (suggesting that nations would not have to abide by rules on competition or investment as part of the next global trade deal).

