

TRIPs: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO

Sean Pager

Indiana University Law School-Bloomington

Follow this and additional works at: <http://scholarship.law.marquette.edu/iplr>



Part of the [Intellectual Property Commons](#)

Repository Citation

Sean Pager, *TRIPs: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 *Intellectual Property L. Rev.* 215 (2006).

Available at: <http://scholarship.law.marquette.edu/iplr/vol10/iss2/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

TRIPS: A LINK TOO FAR? A PROPOSAL FOR PROCEDURAL RESTRAINTS ON REGULATORY LINKAGE IN THE WTO

SEAN PAGER*

INTRODUCTION	216
I. TRIPS, REGULATORY LINKAGE AND CONSTITUTIONALISM IN THE WTO.....	220
II. DOUBLE OR NOTHING: THE UNCERTAIN PROMISE OF STRATEGIC LINKAGE	224
III. EVALUATING TRIPS: A TEST CASE FOR LINKAGE	238
IV. CONTROLLING LINKAGE: SOME POSSIBLE APPROACHES.....	253
<i>A. Just Say NO: A Total Ban on Linkage</i>	253
<i>B. Mutual Gain As a Substantive Criterion</i>	255
V. A PROCEDURAL SOLUTION: PRE-COMMITMENT AS PREREQUISITE	256
<i>A. Vetting by Process</i>	256
<i>B. In Praise of Committees</i>	258
<i>C. A Committee of the Whole</i>	261
<i>D. TRIPs Revisited</i>	266
<i>E. Escaping the Prisoner's Dilemma</i>	268
CONCLUSION.....	271

* Sean Pager is a visiting assistant professor at Indiana University Law School-Bloomington. He wishes to acknowledge the many helpful comments he received from colleagues at IU and elsewhere, with special thanks to David Fidler, Peter Yu, Gregory Shaffer, Joost Pauwelyn, Andrew Guzman, Adam Mosoff, Leandra Lederman, Bill Popkin, Kevin Collins, and the participants at the 2005 Work-in-Progress in Intellectual Property Colloquium at Washington University, St. Louis. To Sheryl and Primo, with great love and anticipation.

INTRODUCTION

Ten years later, the controversy and recriminations over the Agreement on Trade-Related Aspects of Intellectual Property¹ (TRIPs) have scarcely abated. TRIPs is now firmly enshrined as part of the general undertaking to which all members states of the World Trade Organization (WTO) must subscribe, supplying a new global standard for intellectual property protection. Yet, commentators continue to differ widely as to the origins of the TRIPs Agreement, its merits and legitimacy, and its implications for the future of intellectual property rights (IPR).²

The controversy over TRIPs extends well beyond the specifics of the Agreement or even intellectual property (IP) generally. TRIPs forms part of a broader trend to globalize regulatory policy.³ In an era of shrinking borders, there is a growing demand for global solutions to global problems. Yet, shifting regulatory powers from the national to the international level is also problematic for many reasons. Among these are a familiar set of federalist concerns analogous to the domestic debate here in the United States. Many question, for example, whether the gains from centralized policies outweigh the loss of the potential benefits of “state laboratories.”⁴ Regulatory policymaking at the international level raises additional issues relating to process, rather than outcome. Some have argued that the “democratic deficit” inherent in international lawmaking calls into question the very legitimacy of global standards.⁵

Even if one supports regulatory harmonization in principle, the

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs Agreement].

2. See Peter Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006).

3. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000) [hereinafter BRAITHWAITE & DRAHOS, *BUSINESS REGULATION*] (analyzing trend to globalization across multiple domains of business regulation).

4. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). For the international version of this debate, see *infra* notes 59–60 and accompanying text. Ultimately, the “federalism” question must be answered issue by issue. The case for centralization will be stronger for some issues than others.

5. See, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 564 (2000) [hereinafter McGinnis & Movsesian, *World Trade Constitution*].

question remains whether the WTO is the right organization for the job. The WTO has traditionally focused on “negative integration,” i.e., liberalizing trade by reducing tariffs and stripping away regulatory barriers. TRIPs signaled a controversial shift to a “positive integration” approach that goes beyond de-regulation to affirmatively re-regulate (or harmonize), imposing global standards in place of national ones.⁶ TRIPs opponents have also challenged the WTO’s right to intrude on a policy area as peripheral to global trade as IP.⁷

TRIPs has proven just as controversial for the manner in which the Agreement was reached. In an explicit strategy of “linkage,” protection of IP was made a condition precedent for progress on other trade issues being negotiated simultaneously during GATT’s Uruguay Round.⁸ The

6. See, e.g., Ernst-Ulrich Petersmann, *The WTO Constitution and the Millennium Round*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 113–19 (Marco Bronckers & Reinhard Quick eds., 2000).

7. See, e.g., Jagdish Bhagwati, *After Seattle: Free Trade & the WTO*, in *EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 50, 58 (Roger B. Porter et al. eds., 2001) [hereinafter Bhagwati, *After Seattle*] (arguing that TRIPs does not belong in a trade organization because “[i]f your only criterion for getting an issue into the WTO is that your issue affects trade, then virtually everything gets in”). Intellectual property had heretofore been dealt with in the World Intellectual Property Organization (WIPO), which was and is a completely separate international regime from the WTO and its predecessor organization, the General Agreement Trade and Tariffs (GATT). On its face, the substantive connections between international trade and IPR, which have traditionally been governed by territorially-bounded, national law, seemed obscure and insignificant. Nor did the TRIPs Agreement limit its focus to the “trade related aspects” of IP as its title suggests. Not only did the regulatory harmonization imposed by TRIPs go well beyond any reasonable understanding of that phrase, TRIPs does not even address some of the most obvious points at which IPR and trade *do* overlap, such as the reimportation of gray market goods. See TRIPs Agreement, *supra* note 1, art. 6 (leaving exhaustion of IPR up to each member state to decide).

8. See Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”* 96 AM. J. INT’L L. 77, 79 (2002) (“TRIPs [represents] an archetypal, and advanced, case history of linkage.”). The terminology of “linkage” as used in the WTO context is somewhat confused, because the linkage can be used both in a “substantive” sense to describe institutional or substantive connections between trade and non-trade issues as a matter of regulatory governance, as well as a “procedural” sense to describe what may be a one-time quid pro quo over otherwise unrelated issues in the course of negotiating a set of agreements. Such “strategic linkage” can occur either unilaterally or by mutual consent. See generally David W. Leebon, *Symposium: The Boundaries of the WTO: Linkages*, 96 AM. J. INT’L L. 5, 11–13 (2002) (providing a taxonomy of linkage forms). In fact, TRIPs reflects both forms of linkage. As a substantive matter, the TRIPs Agreement served to bring international IP protection within the ambit of world trade law, linking two issue areas that had previously been separate. The achievement of TRIPs was, in turn, made possible by an exercise in strategic linkage in which developing nations were induced to accept upward harmonization of IPR in return for concessions offered in other, largely unrelated areas. This Article focuses on the use of linkage strategies during trade negotiations and will, thus, use the term in its second (procedural) sense.

result was a quid pro quo in which the developed countries essentially pushed through IP harmonization in the face of widespread objections from developing nations in exchange for commitments by the former to open their agricultural and textile markets.⁹

These controversies swirling in the wake of TRIPs are of more than academic or historical interest. They have led to a sharp divide in global attitudes toward regulatory linkage that puts rich countries at odds with the developing world and has helped spawn an atmosphere of distrust that clouds the WTO's broader agenda.

This Article focuses on the process issue raised by TRIPs: namely, the use of linkage strategies to advance harmonization in the WTO. Such "strategic linkage"—or logrolling—to negotiate tradeoffs across disparate issues remains highly controversial. Logrolling is generally frowned upon in domestic lawmaking as it can encourage "amoral" vote transfers that undermine the democratic process. Instead, rules on "single-issue" legislation serve to restrict package deals combining unrelated subject matter.¹⁰

By contrast, linkage has proven almost endemic to multilateral trade negotiations—and all but unavoidable given the consensus rules under which the WTO operates.¹¹ Because each nation has its own mix of export interests and protectionist lobbies, progress on liberalization can only be achieved by trading concessions between countries with reciprocal interests in a bilateral exchange that promises gains to both sides.¹² The WTO combines a series of such "linked" exchanges—e.g.,

9. See Yu, *supra* note 2 at 371–373 (describing "bargain narrative" as dominant explanation for TRIPs based on a North-South tradeoff of IP protection for agricultural and textile concessions, plus a commitment to binding dispute resolution). The extent to which rich countries have, in fact, kept their side of the bargain is disputed. See *id.* at 373–375 (describing alternative "coercion" narrative, which posits a more unilateral exercise in strategic linkage under less equal terms). The GATT was the WTO's predecessor organization. The Uruguay Round of multilateral trade negotiations ran from 1986 to 1994 and culminated in a comprehensive set of agreements of which TRIPs was one component.

10. See *infra* notes 63–68 and accompanying text.

11. Whereas the majority rules applicable in parliamentary systems allow a coalition of interests behind a particular policy proposal to overcome the objections of a minority, WTO rules permit even a single member state to block agreement. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1226, 1232 (1994) [hereinafter WTO Charter]. Because most proposals result in identifiable winners and losers, the only way to stop the losers from blocking agreement is to offer a package deal with something in it for everyone.

12. In this way, such countries each hope to gain enough political backing from their exporters who stand to gain from liberalization in one sector to overcome opposition from the protectionists who stand to lose in another sector. By necessity, the gain/losses must be reciprocal in nature for each country to come out ahead in this calculus. See McGinnis &

tariff reductions on steel in return for cuts in tobacco subsidies—in a global package deal negotiated over the course of a multi-year “round” of trade negotiations. Thus, multilateral trade negotiations are explicitly structured around multi-sectoral linkages.

The use of trade policy as a lever to achieve progress on non-trade issues has a lengthy, albeit controversial pedigree.¹³ Trade sanctions continue to be a widely employed tool in international relations.¹⁴ What was novel about TRIPs, however, was the use of trade linkages to create new international law rather than enforce existing obligations:¹⁵ the new law, in this case, being an agreement to harmonize intellectual property rights within the WTO itself.¹⁶

Regulatory harmonization of such non-trade issues differs significantly from the trade liberalization that has been the WTO’s traditional focus. For one thing, regulatory standards can serve as a vehicle for covert protectionism—the antithesis of liberalization. Because of such differences, this Article will argue that the shift from negative to positive integration in the WTO presents special risks that justify procedural safeguards. While package deals remain essential to the WTO’s mission of trade liberalization, special rules should apply when regulatory policymaking is concerned.

Much of the harmonization debate in the WTO has focused on the extent to which non-trade issues belong in the WTO and where to draw the outer limits of its jurisdiction.¹⁷ Comparatively less attention has

Movesian, *World Trade Constitution*, *supra* note 5, at 545–46.

13. During the Cold War, for example, the U.S. Congress linked trade privileges for the Soviet Union to its policies on Jewish emigration. The Jackson-Vanik Amendment to the 1974 Trade Act formalized this practice by requiring the President to certify that the Soviet Union had made progress on liberalizing Jewish emigration in order to be eligible for “most-favored nation” (MFN) status as a trade partner. Until recently, a similar requirement conditioned China’s MFN privileges on its human rights record. The ritual of annual MFN certifications of China only ended in 2001 with China’s admission to the WTO. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1109–1115 (2d ed. 2000).

14. *Cf. Converting Damascus*, *ECONOMIST*, Oct. 29, 2005, at 14 (describing the recent use of trade sanctions against Libya and threatened sanctions against Syria).

15. By contrast, the various boycotts and embargoes enforced by the United States and its allies against “rogue nations” generally have a stated objective of forcing nations to comply with *existing* international commitments or punishing them to the extent they have not.

16. See BRAITHWAITE & DRAHOS, *BUSINESS REGULATION*, *supra* note 3, at 221 (“TRIPs is the only case of ‘positive’ linkage of non-trade regulatory standards to the GATT. . .”).

17. See, e.g., Steve Charnovitz, *Triangulating the WTO*, 96 *AM. J. INT’L L.* 28–30 (2002); Trachtman, *supra* note 8, at 77–78.

220 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2

been devoted to the *process* by which agreement on non-trade issues is reached. However, this Article argues that process matters. It will propose specific rules to regulate the use of linkage strategies to advance regulatory harmonization of non-trade issues.

The argument will proceed in five parts. Part I situates the “linkage” issue within the larger “constitutional” debate surrounding the WTO. Part II examines a prominent, recent proposal to institutionalize strategic linkage as the lynchpin of an expanded WTO. After considering the proposal’s potential to overcome distributional skews that block single-issue negotiations, this Article assesses the proposal’s possible pitfalls and unintended effects. In particular, it argues that linkage may encourage tactical abuses, create logistical obstacles, give rise to regulatory protectionism, and undermine the WTO’s legitimacy. Part III then analyzes the TRIPs Agreement as a case study to evaluate these risks. It concludes that some degree of regulatory linkage may be a necessarily evil, but only if the downsides can be minimized. The risks of linkage, both specific and systemic, may thus justify some form of formal controls. Part IV next considers substantive approaches to control strategic linkage, ranging from a total ban to a limiting criterion of “mutual gain.” Rather than searching for substantive criteria to evaluate linkage proposals, however, this Article argues in Part V that the better approach is to rely on procedural mechanisms to accomplish this screening. Regulatory proposals would need to demonstrate support among a significant subset of WTO Members to “pre-qualify” for inclusion in a trade round. Ensuring such “pre-commitment” on the part of WTO Members would improve both the quality and legitimacy of regulatory agreements negotiated under future trade rounds. It would also promote greater confidence in the multilateral system.

I. TRIPs, REGULATORY LINKAGE AND CONSTITUTIONALISM IN THE WTO

TRIPs was born as part of the “big bang” in world trade law emerging from the Uruguay Round, which witnessed the creation of the WTO itself and an ambitious expansion of the GATT treaty system.¹⁸

18. The Uruguay Round was part of a succession of periodic “trade rounds” conducted under the auspices of the GATT system in which multilateral negotiators meeting over a course of years arrived at global package deals on tariff reductions and trade regulation. In addition to the agreements on the WTO and TRIPs, the Uruguay Round culminated in several other landmark agreements, including, *inter alia*, the General Agreement on Trade in Services (GATS), which expanded GATT principles for the first time to the service sector, and the Agreement on Trade-Related Investment Measures (TRIMs), a similar (more

In the wake of these historic achievements, commentators have argued over the extent to which global trade law has reached a “constitutional moment.”¹⁹ After Uruguay, many saw the WTO as poised to make the same leap as the European Community made from a multilateral treaty organization to a more organically integrated organ of supranational governance.²⁰ Although such euphoric visions faded in the dramatic failure of the Seattle Ministerial Conference four years later,²¹ the “constitutional” questions remained as WTO Members and commentators engaged in a collective soul searching over the WTO’s purpose and future.²²

In undertaking a sweeping harmonization of an issue at best only tangentially related to trade, TRIPs both expanded the WTO’s jurisdictional reach and signaled a dramatic turn towards positive integration.²³ As commentators debate the feasibility and desirability of

tentative) agreement on foreign investment, an agreement to phase out textile quotas, and major new disciplines governing subsidies, anti-dumping duties, safeguard measures, health and safety standards, and technical barriers. All of which formed part of the single undertaking to which all WTO Members were obliged to subscribe. Two additional agreements on government procurement and aviation were concluded on a plurilateral basis.

19. See Peter Holmes, *The WTO and the EU: Some Constitutional Comparisons*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 59, 76 (Gráinne de Búrca & Joanne Scott eds., 2001); Neil Walker, *Constitutionalism in a New Key, in the WTO and the EU: Some Constitutional Comparisons*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES*, *supra*, at 31.

20. See, e.g., Petersmann, *supra* note 6, at 118 (arguing that WTO harmonization “requires, as in European integration law, a progressive ‘constitutionalization’ of GATT and WTO law”). See generally *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES*, *supra* note 19 (comparing WTO and EU regimes).

21. See Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 94 *AM. SOC’Y INT’L L. PROC.* 220, 220 (2000).

22. See *id.* at 221.

23. See Bhagwati, *After Seattle*, *supra* note 7, at 58; Daniel Kalderimis, *Problems of WTO Harmonization and the Virtues of Shields Over Swords*, 13 *MINN. J. GLOBAL TRADE* 304, 329 (2004); see also Petersmann, *supra* note 6, at 114 (noting the further anomaly that unlike prior trade agreements that have focused on public law, TRIPs mandates the enforcement of private rights in a purely domestic context). But see KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 239 (2000) (arguing that IP is sufficiently trade-related to justify inclusion in the WTO); John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 *HARV. INT’L L.J.* 353 (2004) [hereinafter McGinnis & Movsesian, *Against Global Governance*]. In contrast to TRIPs’ unabashedly comprehensive and intrusive scope, the WTO’s other ventures into regulatory harmonization have, by comparison, been more circumspect. The regulatory authority asserted in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and Agreement on Technical Barriers to Trade (TBT) is largely indirect, serving as a defensive measure to insulate trade from regulatory protectionism, while the TRIMs Agreement is largely declaratory of pre-existing principles. See Kalderimis, *supra* note 23, at 329–31 (distinguishing between “defensive” and “progressive” harmonization); *id.* at 333

222 MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW [Vol. 10:2

incorporating a broader range of policy concerns into the legal and institutional machinery of the WTO, TRIPs naturally plays a pivotal role in this debate.²⁴ Some see the TRIPs Agreement as one of the WTO's chief accomplishments²⁵ and a major innovation in international trade law.²⁶ Even those who disagree with TRIPs often see it as a template for regulatory policymaking by the WTO on issues they do support.²⁷ Others see the Agreement as, at best, an unfortunate detour²⁸ or cautionary tale,²⁹ and, at worst, the embodiment of all that is wrong with the WTO.³⁰ As noted, these differences in opinion are more than

(regarding TRIMs).

24. See Charnovitz, *supra* note 17 (providing analytic framework to evaluate claims for regulatory linkage).

25. See, e.g., EDMOND MCGONUM, INTERNATIONAL TRADE REGULATION §§ 21.211, 21.211-1 (1995) ("The conclusion of the . . . TRIPs Agreement was perhaps the most remarkable achievement of the Uruguay Round.").

26. See, e.g., MASKUS, *supra* note 23, at 2 (describing the TRIPs Agreement's importance as "the first multilateral trade accord that aims at achieving partial harmonization in an extensive area of business regulation [that] forms the vanguard of efforts to establish deep integration of domestic regulatory policies among countries").

27. Charnovitz, *supra* note 17, at 29; Kalderimis, *supra* note 23, at 342; see also Frederick M. Abbott, *Distributed Governance at the WTO-WIPO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON, *supra* note 6, at 25-33 [hereinafter Abbott, *Distributed Governance*] (exploring the division of labor between TRIPs and WIPO as a model for further regulatory expansion by the WTO); Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) (citing TRIPs as an example of the benefits of linkage).

28. See, e.g., Holmes, *supra* note 19, at 76; Kalderimis, *supra* note 23, at 305, 346 (calling for a moratorium on further regulatory harmonization by the WTO).

29. See, e.g., Kalderimis, *supra* note 22, at 342-43 (pointing to conflict over AIDS pharmaceutical patents as an example of the unbalanced weighting of priorities arising from forced regulatory harmonization); Petersmann, *supra* note 6, at 122 (citing the one-sided regulatory balance struck under TRIPs as an example of distorted policymaking likely to be enacted under current WTO procedures).

30. See, e.g., Bhagwati, *After Seattle*, *supra* note 7, at 59 (describing TRIPs as an unwanted "third limb" that will impede progress on trade liberalization); Francis Mangeni, *Implementing the TRIPs Agreement in Africa*, in TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPs, TRADE AND SUSTAINABILITY 219, 230 (Christophe Bellman et al. eds., 2003) (describing TRIPs as "in essence written by developed country industry lobbies" at the risk of "[i]mpoverishing and leaving destitute entire populations in developing countries"). The disastrous campaign recently waged by U.S. pharmaceutical companies to enforce patent rights over AIDS medication has only intensified perceptions of TRIPs as the ugly face of trade-driven globalization. See, e.g., K. Balasubramaniam, *Access to Medicines and Public Policy Safeguards Under TRIPs*, in TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPs, TRADE AND SUSTAINABILITY, *supra*, at 135. Pharmaceutical patents are not the only aspect of intellectual property protection that have attracted the ire of globalization opponents. Trademark and copyright enforcement, also expanded by TRIPs, are viewed as paving the way for the "Coca-Cola-ization" and "Disneysification" of the planet. See generally Rosemary J. Coombe, THE CULTURAL LIFE OF INTELLECTUAL

academic. The unresolved North-South split over TRIPs and its legacy hangs over the WTO as a focus of discord and distrust.

These contrasting perspectives on TRIPs to some extent reflect different normative conceptions of the WTO. Commentators who see the WTO as following the evolution of the European Community from common market to political union welcome a positive integration agenda as part of a deepening commitment to world governance.³¹ Some have openly called for the WTO to embrace its de facto role as global regulator.³² Other commentators regard regulatory harmonization as inherently suspect and have counseled the WTO to stick to its core mission of trade liberalization.³³

Such opposing viewpoints can, in turn, be traced to differing conceptions of linkage. For some, package deal-making in the WTO is a win-win proposition that makes it a natural choice as an organ of world governance.³⁴ Others see the potential abuses of logrolling as an argument against regulatory harmonization.³⁵

This Article critically examines such contrasting views on linkage, using TRIPs as a case study. It finds merit on both sides of the argument, viewing strategic linkage as a double-edged sword. Linkage provides a powerful tool to negotiate reciprocal concessions across unrelated policy areas. However, unrestricted use of linkage can lead to sub-optimal outcomes—with TRIPs arguably serving as a case in point. Ultimately, using package deals to enact regulatory standards on non-trade issues may sometimes prove a necessary evil. However, the procedurally suspect nature of such deals demands special rules to regulate them.

In some respects, the specific procedural proposal advanced here parallels efforts by other commentators to address the “democracy

PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW, 52–55 (1998) (describing how IPR facilitate the domination of global culture by a handful of multinational conglomerates); Naomi Klein, NO LOGO: TAKING AIM AT THE BRAND BULLIES (2001) (criticizing the global branding phenomenon as perpetuating an oppressive and exploitative corporate hegemony).

31. See, e.g., Holmes, *supra* note 19; Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUR. J. INT'L L. 307, 308–12 (2004); Walker, *supra* note 19. *But see* Kalderimis, *supra* note 23, at 341–43 (arguing that the WTO lacks the democratic legitimacy to emulate the European Union).

32. Guzman, *supra* note 27, at 307–08; Marco Bronckers, *More Power to the WTO*, 4 J. INT'L ECON. L. 41, 45 nn.15–20 (2001) (somewhat more tentatively).

33. McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 552–66.

34. Bronckers, *supra* note 32, at 45 nn.15–16; Guzman, *supra* note 27, at 316–21.

35. See McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 355.

deficit” inherent in the WTO’s exercise of regulatory authority. However, their solutions have generally involved “constitutionalizing” the WTO in ways that would fundamentally alter the nature of the organization: either by entrenching binding norms such as a respect for fundamental rights, creating new mechanisms for participation by civil society and/or national parliamentarians, or even moving to some form of direct electoral representation.³⁶ The proposal that this Article makes, however, entails a more modest, sub-constitutional solution, analogous to the parliamentary rules that govern domestic lawmaking. It would merely require harmonization proposals to undergo a “pre-qualifying” procedure before they could be linked into multilateral trade negotiations. To prepare the ground for this proposal, it is first necessary to consider more carefully the *pros* and *cons* of linkage.

II. DOUBLE OR NOTHING: THE UNCERTAIN PROMISE OF STRATEGIC LINKAGE

One of the strongest endorsements of linkage in the WTO appears in Andrew Guzman’s recent article entitled *Global Governance and the WTO*.³⁷ Guzman envisions an expanded, restructured WTO that would serve as a forum in which international negotiators could address trade and non-trade issue alike.³⁸ One of Guzman’s main arguments for centralizing such negotiations within a single umbrella organization is that it would facilitate strategic linkage that would make possible a broader range of international agreements than if such negotiations remained compartmentalized in separate single-issue forums. Guzman sees linkage as enabling creative tradeoffs to the mutual benefit of the international community. Guzman is hardly the first to contemplate such benefits.³⁹ However, his article proposes an innovative institutional

36. See, e.g., Petersmann, *supra* note 6, at 122–25; Peter Van den Bossche & Iveta Alexovicova, *Effective Global Economic Governance by the World Trade Organization*, 8 J. INT’L ECON. L. 667, 672–683 (2005). See generally THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES, *supra* note 19 (considering the potential for the WTO to evolve into a supranational regime akin to the EU and addressing concerns over democracy deficits in both contexts).

37. Guzman, *supra* note 27.

38. Guzman envisions issue areas being divided into separate departments within the expanded WTO, with single-issue agreements being negotiated at the department level. *Id.* at 307–08. The real innovation of Guzman’s plan, however, concerns his proposed “Mega-Rounds,” in which free-wheeling negotiations would encourage concessions across issue areas. *Id.* at 308.

39. See Charnovitz, *supra* note 17, at 31 (quoting WTO Director-General Mike Moore as urging “governments to ‘broaden the negotiating agenda’” to enable cross-issue

mechanism to facilitate cross-issue linkages.

Guzman's vision for the WTO is by no means confined to strategic linkage. His proposal calls for a "World Economic Organization" that would permanently entrench an expanded range of issues under the WTO's authority. Guzman justifies this ambitious proposal by arguing that ongoing conflicts between trade and non-trade issues can only be resolved by bringing all such concerns within the jurisdiction of a single international regime that can address them on an equal footing. Such consolidation would facilitate an integrated approach to regulatory policymaking that could craft comprehensive global solutions to complex global problems.⁴⁰ Much of his article describes the institutional restructuring necessary to achieve the expanded, revamped WTO he envisions.

Guzman presents a well thought-out, forward-looking essay that provides much food for discussion. This Article addresses only the linkage aspects of Guzman's proposal. It argues that the case for encouraging strategic linkage as a means to advance regulatory harmonization is more qualified than Guzman suggests. First, there may be less need for cross-issue tradeoffs than Guzman assumes. Second, in addition to opening the door to otherwise unattainable outcomes, strategic linkage may also result in blocking equally desirable agreements. Third, the benefits afforded by such negotiated tradeoffs may be outweighed by potential negatives. Indeed, the potential for sub-optimal⁴¹ outcomes to arise from linkage strategies justifies formal limitations on their use. A future "World Economic Organization" of the type Guzman envisions would be wise to adopt procedural safeguards to restrict such practices.

Guzman's case for strategic linkage hinges on his observation that negotiations within the framework of a single-issue regime sometimes flounder over skewed distributional outcomes: i.e., when a proposed agreement disproportionately burdens certain nations and benefits others. Particularly when unanimity is required (or virtual unanimity as

concessions that will increase the chance of a successful trade agreement).

40. Guzman, *supra* note 27, at 305–07.

41. This Article will refer to such concepts as "optimality," "global welfare," "desirability," "aggregate benefit," etc., more or less synonymously to describe favorable policy outcomes from the standpoint of the international community as a whole, judged in the broadest possible sense. It does not propose specific definitions or yardsticks to assess them (nor does Guzman). The argument that follows is therefore contingent on the assumption that the range of available definitions for these concepts will yield an area of overlap on which most people could agree.

in the WTO), important policy initiatives may, thus, remain stymied, even if the world as a whole would undeniably benefit from action.⁴² Guzman suggests that linkage can overcome such obstacles by “compensating” those nations that are disadvantaged by a policy initiative in one area with offsetting concessions in unrelated areas.⁴³

Guzman offers TRIPs as a successful example of tradeoffs that resulted in mutual benefit. He observes that proposals for a treaty enforcing mandatory IPR languished for years in the WIPO in the face of opposition from developing nations that, as net IP importers, would bear the costs of increased IP protection.⁴⁴ By offering such nations concessions in other trade sectors, Guzman sees linkage as having facilitated a win-win solution.⁴⁵

Leaving aside the question of whether TRIPs really was a “win-win” outcome, as a descriptive matter, Guzman’s account of the potential for linkage to overcome distributional skews seems correct. Whether the experience of TRIPs can be generalized to justify an endorsement of cross-issue linkages to advance other regulatory goals remains to be seen. First of all, it is worth noting that linkage across issue areas is not the only way of overcoming skewed distributional outcomes. Creative tradeoffs and burden-sharing mechanisms can sometimes be devised *within* a given policy domain. The carbon trading regime established under the Kyoto Agreement on Global Warming offers one such example, providing a market-driven mechanism to share the burdens of preventing global warming.⁴⁶ Similar solutions may be available in many

42. Guzman gives the example of an agreement to prevent deforestation that would benefit the international community by slowing global warming and preserving biodiversity, but would put a disproportionate burden of securing such benefits on Brazil. Guzman, *supra* note 27, at 318. Even if the agreement was in Brazil’s long-term interest, it might prove politically untenable for Brazil to accept all the pain for a shared global gain.

43. *Id.* In Guzman’s deforestation example, Brazil would receive trade concessions in some of its export markets to act as the sweetener that would cinch the environmental deal. See Leebron, *supra* note 8, at 26 (noting that linkage “offers the potential to expand the means by which mutuality can be achieved, and thus enhances the ability to reach an agreement”).

44. See Guzman, *supra* note 27, at 317; see also Meir P. Pugatch, *The International Regulation of IPRs in a TRIPS and TRIPS-plus World*, 6 J. WORLD INVEST. & TRADE 431, 435 (2005) (providing empirical data confirming that the distribution of patents rights overwhelmingly favors developed nations). Mandatory enforcement of IPR can be expected to result in increased monopoly rents paid by developing nations to IPR holders located primarily in rich countries. Although TRIPs advocates dangled the prospect of increased foreign investment as a compensating factor, almost no one seriously expected such promises to fully offset the costs.

45. Guzman, *supra* note 27, at 316–17.

46. Carbon trading provides an incentive for richer countries to “buy” carbon emission

other policy areas.⁴⁷

It is true that there would remain desirable policy outcomes for which the scope for burden-sharing mechanisms is structurally constrained. The harmonization of intellectual property protection may have been one such example.⁴⁸ However, even if linkage could provide a way out in such cases, it is far from clear that the potential gains outweigh the risks. There is no guarantee that linkage would be restricted to the limited set of cases in which a desirable policy is blocked by distributional skews. While the benefits would primarily be captured in those cases, the negative consequences of encouraging linkage could prove to be systemic.

While opening the door to cross-issue concessions increases the range of possible tradeoffs and, thus, expands the set of outcomes theoretically available, it does not follow, however, that more agreements would necessarily result. Linkage claims could inadvertently disrupt progress in sectors in which agreement was

credits by investing in cost-effective emission reduction in less efficient and dirtier industries in the developing world. This burden-sharing mechanism enables rich countries to subsidize emission control technologies in rapidly industrializing nations in the developing world that would pose a prohibitive cost to the latter on their own. See Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 134 (2002) [hereinafter Bhagwati, *Symposium*].

47. See *id.* (describing a similar burden-sharing solution to protect turtles whereby rich countries would purchase turtle excluder devices for use by shrimp fishermen from developing nations); Leebron, *supra* note 8, at 14 (providing further examples of single-issue offsets and burden-sharing).

48. The nature of IPR as private forms of quasi-property make burden-sharing mechanisms vastly more difficult, while the distributional skews associated with such rights are more extreme than with carbon emission controls. It is not entirely inconceivable to envision an alternative to TRIPs that might have been devised so as to overcome the misgivings of the developing world without extrinsic offsets. Some forms of IPR would arguably benefit developing nations. For example, recognizing IPR in traditional knowledge would favor developing nations. Conditioning IPR on reciprocal transfers of technology could offset the burden of paying monopoly rents. Even within the current structure of TRIPs, commentators have pointed out a number of modifications, ranging from fees concessions on patent applications to increased technical assistance and burden sharing on enforcement costs, which could result in a more equitable agreement. See Carlos Correa, *Formulating Effective Pro-Development National Intellectual Property Policies*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY*, *supra* note 30, at 209, 210; J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 452, 465-68 (2000). Nonetheless, the experience in WIPO illustrates the daunting task of forging such a consensus. One could also argue that any compromise solution would require the underlying rights to be diluted to such an extent that the benefits of TRIPs would themselves be compromised.

otherwise feasible.⁴⁹ The breakdowns at the recent Cancún and Seattle ministerials may provide examples of such disruptive effects that should be balanced against the successful linkage practiced during the Uruguay Round. In Seattle, attempts to force human rights and labor law onto the trade agenda provoked a revolt by developing countries.⁵⁰ In Cancún, the so-called “Singapore” issues—among them competition (antitrust), foreign investment, and government procurement—played a central role in the collapse of negotiations.⁵¹

Facilitating linkage might also encourage certain actors to engage in opportunistic forms of strategic behavior. For example, a country might engage in a “holdout” strategy, blocking an agreement on issues to which it has no intrinsic objection in order to gain negotiating leverage elsewhere.⁵² Linkage claims could also provide a convenient device to sabotage progress on other issues without the need to oppose them openly.⁵³ The European Union has been accused of playing such a game in the current Doha Round to avoid making good on its promises of agricultural concessions.⁵⁴ Widespread abuse of such tactics might result in fewer agreements rather than more.

Even without such bad faith intent, the logistical complexities of multi-directional negotiations across an increased set of issues in the largely unregulated “bazaar” that GATT/WTO rounds foster could potentially be staggering. Without controls on who could link what to where and when, paralysis might ensue, as Guzman himself acknowledges.⁵⁵

49. Leebron, *supra* note 8, at 25.

50. See Bhagwati, *Symposium, supra* note 46, at 128 (ascribing failure of Seattle talks to linkage).

51. See *The WTO Under Fire: Why Did the World Trade Talks in Mexico Fall Apart? And Who Is to Blame?*, *ECONOMIST*, Sept. 20, 2003, at 26–28 [hereinafter *WTO Under Fire*]. As in Seattle, the split over the Singapore issues at Cancún was largely along North-South lines. See *id.*

52. Charnovitz, *supra* note 17, at 31 n.18 (quoting Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 *J. INT'L ECON. L.* 275, 293 (2001)); Leebron, *supra* note 8, at 25.

53. The WTO's consensus rules otherwise require blocking nations to voice active opposition to a proposal, a stance that in some cases they might be reluctant to take for any number of reasons, such as a need to honor previous commitments (or at least be seen to), appeasement of domestic lobbies, or a perceived vulnerability on other issues.

54. See Robert D. Hormats, *Governance of the Global Trading System*, in *EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM*, *supra* note 7, at 392, 399 (describing suspicion “that the EU has ulterior motives in wanting a broader round with several controversial items on the agenda”).

55. See Guzman, *supra* note 27, at 310 (“An increase in the number of topics within the

Guzman seeks to avert this danger primarily by calling for single-issue negotiations within a specialized departmental structure.⁵⁶ Negotiations carried out during periodic “Departmental Rounds” would be confined to the specific subject-matter of each department. Guzman argues that such “Departmental Rounds” would take the pressure off separately conducted, multi-issue “Mega Rounds” by eliminating the need to address every issue within an “all-at-once” negotiating structure.

If the division of labor between “Departmental” and “Mega Rounds” could be optimized, this dual format structure could potentially offer the best of both worlds. Agreements conducive to single-issue resolution could be addressed departmentally, while “Mega Rounds” would be reserved for impasses that defied single-issue solutions.⁵⁷ However, Guzman’s proposal fails to provide any channeling mechanism to guide negotiations to the appropriate level and, thus, offers no assurances that the right allocations would be made.

In particular, Guzman’s assumption that “many valuable agreements” would be achieved departmentally seems misplaced. He justifies this assumption on historical grounds, noting that “virtually all international negotiations on regulatory matters undertaken to date . . . have addressed only a single issue area.”⁵⁸ Yet, historically, international negotiators have not had recourse to a multi-issue forum that enables cost-free recourse to linkage strategy. For most of the post-war period, single-issue regimes operated within discrete, well-defined

WTO’s jurisdiction increases the set of potential deals, the number of negotiators, and the number of relevant interests at stake. At best, attempting to conduct all negotiations simultaneously would be inefficient. At worst, it might be paralyzing.”). Guzman’s fatalistic conclusion that “[c]omplexity is the inevitable result of trying to tackle the difficult problem of how to balance competing interests at a global level” offers little reassurance or consolation. *Id.* at 312.

56. Guzman also makes the following prediction:

WTO members would limit the range of issues to be discussed in the same way they do with WTO negotiating rounds today, i.e. they would have preliminary discussions to set out a work program for negotiations. Though the work program may be changed as the negotiations proceed, as happened during the Uruguay Round negotiations, it helps member to focus on a common set of questions.

Guzman, *supra* note 27, at 308 n.30 (citation omitted). The assumption that not every possible issue would enter the ring on any given round may be correct. However, this says very little about how Members would decide *which* issues get nominated for discussion. As Guzman notes, existing WTO practice is rather variable on this score.

57. *Cf.* Leebron, *supra* note 8, at 27 (noting that “[i]n most situations, linkage is a second-best solution”).

58. *See* Guzman, *supra* note 27, at 310.

boundaries with few institutional mechanisms for cross-regime interchange.⁵⁹ The availability of Guzman's "Mega Rounds" would dramatically lower the transaction costs for nations to engage in strategic linkage both by facilitating the logistics and legitimizing the practice. The temptation to use linkage strategies to barter around roadblocks could undercut the commitment of departmental negotiators to pursue the hard compromises and creative maneuvering necessary to reach a single-issue solution while increasing the temptation to engage in opportunistic "holdout" tactics aimed at leveraging concessions elsewhere. Over time, more and more policy matters would become dependent on multi-issue resolutions.

Furthermore, even if linkage *could* facilitate the resolution of difficult issues, it also does not follow that the agreements through linkage achieved would necessarily be desirable ones. In many cases, skewed distributional outcomes may be a sign that the world as whole would *not* be better off with the proposed initiative, despite the preferences of some subset of its member states. An agreement to harmonize labor regulations at rich country standards with high minimum wages and restrictions on working hours might be one example. Such an agreement would force developing nations to forfeit an important comparative advantage in the world marketplace and could result in a net loss in aggregate welfare. Similar criticisms have been lodged at the upward harmonization of IPR mandated by TRIPs, which some see as impeding rather than promoting global innovation.⁶⁰

Indeed, the case for the regulatory harmonization is rarely unequivocal even without distributional imbalances.⁶¹ There is no reason to believe that nations would confine their harmonization efforts to the most "deserving" cases, even assuming one could tell which is

59. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 264, 266.

60. See *infra* notes 120–141 and accompanying text.

61. International harmonization may reduce transaction costs to global traders. Petersmann, *supra* note 6, at 119. However, it has to be balanced against the costs. See *id.* Some issues may be better left regulated at the national or local level for several reasons: to better address local contexts or to respond to changing conditions. There is also a case for encouraging experimentation and regulatory competition across national regimes. See Jacques H.J. Bourgeois, "Subsidiarity" in the WTO Context from a Legal Perspective, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON, *supra* note 6, at 36 (exploring subsidiarity in the European Union as a model of regulatory federalism for WTO); McGinnis & Movesian, *World Trade Constitution*, *supra* note 5, at 552–62.

which. Indeed, countries benefiting from the skewed outcomes would have a built-in incentive to push regulatory harmonization regardless of global welfare. That such negotiations would take place in an organization dominated by trade concerns would have its own disruptive effects.⁶² Nations would be tempted to subvert negotiations over regulatory policy to serve mercantilist ends, exacerbating rather than ameliorating the distributional skews of regulatory outcomes.⁶³ Unrestricted use of trade linkage could provide them the leverage to impose harmonization measures under all sorts of sub-optimal conditions.

Even if regulatory efforts were confined to policy areas in which a strong theoretical case for harmonization exists, there is still a risk that the sort of package deals that Guzman contemplates could yield undesirable outcomes due to “regulatory capture” by special interests. It is no accident that virtually all parliamentary systems have rules against vote trading as well as restrictions on the scope of legislative acts.⁶⁴ “Germaneness” requirements or “single-subject” rules serve to improve clarity and accountability by forcing legislators to vote on a coherent set of proposals focused on addressing an identifiable issue. Restricting legislation to a single issue also makes it easier to weigh costs against benefits on an apples-to-apples basis, improving the quality of deliberation.⁶⁵ In the absence of such safeguards, special interests can more easily manipulate legislation to serve their private interests.⁶⁶ Such

62. To be fair, Guzman recognizes the need to re-balance the WTO to ensure that trade concerns no longer dominate. Guzman, *supra* note 27, at 332–33. However, it is not clear that there is an easy remedy. By its very nature, trade intersects with an enormous variety of issues, and the reality is that trade lobbies tend to speak with a louder voice than other constituents. Combining issue regimes under a single roof would make it easier for trade functionaries to monitor and meddle in negotiations carried out in other policy sectors.

63. See Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 219–20 (1998) (describing policy distortion arising from reconceptualization of IP as a trade issue).

64. See DENNIS C. MUELLER, PUBLIC CHOICE II 82 (1989); Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389–90 (1958) (tracing such scope limitations date back to ancient Rome).

65. The formal basis of such rules varies. In some systems, the rules remain implicit within parliamentary custom. Several states in the United States, however, require “single-issue” legislation as a constitutional requirement. See generally Ruud, *supra* note 64 (surveying state provisions).

66. This can occur several ways. An existing piece of legislation can be “hijacked” by some unrelated provision in which its objectionable nature is either hidden or simply not worth fighting over. Custom-built coalitions can be manufactured through manipulations of agenda. And “poison pills” can be inserted to torpedo measures that would otherwise attract widespread support. See, e.g., *Madison Nat'l Bank v. Newrath*, 275 A.2d 495 (Md. 1971)

232 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2

rules also serve to restrict the scope for linkage—or “logrolling” as it is often called in legislative contexts—by preventing package deals that lock in reciprocal bargains.⁶⁷ Logrolling is generally regarded as contrary to democratic principles because it encourages “amoral vote transfers” by legislators who no longer base their decisions on the merits of individual bills.⁶⁸

The assumption that such restrictions lead to better legislation is arguably demonstrated in the legislative habits of the U.S. Congress. Large omnibus legislation and/or budgetary authorizations serve as perennial magnets for “pork,” because they involve package deals in which “riders” advancing private interests can easily evade scrutiny or at least logroll their way past opposition.⁶⁹ Such pork-barrel politics is harder to practice when individual bills are confined to relatively narrow issues.

Domestic legislatures also incorporate a number of other procedural safeguards designed to improve the deliberative process, prevent last minute surprises, and guard against capture by special interests.⁷⁰ Committee systems, bicameralism, executive vetoes, multiple reading requirements, limits on floor amendments—all of these checks and balances serve to slow down the legislative process and provide more points of entry for democratic inputs.⁷¹ The absence of such procedural protections at the international level should make logrolling even more suspect when used to negotiate treaties.

(discussing dangers of mixed-purpose legislation).

67. It is impossible to eliminate logrolling entirely as such deals can still be made informally. However, by forcing separate votes on individual bills, legislators become accountable for their choices on an issue-specific basis, making naked vote trading a more costly proposition. Moreover, preventing package deals makes logrolls more uncertain by raising the possibility of defections during the course of sequential voting, as well as the chance that the separate bills might not pass on their own. See MUELLER, *supra* note 64, at 82, 85; Ruud, *supra* note 64, at 391.

68. McGinnis & Movesian, *Against Global Governance*, *supra* note 23, at 355; see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 123 (1999) (“With relatively few exceptions logrolling phenomena have been viewed as deviations from the orderly working of the democratic process.”).

69. See MUELLER, *supra* note 64, at 84; WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 127–30 (4th ed. 2005). The energy and transportation bills recently enacted by the current Congress offer especially grotesque examples of such perversion of public legislation.

70. State legislatures tend to have the strongest procedural safeguards, reflecting the tradition of part-time citizen legislators who had only limited time to devote to monitoring legislation and were prone to capture by special interests. *Id.* at 1014–15.

71. *Id.* at 130, 1014–15, 1029.

Moreover, the democratic shortcomings of international lawmaking raise added dangers. As John McGinnis and Mark Movsesian have observed, the political economy of international regulation makes it especially vulnerable to sub-optimal outcomes.⁷² “Interest groups have substantially more power at the global than at the domestic level.”⁷³ The ability of private citizens and public interest watchdogs to monitor backroom deals and to control abuses is greatly reduced in the international sphere. International negotiations take place in physically remote settings, follow obscure procedures, and may involve foreign languages. Thus, “[a]verage citizens find the international process even more opaque than domestic lawmaking.”⁷⁴ By contrast, organized special interests often employ international lobbyists and enjoy privileged access to their national delegations. At the same time, “the global scale of regulation allows greater rents for interest groups.”⁷⁵

McGinnis and Movsesian also worry that if the WTO expands its regulatory authority as Guzman envisions, “departmental staffers themselves may have interests that diverge from the interests of their appointing authorities.”⁷⁶ Such concerns may be premature given the tight leash on which member states have traditionally kept trade negotiations.⁷⁷ Yet, even without such agency problems, vesting regulatory policy in international bodies necessarily entails a loss of democratic accountability.⁷⁸ Voters must depend on unelected officials,

72. See McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 355; McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 556–58.

73. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 357.

74. *Id.* But see BRAITHWAITE & DRAHOS, BUSINESS REGULATION, *supra* note 3, at 606–07 (arguing that in some circumstances international regulatory policymaking can promote transparency and resist regulatory capture by national lobbies).

75. *Id.*

76. *Id.* (“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.”).

77. Empirical work by Greg Shaffer casts doubt on the extent to which the WTO conforms to a paradigm of centralized policymaking driven by supranational actors. He demonstrates that member nations have zealously guarded their ability to control trade agendas and have deliberately confined the scope of the WTO Secretariat to a relatively minimalist role. Gregory S. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 56–61 (2001).

78. Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 227, 241–42; Keohane & Nye, *supra* note 59, at 283–85.

who are often subject to far less legislative oversight than regulatory policymakers at the domestic level, to represent their interests.⁷⁹ Policies must be arrived at by consensus between nations that represent a diversity of constituencies whose shared commitments cannot be presumed.⁸⁰ Relying on linkage to force agreements on issues when the divergence in viewpoint is too great invites perceptions of illegitimacy.⁸¹ When unilateral exercises in linkage result in unequal outcomes, accusations of coercion can also arise. There are, thus, systemic costs to relying on linkage to force through one-sided harmonization.

For all of these reasons, international regulation must be treated with suspicion, particularly when negotiated through logrolling. Unlike private contracts that can be presumed to yield mutual benefits, regulatory bargains between nations can easily result in “amoral wealth transfers”⁸² between private interests of dubious benefit. The use of linkage strategies to lower the transaction costs and overcome distributional roadblocks to harmonization heightens the danger. “[E]very government has protectionist interests to pay off and regulatory bargaining would permit the logrolling of their disparate interests.”⁸³

The WTO may be particularly susceptible to such distortions of

79. See DONALD G. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT* 123 (2004) (describing how trade negotiators drawn from the “elite” in developing nations were “captured” by the pro-IP paradigm peddled by TRIPs proponents leading them to accept protection standards contrary to the interests of their countrymen). In the United States, as in most other countries, foreign policy (and especially trade policy) remain the preserve of the executive, and Congress has far less opportunity for input. Trade agreements are typically subject to a single, up-or-down vote, with no opportunity to amend specific provisions. Unlike domestic regulations that can easily be overridden by congressional statute, international agreements have an equal status to statutory law (and indeed, in several countries, treaties enjoy a higher status).

80. See Kalderimis, *supra* note 23, at 343 (arguing that the WTO lacks the “social legitimacy” to act in regulatory matters on behalf of a diverse global community); McGinnis & Movesian, *World Trade Constitution*, *supra* note 5, at 564 (“If the WTO were to assume a regulatory function, its legitimacy problem would be far more acute. Quite simply, there is no global demos.”).

81. See Kalderimis, *supra* note 23, at 343. See generally H.L.A. HART, *THE CONCEPT OF LAW* 79–124 (2d ed. 1994) (distinguishing between primary and secondary norms and arguing that instantiation of the latter without agreement on the former is fundamentally illegitimate).

82. McGinnis & Movesian, *Against Global Governance*, *supra* note 23, at 355.

83. *Id.* at 358. The fact that such deals would be subject to the consensus requirements of the WTO provides no assurance that any such consensus among national representatives is actually reflective of the interests of the broader publics in whose name they speak. *Id.* at 357–58.

policy. Transparency has never been the norm at the WTO, and participation by civil society organizations is virtually non-existent.⁸⁴ The single-undertaking, package deals typical of trade rounds make logrolling a necessity.⁸⁵ The complex backroom deal-making required to reach agreement also makes it especially difficult to track hidden (possibly last-minute) bargains. Yet, once enacted, such bargains are difficult to revise; the consensus principle on which the WTO operates virtually ensures regulatory lock-in because a single nation can block attempts to revisit the issue.⁸⁶

The WTO's consensus requirement also encourages deliberately ambiguous compromises such that the contents of which can be selectively advertised by politicians to their constituents.⁸⁷ This combination of fuzzy language and package deals makes it hard to keep track of who is getting what from where. This disadvantages nations with limited resources and hinders efforts to ensure democratic accountability in general. The democratic deficit inherent in international lawmaking is further exacerbated by the use of streamlined domestic procedures to implement trade agreements, such as the U.S. "fast track" authority, which significantly impairs the opportunity for legislative oversight.⁸⁸

Under the GATT's original focus on trade liberalization, these shortcomings did not arise. By limiting its remit to "negative integration" through prohibitions on trade barriers and progressive opening of markets, the GATT ensured mutually beneficial welfare gains.⁸⁹ The reciprocal basis on which such trade liberalization proceeded helped to blunt protectionist lobbies by pitting exporter interests against them. Moreover, far from enabling "regulatory capture," trade liberalization is aimed at *eliminating* regulatory barriers.⁹⁰

Under these conditions, GATT's functionalist traditions—privileging insider dealings over transparency and democratic input—

84. See Keohane & Nye, *supra* note 59, at 270–72.

85. Trade rounds have varied as to the degree to which all agreements reached are subject to the single-undertaking rules. However, at least the core tariff bindings have been consistently subject to this rule of multiple reciprocal tradeoffs negotiated multilaterally and agreed to collectively.

86. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 358.

87. See generally Holmes, *supra* note 19, at 65; Petersmann, *supra* note 6, at 124.

88. McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 540.

89. Petersmann, *supra* note 6, at 112.

90. See McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 544–48.

aroused little concern. Giving trade experts carte blanche to engage in backroom horse trades was seen as advancing enlightened technocratic policy.⁹¹ In the long run, the theory of comparative advantage ensured that trade liberalization would benefit all participants, while the principle of reciprocity facilitated the equitable distribution of short-term sacrifices. Thus, the very structure of the GATT system ensured mutually beneficial outcomes even in the absence of democratic inputs or external monitoring. Furthermore, core principles of GATT such as MFN, national treatment, and progressive tariffication helped to promote transparent outcomes even if the GATT process itself remained shrouded in non-transparent dealings.⁹² Similarly, neutralizing the grip of protectionist lobbies arguably served to facilitate democratic choice within individual member states.⁹³ Even the seemingly anti-democratic mechanism of “fast track” legislation can be defended on democratic grounds as a necessary safeguard against protectionist meddling.⁹⁴

However, a succession of GATT rounds has already plucked most of the low-hanging fruit among possible trade concessions. Liberalization increasingly involves painful sacrifices for which trade concessions alone sometimes prove inadequate to compensate. As tariff levels have come down dramatically, attention has also shifted to non-tariff barriers. Defensive measures to control such barriers often entail sanctioning limited forays into regulatory harmonization. Furthermore, as trade continues to integrate the global economy, demands for global regulation have swollen. For all of these reasons, the WTO has increasingly moved beyond GATT’s focus on “negative” trade liberalization to encompass a more robust regulatory agenda.⁹⁵

This transition from negative to positive integration threatens to undermine the natural balance and self-regulatory features of the GATT process. So long as trade negotiations focused solely on eliminating tariffs, such talks could be safely delegated to trade experts,

91. Petersmann, *supra* note 6, at 112; see Keohane & Nye, *supra* note 59, at 267–68.

92. McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 547–48. Most-favored nation and national treatment function as non-discrimination rules, ensuring equal treatment among members states. Tariffication consists of converting quotas and covert barriers into more a transparent form of trade barrier—tariffs—which can then be more easily targeted by anti-protectionist lobbies. McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 548.

93. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 356; Petersmann, *supra* note 6, at 117.

94. McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 542.

95. See generally Kalderimis, *supra* note 23, at 316–38 (providing multiple examples).

primarily representing producer interests, whose reciprocal concessions could be relied on to advance global welfare. With regulatory harmonization on the table, the prospect of reduced global welfare and covert protectionism becomes a real concern. Moreover, as the ambit of global trade law expands to impinge on a broader array of policy concerns, the set of constituent interests that must be accounted for is no longer limited to those of trade ministries and manufacturers.⁹⁶ The democratic shortcomings of the WTO have, thus, become much more objectionable.⁹⁷

To his credit, Guzman recognizes the need to reconfigure his expanded WTO to address non-trade concerns. However, his solution—forming other specialized departments staffed by technocrats—seems inadequate.⁹⁸ The same democratic objections would remain applicable to policymaking by insiders whether drawn from trade ministries or from any other branch of government.⁹⁹ Conversely, more ambitious “stakeholder” or “civil society” models for institutional reform present their own democratic flaws, in that they would likely privilege “Northern” (rich country) viewpoints over “Southern” perspectives.¹⁰⁰

In any case, procedural reforms to ameliorate the problems of democratic input and transparency can only go so far. Even if the WTO were to take into account the full range of relevant perspectives, the temptation for regulatory policy to be subverted to mercantilist ends would remain of concern.¹⁰¹ The tangible, bottom line effects of trade

96. Regulatory harmonization can impact a broad gamut of domestic actors having little or no direct connection to trade. Unlike tariff policies, which primarily affect input prices, regulatory policies can affect the ability of ordinary citizens to engage in economic and non-economic activities on many levels. Cf. Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back*, 71 U. CHI. L. REV. 21, 21 (2004) [hereinafter Dreyfuss, *TRIPS—Round II*] (describing how “the free traders who negotiated the GATT worked in an environment in which the core concern, reducing market barriers, was viewed as producing . . . unmitigated welfare gains [and thus] were not likely to appreciate the social importance, in TRIPS, of balancing proprietary interests against public access needs”).

97. See Petersmann, *supra* note 6, at 117–18; McGinnis & Movsesian, *World Trade Constitution*, *supra* note 5, at 564.

98. Guzman also tentatively raises the possibility of enabling amicus briefs to be submitted in the WTO dispute resolution process, which could help broaden input into judicial decisions, but would do nothing to widen the input into regulatory policymaking.

99. See *supra* notes 75–78 and accompanying text.

100. See Shaffer, *supra* note 77, at 62–74 (describing how the move to a “civil society” model would privilege wealthy “Northern” non-governmental organizations (NGOs) that have superior resources and organizational abilities as compared to their “Southern” counterparts).

101. Cf. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94

policy may trump other regulatory concerns that have an importance that is harder to quantify in monetary terms. Trade also commands the attention of powerful business interests that (despite formal equality) will likely retain readier access to policymakers rather than other lobby groups. So long as the package deals negotiated under Guzman's "Mega Rounds" remained dominated by trade concerns (or are perceived to), the tendency to view their contents through the lens of trade interest would be hard to overcome.¹⁰² Regulatory bargains born of strategic linkage could thus facilitate mercantilist aims and private rent seeking to the global detriment.

III. EVALUATING TRIPS: A TEST CASE FOR LINKAGE

Given their apprehensions about regulatory bargaining, it comes as no surprise that McGinnis and Movsesian have opposed Guzman's proposal for expanding linkage.

Interestingly, however, McGinnis and Movsesian do not appear to regard TRIPs as an example of the sort of regulatory abuses of which they warn. They suggest that the "danger of amoral wealth transfers is different with respect to intellectual property than with respect to other substantive regulation."¹⁰³ However, a plausible case can be made that TRIPs, in fact, exemplifies the subversion of international lawmaking that McGinnis and Movsesian predict generally. There is certainly ample reason for concern that the regulatory bargain struck in TRIPs was less than optimal. Moreover, the negative fallout from TRIPs arguably extends beyond the confines of the Agreement itself. To the extent that these concerns are valid, TRIPs may not be the model of successful linkage that Guzman assumes, but rather the contrary.

Much ink has been spilled elsewhere debating the pros and cons of TRIPs. Although most would agree that—at least in the short-term—TRIPs largely inures to the benefit of the developed world at the expense of developing nations,¹⁰⁴ there is no consensus as to whether

AM. J. INT'L L. 478, 479 (2000) ("No matter how adroitly these two sets of norms are reconciled in theory . . . forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg.").

102. Cf. Leebron, *supra* note 8, at 25–26 ("Linking disparate issues into a single regime also poses the risk that the policy goals of one of the issue areas will predominate, so that the goals of one are effectively sacrificed to the other. This is a particular danger where . . . the institutional structure or bureaucratic players favor one set of policy goals over another." (footnotes omitted)).

103. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 359.

104. See Yu, *supra* note 2, at 379–386. But see Edmund W. Kitch, *The Patent Policy of*

Northern gains outweigh Southern losses. In other words, whether the world as a whole has emerged better off as a result of the regulatory harmonization of IPR that TRIPs imposes remains unclear.¹⁰⁵ The relevant calculus goes well beyond balances of trade. Intellectual property rights affect a broad range of domestic actors who may have nothing to do with global commerce. Economists struggle as it is to model the optimal level of intellectual property protection within the confines of a single domestic system.¹⁰⁶ Performing such an assessment in the international sphere across a diversity of national systems with differing patterns of economic activity, development, and technological advancement perhaps amounts to a fool's errand.¹⁰⁷ Therefore, any conclusions on this score must be regarded as tentative and contingent. That being said, there are two different issues that must be addressed: First, is some harmonization of IPR better than no harmonization? And second, if so, did TRIPs arrive at the right level of harmonization? In other words, does TRIPs put in place a level of IP protection that ensures an optimal balance between innovation and monopoly power?¹⁰⁸

On the first question, the answer appears to be a definite "maybe." On their face, IPR constitute monopoly barriers in restraint of trade. They also restrict access to technology and inhibit the free flow of information. Somewhat paradoxically, however, a plausible case to be made is that all of these problems were worse in the pre-TRIPs world of inadequate IP protection. The lack of effective IPR enforcement in many countries deterred both IP exports and foreign investment, inhibiting global integration and the dissemination of technology. To the extent that one regards globalization as a good thing, harmonization of IPR may be credited with overcoming obstacles that stood in its way.

Intellectual property rights also serve to promote innovation, a public good that benefits the world as a whole. Preventing free riders from engaging in sterile copying of IP resources may be necessary to

Developing Countries, 13 UCLA PAC. BASIN L.J. 166 (1994) (arguing that TRIPs was in the developing world's economic self-interest).

105. It is also necessary to distinguish between short-term and long-term costs and benefits to provide a full accounting. The discussion that follows represents a simplified version of the underlying economics.

106. See MASKUS, *supra* note 23, at 28–33.

107. See *id.* at 33–35; Correa, *supra* note 48, at 209 ("The available evidence clearly suggests that the role of IPRs vary significantly in accordance with productive structures and levels of development.").

108. A third issue one could raise is whether TRIPs belongs in the WTO. However, this invites a more general debate on the institutional competence and regulatory governance that lies beyond the focus of this Article.

preserve optimal incentives for further investments in innovation. Variants on this argument focus on forms of innovation of special relevance to the developing world. Permitting IP producers protected access to enable them to profit from their innovations in developing markets provides an incentive for them to develop and to disseminate technologies tailored to the specific needs of those nations.¹⁰⁹ Harmonized IPR may also encourage technology transfers and foster indigenous innovation in the developing world, which could help reduce the current imbalance in IP production.

Against this, one could argue that IPR are just one factor influencing trade and foreign investment decisions, and that nations should be free to choose their own mix of regulatory responses to balance globalization and innovation against other priorities.¹¹⁰ Indeed, there may be a benefit to regulatory competition between nations in helping to promote more efficient tradeoffs in policymaking. Moreover, without adequate access to off-shore technologies, developing nations may arguably end up falling further behind the technological rat race. Existing IPR models offer insufficient assurance that such access will occur on affordable terms.¹¹¹ The ability to appropriate IP goods directly, whether through compulsory licenses or unsanctioned copying, may outweigh the marginal benefits that developing nations stand to gain from IP harmonization.

Moreover, regardless of the economic merits, the political reality going into TRIPs was that most developing countries remained deeply unconvinced of the value of Western IPR.¹¹² Foisting a full-fledged IP

109. Anti-malarial medications are often cited as an example of a product need that Western pharmaceutical companies have ignored because of a lack of market incentives. Some have argued that this market failure arises from the absence of effective patent protection for pharmaceuticals in nations suffering from malaria; thus, the implementation of TRIPs may alleviate the problem. See MASKUS, *supra* note 23, at 156. However, patent rights are not enough to create a market: there must also be the means to pay for medications in sufficient quantity to offset development costs.

110. Cf. Correa, *supra* note 48, at 209 (arguing that “in the area of intellectual property ‘one size does not fit all’”).

111. In theory, since IPRs are territorial rights, IP producers should be able to engage in price discrimination to sell their products to developing world customers at affordable rates without undercutting their rich world markets. Yet, market imperfections stemming from a fear of reimportation, inadequate returns sufficient to offset the costs of overseas marketing, or simple inertia may stand in the way. Accordingly, some form of compulsory licenses may be necessary to bridge the gap. See Netanel, *supra* note 63, at 322–28.

112. See Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”?* A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L & COMP. L. 307 (1996). To

regime upon them in exchange for unrelated trade concessions creates a kind of regulatory non-sequitur: Such countries become responsible for enforcing a set of regulatory norms that have no intrinsic *raison d'être* except as a quid pro quo.¹¹³ IP protection is not cheap.¹¹⁴ Establishing a functioning patent system, in particular, requires a specialized, technical staff.¹¹⁵ Southern resentment of such burdens as Northern impositions (however, fairly compensated in the bigger scheme) is unavoidable and may lead to broader perceptions of illegitimacy directed against the WTO. The lack of any organic commitment to enforcing such norms can set up a dynamic of either systemic transgressions and hence future trade friction, as has been the case with China¹¹⁶ or, perversely, *over-*

the extent IPR existed in Southern legal regimes pre-TRIPS, they often sprang from radically different premises. *See, e.g.,* Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT'L & COMP. L. 785, 786–87 (2003) (describing protection of folklore and traditional knowledge enacted under auspices of the African Intellectual Property Organization).

113. One can imagine, for example, a court in a hypothetical Central American country being presented with a novel question of patent law under that nation's freshly minted patent statute. Obligated to inquire into the underlying purpose of the patent system to resolve an ambiguity, the court is told that the purpose of protecting patents is to ensure access to Yankee markets for the local banana industry. Where does one go from there?

114. PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 147 (2002) [hereinafter DRAHOS & BRAITHWAITE, INFORMATION FEUDALISM] (“Developing nations would have to find tens of millions of dollars to set up the infrastructure of intellectual property protection . . . that would largely service the needs of foreign rights holders.”). Some of this expenditure can be recouped through user fees, but only at the risk of making the acquisition of IPR prohibitively expensive for anyone other than rich multinational companies (i.e., effectively denying local actors access to IP protection in their country—discriminatory pricing by nationality being prohibited under TRIPS).

115. One could, of course, piggyback on the patent prosecution efforts of other nations, on the assumption that most applicants will also have sought patents elsewhere. However, such attempts to function on the cheap invite abuses by applicants and raises the potential of over-enforcement. *See* James Love, *Access to Medicine and Compliance with the WTO TRIPS Accord: Models for State Practice in Developing Countries*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 77 (Peter Drahos & Ruth Mayne eds., 2d ed. 2002).

116. From a Northern standpoint, China represents the most glaring example of a “rogue nation” perceived to systematically flout IPR. Yet, such transgressions are entirely predictable. The absence of any indigenous tradition of intellectual property (and indeed a cultural tradition that values copying) arguably renders the whole project illegitimate in the eyes of the Chinese public. *See generally* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995) (describing intellectual tradition in China based on reverence for and imitation of ancient “classics”). Even assuming complete good faith on the part of the Chinese government, systemic under-enforcement of IPR in China could thus be expected.

enforcement due to unfamiliarity with permissible exceptions¹¹⁷ and/or capture by multinationals of the new-fledged IPR regimes;¹¹⁸ all of which can fuel further indigenous resentment. So long as IPR remain an alien graft upon the body of indigenous law, the prospect of their successful implementation, thus, remains problematic.¹¹⁹

On the other hand, IP harmonization cannot be viewed in isolation. By the time the Uruguay Round began, the open appropriation of IP goods and, in particular, blatant forms of piracy and counterfeiting had grown into a major irritant to global trade. The United States' response of unilateral "Special 301" sanctions in retaliation for such IP "theft" had engendered further bad will.¹²⁰ A multilateral agreement offered the advantage of disciplining these interventions and defusing future conflicts.¹²¹ Yet, WIPO had proven incapable of reaching a consensus on a baseline IPR agreement. Meanwhile, agricultural and textile protection of rich world markets had stubbornly resisted prior trade liberalization efforts. It was unclear if the South had enough bargaining clout in purely trade terms to overcome that resistance. Whatever the merits of IP harmonization on its own, one could argue that TRIPs filled a necessary function in the political economy of global trade negotiations without which the WTO itself might not have been achieved. On this view, a case can be made that IP harmonization was imperative on political grounds and that the South had just as much to gain from linkage as the North.

Assuming this was so, it brings us to the second question: Did TRIPs get the level right? Too much IP protection can deter innovation, obstruct the free flow of information, and lead to other

117. See Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 25 (noting that TRIPs does not catalog permissible user rights retained under its general rubric, thereby raising the risk that a literal incorporation of its prescriptions regarding IPR without mention of such exceptions would lead to a higher level of protection than that in the United States).

118. See DRAHOS & BRAITHWAITE, *INFORMATION FEUDALISM*, *supra* note 114, at 204–05.

119. See RICHARDS, *supra* note 79, at 9 (noting problems with interpretation and applications of externally imposed IPR); Netanel, *supra* note 63, at 274 (describing problems with "legal transplants"). H.L.A. Hart's account of primary norms (i.e., acceptance of the *idea* of intellectual property) serving as a prerequisite before secondary norms (i.e., the terms of a particular IPR regime) can have any meaning seems apposite. HART, *supra* note 81, at 79–124. I am grateful to Adam Mosoff for this point.

120. See MASKUS, *supra* note 23, at 1.

121. See Adronico Oduogo Adede, *Origins and History of the TRIPS Negotiation*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY*, *supra* note 30, at 23, 31; cf. Leebron, *supra* note 8, at 26 (noting that "linkage will often be preferred to unilateralism").

inefficiencies associated with monopoly power.¹²² Too little protection would also detract from innovation and perpetuate the imbalances that preceded TRIPs (albeit in reduced form) to the extent that developed nations continued to exceed the floor of IPR minima that the Agreement established.¹²³ Again, a definitive assessment of optimal IPR levels defies current economic capabilities. Nonetheless, a number of circumstantial elements suggest that TRIPs erred on the high side; that is, it set mandatory minimum levels of IPR that conferred more power to IP producers than might have been warranted.

First, the fact that TRIPs amounts to an upward harmonization, imposing essentially rich world IP standards on developing nations, appears problematic. A number of commentators have argued that IP standards in developed nations, especially in the United States, have become inflated in recent years, reaching excessive levels of protection.¹²⁴ Therefore, these standards are already suspect in the eyes of many.¹²⁵

Even if such standards were appropriate for rich countries, expanding IPR to include developing nations would, on its face, seem to warrant a reduced level of protection overall. Broadening the market protected by IPR makes an expanded source of rents available to IP producers. In the absence of increased competition, this would reduce the time required to ensure an adequate return on their investments.

122. See, e.g., Netanel, *supra* note 63, at 222 (noting that “copyright may sometimes impede democratization unless substantial limits are placed on copyright holder rights”).

123. Referring to an overall “level” of IP protection amounts to an oversimplification. Not only must IPR be separated into the different regimes, copyright, patent, trademarks, etc., but also the cluster of rights and exceptions both as to the scope and the duration of protection granted in each individual regime represents individual variables in which its various permutations must be considered separately to model the effects of a particular IP regime.

124. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 242–67 (2003) (Breyer, J., dissenting) (criticizing the extension of the copyright term as exceeding any plausible incentive-based limit); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) (questioning the need for property rights in a cyber-connected society); Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business*, 16 SANTA CLARA COMPUTER & HIGH TECH L.J. 263, 274 (2000) (questioning the value of business method patents and critiquing the general trend in IP law toward excessive protection without any underlying rationale); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999) (critiquing excessive propertization of trademark law); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997).

125. See MASKUS, *supra* note 23, at 65–66 (arguing that the U.S. intellectual property “regime has become overly protectionist by almost any utilitarian standard,” and that “it seems unwise to advocate the exportation of such protection to developing nations”).

244 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2

Because IP producers are overwhelmingly concentrated in rich countries, such competition is unlikely to arise. Instead, bringing developing nations into a global IP regime gives IP producers access to essentially captive markets. Therefore, at least for products developed for a worldwide market, an equivalent incentive to innovate could be obtained at reduced levels of IP protection.¹²⁶

Notwithstanding the overall logic of lower protection, IP producer nations have a vested interest in moving standards upward. Because IP exports externalize the losses from deadweight monopolies to purchasers abroad while internalizing the benefits as a positive balance of trade, producer nations might rationally pursue higher levels of protection in a global IP regime than they would otherwise opt for in a purely domestic system.¹²⁷ Under such conditions, IP importers (for the most part in the South) would end up subsidizing the added costs of such supra-optimal protection.

Assuming *arguendo* that TRIPs represents such a supra-optimal outcome, the fact that developing nations received offsetting compensation in the form of agricultural and textile concessions hardly rectifies this fundamental imbalance. Trade concessions, even if unilateral, generally benefit both the recipient and the grantor alike because trade protection is fundamentally inefficient.¹²⁸ By contrast, excessive IP protection can hurt all sides. Developing nations, as IP importers, emerge the most visibly disadvantaged, because they are forced to pay higher rents for longer periods. To the extent that Southern nations have traded away access to technology for textile and agricultural markets, the long-term implications of this bargain are particularly troubling. As Rochelle Dreyfuss has pointed out, technology is a cumulative enterprise and the developing world risks falling further and further behind, stuck in a neo-colonial trap as producers of primary goods and basic commodities.¹²⁹

126. For products specifically targeting the needs developing nations, the opposite might apply. Because poorer nations may pay lower rents, higher levels of protection might be needed to ensure an adequate return. Nonetheless, this special case hardly undermines the economic logic of reduced protection. Instead, the problem can be tackled through *sui generis* solutions. An example of the latter would be recent proposals in the United States to offer extended patent protection on *existing* drugs as an incentive for pharmaceutical companies to invest in risky and potentially unprofitable safeguards against bioterrorism. See Marc Kaufman, *Bioterrorism Response Hampered by Problem of Profit*, WASH. POST, Aug. 7, 2005, at A5 (describing proposal for “wildcard patents”).

127. Guzman, *supra* note 27, at 316.

128. See Bhagwati, *After Seattle*, *supra* note 7, at 62 n.1.

129. Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 28–30 (condemning TRIPs as

Even rich countries may emerge worse off overall if protection levels rise too far. Not all monopoly deadweight losses can be externalized; some remain the burden of domestic consumers and others may be re-internalized to the extent that the costs of IPR enforcement in developing nations hurt collateral U.S. interests.¹³⁰ Moreover, as existing IP holders gain undue leverage to stifle secondary inventors/creators, this will hinder innovation rather than foster it.¹³¹

To explain why rich country negotiators would pursue IP standards antithetical to their own national interests, one must consider the political economy underlying such negotiations. TRIPs did not emerge on the Uruguay Round agenda out of an abstract concern over fostering global innovation.¹³² Rather, TRIPs was negotiated at the behest of powerful IP producer interests, primarily in the United States, Europe and Japan.¹³³ These industries mobilized concerted lobbying efforts to propose specific provisions that advanced their corporate interests.¹³⁴ Naturally, such lobbying favored stronger protection designed to maximize monopoly rents tied directly to their own bottom lines.¹³⁵

While producer lobbies have traditionally enjoyed privileged access

resting on an “unconscionable bargain” that condemns developing countries to a future of industrial obsolescence).

130. An example of such potential re-internalization of costs could have arisen in the recent AIDS pharmaceutical showdown had the hardline stance of Big Pharma prevailed and an entire continent succumbed to the pandemic. The long-term costs of the socio-economic disruption and political instability that would have resulted could easily have outweighed the value of the patent rights being contested. See Francis Mangeni, *Implementing the TRIPS Agreement in Africa*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY*, *supra* note 30, at 219, 230 (“Impoverishing and leaving destitute entire populations in developing countries is economic suicide for developed countries and industry lobbies.”).

131. See Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 22.

132. See Petersmann, *supra* note 6, at 120–22 (arguing that TRIPs was not based on any serious cost-benefit analysis of global welfare effects but was rather a political deal brokered on behalf of IP producers).

133. BRAITHWAITE & DRAHOS, *BUSINESS REGULATION*, *supra* note 3, at 63. The strongest proponents of globalized IPR were centered in the software, content (film and music), and pharmaceutical industries. One commentator goes so far as to claim that “[i]n effect, twelve corporations made public law for the world.” SUSAN SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96 (2003); see also Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1, 19 (2004).

134. See Yu, *supra* note 2, at 405–06 (citing SELL, *supra* note 133, at 8).

135. Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 *INT’L AFFAIRS* 15, 26 (2001) (describing TRIPs as “turn[ing] the WTO into a royalty-collection agency” for the benefit of IP producers).

to trade negotiators,¹³⁶ WTO negotiations are difficult for consumer advocates and other non-producer interests to monitor, let alone influence. Meanwhile, opposition from developing nations could simply be “bought off” by trade concessions. In the absence of a counterbalancing impetus to safeguard the public domain or legislate in favor of user rights, the provisions of TRIPs focused primarily on defining the rights of IP owners, rather than on their limitations.¹³⁷

That TRIPs was negotiated in the context of a global trade agreement (as opposed to a stand-alone treaty on intellectual property) may have also encouraged mercantilist biases of negotiators to supplant a broader reckoning of national interest.¹³⁸ Given the powerful comparative advantage rich countries enjoy in IP, harmonization promised to unlock new export markets and to ensure a more favorable balance of trade. Such concrete, short-term objectives could be expected to eclipse more nebulous, fundamentally unquantifiable concerns over optimizing innovation.¹³⁹

Furthermore, IP treaties (of which TRIPs is no exception) typically act as a one-way ratchet, whereby a minimum floor of IPR becomes entrenched without any corresponding ceiling.¹⁴⁰ There is, thus, a natural tendency for standards to creep upwards over time as rich country negotiators agree to match each other’s highest levels. While regulatory harmonization is often justified as preventing a “race to the bottom,” the dynamics of international harmonization risk the opposite danger, namely a “race to the top.” IP harmonization may, thus, offer a means for IP producers to enact an end-run around domestic opposition, using international treaties to achieve a level of protection they could not attain by domestic means. Indeed, the mere prospect of

136. Shaffer, *supra* note 77, at 52–54; Tarullo, *supra* note 101, at 488.

137. Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 25–28; BRAITHWAITE & DRAHOS, *BUSINESS REGULATION*, *supra* note 3, at 139.

138. See Reichman, *supra* note 48, at 456 (“[T]he big multinational firms with greatest access to USTR keep on pressing for ever higher levels of intellectual property protection, regardless of the costs, and few have bothered to ask the small and medium-sized firms that actually drive the U.S. economy whether they would benefit or suffer from such proposals.”).

139. See Netanel, *supra* note 63, at 218–20 (describing how TRIPs epitomized “a dramatic move to reconceptualize” intellectual property as a trade issue, “riding roughshod over venerable copyright values and the public interest in the process”); cf. Leebron, *supra* note 8, at 26 (describing how linkage can lead to issue biases). Such myopic tendencies in policymaking are consistent with studies in psychology that demonstrate that people assign an undue salience to concrete, immediate events that outweigh more important, but distant goals.

140. See Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 22.

international harmonization has been used to justify increased domestic protection.¹⁴¹ As a result, IP agreements have led to higher IP standards, even in rich countries.¹⁴² Yet, once entrenched, these higher standards are difficult to revise downward, even when conditions might otherwise justify pulling back. Over time, one can expect IPR standards to continue to migrate toward supra-optimal levels.¹⁴³

Therefore, international harmonization of IPR would appear to raise the sort of public choice hazards of which McGinnis and Movsesian warn. A mercantilist focus may distort a broader weighing of national interest. Producer lobbies can unite around their shared interest in regulatory protectionism,¹⁴⁴ while the opposing forces are weak and fragmented, with domestic opposition unable to mobilize effectively at the international level and international resistance easily overcome by logrolling. Finally, regulatory “lock-in” ensures that standards follow a one-way ratchet upward towards greater protectionism, leaving no discretion to revise standards downward to meet changing needs. In theory, such regulatory flaws could manifest even in the absence of a direct link to trade. However, without linkage, IP harmonization would never have gotten off the ground.

Other features specific to the negotiating history of TRIPs reinforce the suspicion that the Agreement may have been the product of a flawed regulatory process. Although the United States had long sought to make IPR part of global trade negotiations and adopted unilateral measures designed to force the issue,¹⁴⁵ the original Uruguay Round

141. See *Eldred v. Ashcroft*, 537 U.S. 186, 205–08 (2003) (finding that the United States needs to “play a leadership role” in setting international copyright standards); H.R. 374, 104th Cong. (1st Sess. 1995) (same for trademark law).

142. There is some tendency to harmonize upwards toward the highest common denominator. Even without an actual agreement, domestic IP lobbies can promote higher standards *pour encourager les autres* (i.e., to set a good example). See 537 U.S. at 198, 205–08.

143. The optimal level of IP protection varies as technological and industrial factors evolve. Ideally, the precise mix of rights, exceptions, and limitations in an IP regime should be adjusted over time to maintain a dynamic equilibrium between incentives and monopoly losses. Because international treaties permit only upward variations and then lock in the higher standards through subsequent agreements, the ability of domestic regulators to maintain an optimal balance would be gradually foreclosed. See Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 22.

144. The software industry has recently had something of a change of heart regarding IP protection, at least within the United States, with several leading companies expressing concerns that software and business methods patents have gotten out of hand. However, most software firms continue to support expanded IPR abroad.

145. Efforts to legislate IPR into GATT dated back to Tokyo Round when anti-copying provisions had been proposed and rejected. In 1988, the U.S. Congress designated inadequate IP protection as a form of “unfair trade” subject to unilateral retaliation under

agenda set out a rather modest IP agenda for discussion.¹⁴⁶ Instead, the ambitions of IP proponents appear to have expanded as the Round progressed. An initial focus on preventing trading of counterfeit goods evolved into proposals for a full-blown IPR regime with detailed standards governing all of the major categories of intellectual property.¹⁴⁷ Moreover, while the original agenda contemplated both creating limits to IPR as well as establishing a floor of a minimum protection, the end product contained only the latter. Rich countries dominated the drafting of the final agreement and were able to shape it to their interests.¹⁴⁸

Furthermore, the linkage attached to TRIPs was not limited to agricultural and textile concessions. As the Uruguay Round advanced, the United States made it clear that the entire package of agreements being negotiated in the Round hinged on the United States achieving its IPR goals and threatened to unilaterally retaliate against individual hold-outs.¹⁴⁹ Accordingly, some commentators have argued that there was a coercive element to the TRIPs negotiations in which developing nations were bullied into a deal against their better judgment.¹⁵⁰

Finally, it is worth recalling that the Uruguay Round represented a quantum leap in global trade law. TRIPs represented only one of several landmark agreements ultimately adopted, not the least of which was the establishment of the WTO itself.¹⁵¹ Many trade delegations, particularly those from developing nations with limited resources, may

section 301 of the 1971 Unfair Trading Act (section 301). *See* RICHARDS, *supra* note 79, at 125.

146. *See* World Trade Organization, Punta del Este Declaration, Draft Ministerial Declaration of 20 September 1986, at 7–8, WT/MIN(86)/W/19 (establishing as an agenda item for Uruguay Round the “aim to clarify GATT provisions and elaborate as appropriate new rules . . . to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods”); *see also* DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 11 (2d ed. 2003); Adede, *supra* note 121, at 25 (arguing that the “inclusion of TRIPS on the agenda was a last-minute political compromise [which] ‘featured almost as a footnote on a crowded agenda . . . and it was uncertain whether that contentious item would survive the end of the round’”).

147. GERVAIS, *supra* note 146, at 10–26 (recounting the history of TRIPs negotiations).

148. *See* Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT*, *supra* note 115, at 167–69.

149. *See id.* at 169–70; *see also id.* at 178 (noting that the European Union also applied its own unilateral pressure).

150. *See* Drahos, *supra* note 148, at 169–172; Dreyfuss, *TRIPS—Round II*, *supra* note 96, at 29; Yu, *supra* note 2, at 373–75 (describing “coercion” narrative).

151. For a partial list, *see supra* note 3.

have been unable to keep track of the evolving provisions of TRIPs.¹⁵² In addition, because of the pressure to conclude an IP agreement, troublesome issues were resolved through compromises that relied on ambiguous language to finesse substantive disagreements.¹⁵³ Most of the ambiguities concern exceptions to IPR; the rights themselves are clearly defined. Some commentators have argued that TRIPs amounted to something of a swindle foisted by the North on an unsuspecting South.¹⁵⁴ Such accusations of bad faith have intensified as rich nations have failed to make good on their promises of offsetting agricultural and textile liberalization.¹⁵⁵

In any case, such ambiguities represent unfinished arguments that continue to fester as a source of acrimony. IP producers stand accused of twisting TRIPs' language to achieve an *in terrorem* effect.¹⁵⁶ More generally, the disagreements reflect a fundamental gulf in conceptions of IPR whereby one man's piracy is another's intellectual commons. The AIDS pharmaceutical debacle provides a vivid example of the heated rhetoric such conflicting perspectives can generate. Where Big Pharma saw the wholesale appropriation of their property, others saw a necessary humanitarian response to a global health crisis.¹⁵⁷

All of these reasons underscore the concern that, far from being an unqualified success, the use of linkage to bring TRIPs into the WTO resulted in a flawed regulatory bargain that might have done more harm than good. Forcing an issue into the WTO on which its membership had not yet achieved anything close to consensus might ultimately have been counterproductive.¹⁵⁸ Admittedly, it is difficult—and perhaps premature—to judge. Some of the criticisms of TRIPs overstate the case. TRIPs was essentially completed in final form at least one year

152. See Yu, *supra* note 2, at 375–76 (describing “ignorance” narrative); see also Shaffer, *supra* note 77, at 44–45 (noting that many smaller developing nations cannot afford more than a skeletal staff—sometimes only a single diplomat—to represent them in the WTO).

153. DRAHOS & BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 114, at 139.

154. See Yu, *supra* note 2, at 375–76 (describing “ignorance” narrative).

155. See *id.*

156. See Reichman, *supra* note 48, at 452–54 (describing “pound of flesh mentality”).

157. The AIDS pharmaceutical dispute focused on ambiguities such as the provision in TRIPs governing the use of compulsory licenses, with disagreement as to the scope of “emergency” exception and the measures authorized thereunder. See TRIPs Agreement, *supra* note 1, art. 30.

158. Cf. Leebron, *supra* note 8, at 26 (stating that “it seems inappropriate to use linkage to create pressure to reach an agreement on a subject on which few believe there should a multilateral agreement at all”).

before the conclusion of the Uruguay Round; thus, it is difficult to argue that developing nations were railroaded into an eleventh-hour settlement. Moreover, no agreement is perfect, and TRIPs does have enough “wobble room” to potentially avert some of the worse-case scenarios.¹⁵⁹ Much will depend on the interpretations given to TRIPs’ more ambiguous provisions. The delayed implementation permitted for developing nations also means that its economic and political consequences remain largely unknown.¹⁶⁰ Moreover, far from being solely a one-way ratchet, the understanding on compulsory licensing adopted in the Doha Declaration and its sequel did affect something of roll-back, at least measured against the most maximalist interpretations of TRIPs.¹⁶¹

Nonetheless, the perception remains in many circles that TRIPs amounted to a one-sided deal forced down the throats of the developing world through a combination of false promises and coercive pressure.¹⁶² Such perceptions continue to poison negotiations over current IP issues.¹⁶³ Plans in the United States for a “TRIPs II” have been shelved in the face of Southern intransigence. Instead, the United States and the European Union have turned to bilateral agreements to implement so-called “TRIPs+” provisions.¹⁶⁴ Developing nations have pursued their own “regime-shifting” strategies to counterbalance TRIPs by building favorable IP-related norms into other international agreements.¹⁶⁵ Non-governmental organizations have also been active in fulminating against TRIPs. The AIDS pharmaceutical debacle gave

159. See Reichman, *supra* note 48, at 459.

160. Developing nations were granted a five-year delay before the obligations of TRIPs came into force, while the least developed had a ten-year phase-in that only expired this year. See TRIPs Agreement, *supra* note 1, arts. 65, 66. Under the Doha Declaration, the latter were granted an additional ten years before pharmaceutical patents had to be protected. See Helfer, *supra* note 133, at 5.

161. See generally Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 88 AM. J. INT’L L. 317 (2005) [hereinafter Abbott, *Medicines Decision*] (providing background to Doha Declaration and account of negotiating positions).

162. If anything, these critical perspectives have increased and strengthened in vehemence over time, as phase-in deadlines for implementation have begun to expire. See Helfer, *supra* note 133, at 3, 24.

163. Cf. Leebron, *supra* note 8, at 26 (noting the risk that using linkage to bring in parties hostile to a set of policy norms may undermine further development of such norms).

164. Pugatch, *supra* note 44, at 442–62 (providing empirical analysis of recent agreements).

165. See Helfer, *supra* note 133, at 55–61 (describing resistance strategies used by developing nations to generate counterregime norms in alternative fora that can be used to oppose or mitigate the effects of TRIPs).

them a golden opportunity to cast TRIPs as the ugly face of globalization run amok. Attacks on “biopiracy” also serve to highlight rhetorically the perceived one-sidedness of the IPR codified in TRIPs.¹⁶⁶ While opposition to IP harmonization was perhaps inevitable, such antagonism has been fueled by sense of illegitimacy over the process by which TRIPs came about and the narrow coterie of interests the Agreement is seen to serve.

Moreover, the bad will accumulated over IP issues has spilled over into negotiations on other trade issues. Commentators have linked the stalemate in recent trade negotiations, in part, to lingering resentment and distrust over TRIPs.¹⁶⁷ While Northern interest groups have seen TRIPs as pioneering an effective form of linkage that has inspired a myriad other “trade and” causes to attempt to copy its playbook,¹⁶⁸ Southern negotiators have adamantly refused to budge on any of them. These conflicting views of linkage contributed to the breakdown of both the Seattle and Cancún trade talks.¹⁶⁹ The WTO may, thus, be the victim of unrealistic expectations and cumulative distrust—both too little linkage as well as too much. While the factors driving these phenomena go well beyond IPR and TRIPs, at least some degree of culpability may be placed at their doorstep.

Granted, some of the bad will associated with TRIPs has to do with unfulfilled promises, as opposed to the contents of the Agreement per se.¹⁷⁰ Similarly, the heated protests engendered by the AIDS pharmaceutical crisis arguably had more to do with maximalist positions adopted by Big

166. “Biopiracy” is used as a pejorative to describe the exploitative acts of Western “bioprospectors” who convert natural resources found in developing nations—often identified by drawing on the traditional knowledge (TK) of indigenous peoples—into valuable IP products without adequately compensating the indigenous communities from which the resources were identified and/or taken. The term “biopiracy” provides a deliberate echo of the “anti-piracy” rhetoric which Western proponents of TRIPs used to mobilize support for their cause. By drawing such parallels between “Western” IP and TK, proponents of TK protection seek to assimilate the issue into the larger IPR debate. See Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 237–38 (2001).

167. See, e.g., MASKUS, *supra* note 23, at 239–40.

168. Bhagwati, *After Seattle*, *supra* note 7, at 59.

169. See *supra* notes 50–51 and accompanying text; cf. Bhagwati, *After Seattle*, *supra* note 7, at 59 (describing the “three legs” of the WTO mutating into an even more unwieldy “centipede” whose forward progress grinds to a halt).

170. Developing nations are still awaiting the liberalization in the agricultural and textile markets that they were promised in exchange for IPR. Technical assistance and technology transfers called for under TRIPs are also seen as falling short of expectations. See Yu, *supra* note 2, at 379–386.

252 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2]

Pharma and its White House allies than the intrinsic one-sidedness of TRIPs itself.¹⁷¹ Still, these later conflicts can be traced, in part, to the sub-optimal circumstances in which the TRIPs Agreement was negotiated. The complex dynamics of the Uruguay Round arguably fostered incomplete bargains and ambiguous drafting that set the stage for confrontations down the road. Such flawed compromises encouraged actors on both sides to believe that they had gotten more than was actually agreed to, thereby lending a sting of betrayal to the inevitable confrontations.¹⁷²

Perhaps some version of TRIPs was inevitable and necessary to advance global integration. But was there a better way to go about negotiating that might have led to a more congenial outcome? Guzman may be correct to argue that TRIPs could only have been achieved through linkage. However, this does not necessarily justify an unqualified endorsement of such linkage strategies. Regardless of the actual merits of TRIPs, the negative concerns and perceptions it has generated should give one pause before calling for further emulation of the formula that gave rise to it. Even if TRIPs is not as bad as some claim, other regulatory agreements born of linkage may be worse.¹⁷³ The risk of linkage is not only that flawed agreements might result, but also that a cumulative legacy of distrust and resentment will prevail.¹⁷⁴ The potential paralysis that proliferating linkage claims could induce must be reckoned with as well.

Ultimately, some forms of regulatory linkage may be necessary to continue the processes of economic liberalization and global integration that the GATT pioneered. However, left unregulated, linkage strategies may do more harm than good. The general presumption should be that linkages to advance regulatory harmonization are disfavored.¹⁷⁵ Without better assurances, such strategies arguably should be discouraged. This begs the question of whether some form of formal controls on linkage should be adopted, either substantive or procedural in nature.

171. See Reichman, *supra* note 48, at 452–56.

172. *Cf. id.* at 460 (“The hard truth is that these same governments compromised far more, and obtained far less, than the various trade associations can afford to admit.”).

173. There is no reason to think that TRIPs, coming as but the first in what might be a long line of regulatory harmonization measures, has charted the farthest depths possible of abusive linkage.

174. See Tarullo, *supra* note 101, at 494 (describing the “system costs” of linkage in causing further “strain on the legitimacy and institutional integrity of the WTO itself”).

175. See Leebron, *supra* note 8, at 26.

IV. CONTROLLING LINKAGE: SOME POSSIBLE APPROACHES

A. *Just Say NO: A Total Ban on Linkage*

Perhaps the simplest solution would be to abolish linkage strategies. This approach is advocated by McGinnis and Movsesian who disapprove of regulatory harmonization on principle and want the WTO to return to its core focus on trade.¹⁷⁶ They oppose linkage because it lowers the transaction costs to (bad) regulatory bargains.¹⁷⁷ As a result, they appear to favor a total ban on any form of regulatory linkage between trade and non-trade issues, whether procedural or substantive.¹⁷⁸

Their approach has the benefit of clarity. However, McGinnis and Movsesian proceed to make an exception for TRIPs, which they see as sufficiently related to trade to justify inclusion in the WTO.¹⁷⁹ Yet, as Jagdish Bhagwati has observed, if IPR qualify as “trade-related,” then almost anything can.¹⁸⁰ This points to a problem with the trade purist approach: however much one opposes linkages in general, the temptation to make exceptions remains powerful. Indeed, now that TRIPs has set a precedent, this temptation has become almost irresistible. As a practical matter, few countries could be expected to rule out future linkages entirely.

One might also question whether the WTO can continue its work of trade liberalization without incorporating some degree of linkage for at least three reasons. First, successive GATT rounds have already hit the easy targets. The main trade sectors left to be liberalized—agriculture in particular—require politically painful concessions that will not come easily. In order to pry open Northern markets for primary goods, developing nations need to have something to offer in exchange;

176. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 365.

177. Others go even further in the case of TRIPs and appear to equate strategic linkage with coercion, arguing that the “package deal” structure of the Uruguay Round meant that developing nations were “coerced” into signing the parts they did not want to get the ones they did. *See supra* notes 149–50 and accompanying text.

178. McGinnis & Movsesian, *Against Global Governance*, *supra* note 23, at 358.

179. *Id.* at 359.

180. *See* Bhagwati, *After Seattle*, *supra* note 7, at 58. An attempt to establish a “substantial relation” to trade test would parallel the U.S. Supreme Court’s efforts to supply a meaningful boundary to the Commerce Clause, a line that has proven notoriously difficult to draw. *Cf.* *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as beyond Congress’ Commerce Clause power); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the ban on guns in schools as beyond Congress’ Commerce Clause power).

regulatory harmonization is one of the few cards with which they have to play.¹⁸¹

Second, as tariff levels have come down, the WTO has been forced to police regulatory policy as an alternative source of covert protectionism. The standard setting agreements negotiated as part of the Uruguay package represent steps in this direction.¹⁸² While such purely “defensive” harmonization does not raise the same dangers as the affirmative mandates imposed by TRIPs (and thus need not be subjected to the procedural controls contemplated here),¹⁸³ not all regulatory issues can be guided by the relatively objective standards that these agreements rely on. More aggressive forms of harmonization may be sought in other areas to preemptively foreclose the prospect of unilateral protectionism.¹⁸⁴

Third, even without protectionist motives, more and more regulatory issues have impacts on trade, and vice versa. Many argue that the WTO’s very legitimacy depends on its ability to balance trade against other policy concerns in an even-handed manner.¹⁸⁵ In this respect, the case for linkage transcends individual programmatic goals. As globalization advances in an increasingly interconnected world, the need to negotiate comprehensive policy solutions makes linkage almost

181. Developing economies account for only a small share of total global gross domestic product. However, they are disproportionately dependent on agriculture and other primary goods. The unfortunate reality is that the marginal value these countries have as export markets for rich countries may be dwarfed by the political clout wielded by domestic farm lobbies. On the other hand, developing nations generally are “underregulated” by comparison to their richer peers. Such regulatory laxities are often viewed as a form of unfair trade or “social dumping” by the latter, that then seek to harmonize away the differences. Thus, a North-South exchange of trade concessions for regulatory harmonization along the lines of TRIPs may be the only way of extracting significant trade concessions from the North. Whether such deals are a good thing from the standpoint of trade liberalization depends, of course, on the nature of the harmonization.

182. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1144 (1994); Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1144 (1994).

183. See Kalderimis, *supra* note 23, at 329–31 (distinguishing between “defensive” and “progressive” harmonization).

184. See Cottier, *supra* note 21, at 221 (“[T]rade liberalization, at some point, inherently starts to require, rely upon and develop positive integration, i.e., it depends on common and shared standards.”).

185. See, e.g., *id.* at 221; Guzman, *supra* note 27, at 306–07.

unavoidable.¹⁸⁶

If strategic linkage of regulatory issues cannot be excluded entirely, could it be policed to control abuses? Ideally, one would want to devise a mechanism to channel regulatory talks to the optimal level, confining most to single-issue forums,¹⁸⁷ while permitting a chosen few to advance into multi-issue “Mega Rounds” of the sort Guzman envisions in cases in which distributional skews block a policy outcome that everyone agrees is in their long-term interest. In this way, the best of both worlds could be obtained, because linkage would be restricted to issues in which it is needed the most.

B. Mutual Gain As a Substantive Criterion

The difficulty comes in determining how such a channeling mechanism might function. The most immediate focus needs to be on restricting the agenda of future trade rounds in the WTO, because these are the fora in which cross-issue logrolling can most readily occur. The approach advocated by Jagdish Bhagwati would rely explicitly on the criterion of “mutual gain” as the prerequisite for linkage: non-trade issues could only be negotiated under WTO auspices to the extent that they promise outcomes that would benefit all participants.¹⁸⁸ His approach would, thus, bar agreements such as TRIPs that serve to bring in issues with built-in distributional skews.

Ensuring mutual gain could prevent linkage from facilitating sub-optimal outcomes. However, it is not obvious how such a requirement could be enforced. Proponents of TRIPs argued, however tendentiously, that IPR *would* benefit developing nations by spurring innovation and transfers of technology. Who is to say for sure that they were wrong? Mutual gain can be measured on many levels: micro/macro or short-term/long-term. It might be unwise to rule out

186. See Keohane & Nye, *supra* note 59, at 270–72 (arguing that linkage is necessary to address an “inherently connected” world).

187. Such forums need not be located within the WTO, as Guzman envisions with his proposed departmental structure. Regulatory issues could continue to be dealt with in such pre-existing international bodies as WIPO, the World Health Organization, UNESCO, International Labour Organization, and the various environmental fora. Only where multi-issue tradeoffs are required would the issue be transferred to the WTO for inclusion in a trade round. Such a hybrid multi-institutional structure would have the advantage of preserving the institutional capital and technical expertise of existing regimes (and to some degree insulating them from the mercantilist pressures of the WTO), while providing the option of referring certain proposals to the WTO both for bargaining purposes and, where appropriate, for enforcement under the WTO’s dispute resolution mechanisms.

188. Bhagwati, *After Seattle*, *supra* note 7, at 57–59.

potential agreements merely on the basis of distributional skews if there were assurances that mutual benefits would accrue in the long run. Indeed, even trade, Bhagwati's paragon of mutual gain, can engender short-term welfare losses as shifting markets force industrial restructuring, as he himself acknowledges.¹⁸⁹ Yet, while the long-term benefits of trade liberalization might qualify as axiomatic, the consequences of other regulatory policies are much harder to forecast.

Establishing a methodology to identify the right sort of "mutual gain" after netting all of the losses presents a daunting challenge, and Bhagwati does not attempt this. Therefore, relying on mutual gain as a substantive criterion to vet linkage claims appears somewhat impractical. While certainly a desirable goal in principle, it offers limited practical utility as a screening device.

V. A PROCEDURAL SOLUTION: PRE-COMMITMENT AS PREREQUISITE

A. *Vetting by Process*

A better approach would be procedural, rather than substantive. The idea would be to build procedural "filters" into the agenda-setting mechanism of a trade round to weed out flawed or one-sided regulatory proposals. Several commentators have proposed "constitutional" solutions along these lines, such as democratizing the WTO by opening it to participation by civil society, promoting transparency, and incorporating protections of fundamental rights.¹⁹⁰ However, whatever their intrinsic merits, such proposals face an uphill battle. Most member states of the WTO remain firmly wedded to its current intergovernmental mode of dealings and would be unwilling to relinquish further sovereignty to an organization they could not fully control.¹⁹¹

Given such constraints, the best approach may be to work sub-constitutionally within the political economy of member states alone. The general idea would be to let the political "marketplace" of member states decide which agreements offer sufficient promise of mutual benefit to justify linkage. Just as the "invisible hand" of the market

189. Bhagwati, *Symposium, supra* note 46, at 127.

190. See, e.g., Petersmann, *supra* note 6, at 122–25.

191. The enormous fuss raised over filing amicus briefs in WTO dispute resolution offers a glimpse of the determination of member states to defend their sovereign prerogatives in this regard. See generally Georg C. Umbricht, *An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO*, 4 J. INT'L ECON. L. 773 (2001) (summarizing debate).

tabulates the collective preferences of private actors to generate a wealth-maximizing solution, the collective decisions of WTO Members arguably could provide a better indicator of mutual gain than any “command and control” regime relying on substantive criteria to guide its decisions.¹⁹²

The key is to get the process right. Just as markets function best under rules that ensure an even playing field and equal access to information, the process of lawmaking must be regulated to ensure optimal decision-making. Parliamentary procedures in domestic legislatures commonly incorporate a variety of mechanisms to slow down decision-making, improve deliberation, and promote internal transparency. As noted earlier, international lawmaking not only lacks these sort of procedural safeguards but also suffers from systemic imperfections that raise additional dangers.¹⁹³ Therefore, the obvious remedy is to build safeguards into the WTO process.

Peter Drahos has written of the need to create the conditions for “democratic bargaining” over regulatory harmonization.¹⁹⁴ Drahos focuses on the conduct of the actual negotiations. However, equal attention should be paid to the process of setting the agenda.¹⁹⁵ Accordingly, in order to qualify for inclusion in a trade round, proposals for regulatory harmonization of non-trade issues should be subject to certain prerequisites designed to establish a shared “pre-commitment” among a significant subset of WTO Members. Such pre-qualifying procedures would be limited to proposals presenting the greatest danger of regulatory abuse—namely, harmonization measures containing affirmative regulatory mandates covering non-trade issues. The purpose of such procedures would be three-fold. First, they would winnow the field of candidate issues, reducing the logistical complexities of negotiating across multiple issues in a round and the opportunity for tactical abuses thereby created. Second, they would both encourage and enable a focused assessment and critique of each specific proposal,

192. See Drahos, *supra* note 148, at 162–64 (describing democracies as producing more efficient regulatory outcomes than in communist societies and extending model to democratic bargaining among sovereign states).

193. See *supra* notes 71–86 and accompanying text.

194. See Drahos, *supra* note 148, at 163–64 (describing conditions for democratic bargaining between sovereign states); see also Graeme B. Dinwoodie, *The New Intellectual Property Law System: New Actors, New Institutions, New Sources*, 10 MARQ. INTELL. PROP. L. REV. 205 (2006).

195. Cf. MUELLER, *supra* note 64, at 92–94 (describing how agenda control permits manipulation of ostensibly democratic outcomes).

providing quality control that would serve as a confidence booster before any horse trading could begin.¹⁹⁶ Third, the pre-commitment required by this “vetting” process would help to legitimize the proposal should it ultimately be adopted by demonstrating initial broad consensual support.

Adopting a set of procedural rules along these lines need not require any “constitutional” changes in the WTO. Member states could adopt such rules as an operating convention akin to the internal parliamentary rules set by each house of Congress.¹⁹⁷ They would be implemented as part of the conditions of a newly-launched trade round and could always be revised by consensus.¹⁹⁸ However, if they proved successful over time, a legitimacy norm that might acquire de facto constitutional force could emerge.¹⁹⁹

B. In Praise of Committees

In domestic parliamentary contexts, there is a similar process of vetting functions through a variety of mechanisms. The process begins when a bill is introduced. The bill must be framed as a concrete legislative proposal that could be enacted in its present form and is often subject to scope limitations and labeling requirements. Proposed legislation may then be referred to one or more committees for consideration and approval before being offered for a floor vote. Parliamentary procedures may also entail multiple “readings” of a bill before it can advance. Finally, bicameralism and executive vetoes build additional stages of review into the legislative process. These checks and balances serve to temper the pitfalls of majoritarian power by delaying impulse legislation, preventing legislative surprises, restricting logrolling, and generally encouraging an orderly process. They also provide pre-defined points of entry for external stakeholders to offer input and attempt to influence decisions. Perhaps just as important,

196. The analogy might be to a mandatory veterinary exam before the horses are put up for auction.

197. *Cf.* Ruud, *supra* note 64, at 451 (describing how the Constitution delegates to each chamber of Congress the task of establishing its own internal rules of procedure).

198. Again, the analogy would be to the rules of Congress, which are left entirely to the discretion of its Members. As has become recently apparent, even hallowed parliamentary traditions as the Senate filibuster remain open to revision upon a simple majority vote. *See* Brian McGuire, *S.D. Senator Warns Democrats Against Obstruction Tactics*, N.Y. SUN, Nov. 18, 2005, at 5.

199. An analogy here might be drawn to British “unwritten” constitutionalism, which, in principle, remains subject to the paramount supremacy of Parliament, but as a practical matter effectively constitutes a de facto set of binding norms.

such requirements serve to enhance confidence in the legislative process as a form of deliberative democracy that produces results that can be accepted as legitimate.²⁰⁰

A committee system offers perhaps the best opportunity for in-depth vetting. Committees in U.S. legislatures comprise a subset of Members, reflecting bipartisan balance, who are given continuing oversight over a pre-defined set of issues.²⁰¹ As such, they can acquire technical expertise in these issues over time and assemble a specialized staff. Committees hold hearings to gather testimony and review evidence on issues relevant to proposed legislation and issue reports summarizing their findings.²⁰² Their efforts help to build a consensus around legislative proposals.²⁰³ Finally, in order to “report out” a bill, committee members must vote in approval, bestowing their blessing of presumptive legitimacy.

The committee review process thus serves many of the pre-qualifying functions identified above. It helps to winnow the field of proposed legislation, conserving and prioritizing legislative resources. It provides quality control by ensuring that the pros and cons of a given bill are clearly identified and that obvious flaws have been vetted. And finally, committee approval represents a degree of “pre-commitment” by key legislators in that it tests the political support behind the proposal. Because committee procedures often enable minority blocking tactics,²⁰⁴ committee approval may also signify a measure of bipartisan support that confers additional legitimacy.²⁰⁵

Note, however, that these pre-qualifying functions lose their

200. See generally POPKIN, *supra* note 69, at 152–53. Cf. Dean E. Murphy, *Same Sex Marriage Wins Vote In California*, N.Y. TIMES, Sept. 7, 2005, at A14 (describing criticism of California Assembly legislators’ use of “gut and amend” tactics as subverting the normal legislative process).

201. Committees are often further subdivided into subcommittees, thereby providing yet another layer of review. For reasons of simplicity, these two levels will be collapsed into one in the following discussion.

202. See generally Alan Rosenthal, *The State of State Legislatures*, 11 HOFSTRA L. REV. 1185 (1983) (describing the “workhorse” role performed by committees).

203. See *Common Cause of Penn. v. Commonwealth*, 668 A.2d 190 (Pa. Commw. Ct. 1995) (describing consensus-building function served by committees). A bill that has undergone committee review, thus, acquires a degree of inherent legitimacy that the measures enacted solely through majority floor votes may be perceived as lacking.

204. Such minority blocking is colloquially referred to “bottling up in committee.”

205. One might also regard the bicameral structure of the U.S. Congress as constituting a second level of “committee” review. The Senate filibuster can also be seen as enforcing a heightened “pre-commitment” by requiring a supermajority of Members to allow a vote to proceed. See POPKIN, *supra* note 69, at 154–55 (describing the operation of a filibuster).

meaning to the extent that subsequent amendments to the bill materially alter its contents.²⁰⁶ Accordingly, many legislatures impose limits on floor amendments. For example, rules in the U.S. House of Representatives require amendments to be “germane.” Many bills are brought up under special rules precluding amendments entirely.²⁰⁷

Could a committee system be grafted onto the WTO treaty process? With 148 Members in the WTO, trade negotiations have grown increasingly unwieldy.²⁰⁸ The WTO already relies on “working groups” and “green room” processes to caucus and to negotiate on an exploratory basis and has various standing committees and councils charged with specific issues on a more permanent basis.²⁰⁹ Could linkage proposals be formally delegated to some such group? In fact, a committee system did function in GATT prior to 1991 to set the agendas. The Consultative Group of Eighteen (CG-18) was made up of key member states representing a broad spectrum of geopolitical interests, which by some accounts was successful in building a consensus around forthcoming trade initiatives.²¹⁰ Proposals to reconstitute it occasionally surface.²¹¹ A committee approach has also been used successfully as a consensus-building mechanism in other international contexts.²¹²

206. Cf. Murphy, *supra* note 200.

207. POPKIN, *supra* note 69, at 153–54.

208. See Keohane & Nye, *supra* note 59, at 270–72.

209. See generally WTO Charter, *supra* note 11, art. IV; Sylvia Ostry, *World Trade Organization: Institutional Design for Better Governance*, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 361 (describing “green room” process in which informal caucusing occurs).

210. See *id.* at 368–69.

211. See *id.*; see also Gary Hufbauer, *Part Five Summary* to EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 419, 423–24 (calling for the formalization of the green room system).

212. The “G-20” emerged as informal coordinating body comprised of foreign ministers from a select grouping of global powers during the aftermath of the emerging market financial crises in the late 1990s and proved a successful sounding board and consensus builder for international economic policy, pulling together “the right countries” in a careful balance between legitimacy (ensuring global representativeness) and effectiveness (limiting membership to a manageable size). See Paul Martin, *A Global Answer to Global Problems*, 84 FOREIGN AFF. 2 (2005) (calling for an expansion of this committee model to tackle other international challenges). Jonathan Fried has suggested that this precedent could serve as a model for WTO governance. See Jonathan T. Fried, *General Summary* to EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 428; see also Hufbauer, *supra* note 211, at 423–24 (citing similar committee governance models from the International Monetary Fund (IMF) and World Bank).

However, at present, any proposal to delegate decision-making authority over WTO business to a limited subset of Members is probably politically untenable.²¹³ The WTO membership has expanded from its GATT origins as a relatively homogeneous club dominated by Anglo-Europeans to become a much more diverse body.²¹⁴ Members remain zealously protective of their sovereign rights and intensely suspicious of any hint of insider dealings from which they might be excluded.²¹⁵ Work within the WTO's existing committee structures as well as informal groupings on an ad hoc basis would be helpful in the preparatory stages because these structures can consider various regulatory options and help build a consensus around a specific proposal. However, at least for the foreseeable future, formal agenda-setting decisions would have to be undertaken at a higher level process in which all Members could participate fully.²¹⁶

C. A Committee of the Whole

If a committee system is ruled out, perhaps an equivalent vetting mechanism could be devised to serve as a "virtual committee." One answer would be to reconstitute the WTO membership as a "committee of the whole" that would perform essentially the same pre-qualifying functions. To do so, three main procedural requirements would need to be respected. First, a reasonably specific and concrete regulatory proposal needs to be placed on the table for consideration at the outset of a trade round in a form that could be enacted into law. Second, adequate opportunity to review the proposal and to suggest changes

213. As one seasoned trade diplomat observed, after Seattle, any revival of the CG-18 is a non-starter. See B.K. Zutshi, Comment, *World Trade Organization: Institutional Design for Better Governance*, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 7, at 387, 389.

214. See Keohane & Nye, *supra* note 59, at 266–67, 270.

215. *Id.* at 269–70; Hormats, *supra* note 54, at 395.

216. Many smaller nations in the developing world lack the resources to participate in the various working groups that the WTO fosters on an ongoing basis. Therefore, the ultimate decision agenda setting should be reserved for either a Ministerial Conference or a General Council meeting. Note that the other main procedural control devices of parliamentary systems also appear inapposite. For example, multiple readings of proposed legislation can be significant when majority voting applies, because the minority can work to peel off individual votes to gain a blocking majority in a subsequent voting round. Under the consensus rules of the WTO, however, multiple hearings are unlikely to arrive at a different conclusion. Once a consensus exists, it means there is no active source of opposition to organize a blocking effort. In addition, the strong, Member-centered ethos of the WTO makes executive vetoes by, for example, the Secretary-General, a non-starter. Cf. Shaffer, *supra* note 77, at 60–61.

262 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2

must be afforded to all Members. Third, after reviewing (and possibly revising) the draft agreement, there would have to be a broadly shared consensus among Members that, at least as to its regulatory merits, the proposal makes enough sense that it deserves inclusion on the formal agenda of the round.²¹⁷

The “pre-commitment” represented by this decision would not bind any Member to approve the agreement as part of a package deal ultimately adopted at the conclusion of the round. The only thing that it would decide is what gets put on the agenda. At most, it would merely signal a consensus among Members that the proposal, in theory, represents a reasonably balanced, plausible regulatory policy solution to a recognizable global problem.²¹⁸ Acceptance of the proposal would remain contingent on further negotiations to offset any anticipated (or perceived) inequalities in the economic and political burdens the proposal would engender. During this process, concessions could be exacted across other issues areas over the course of the round. Member states would explicitly retain the option to reject the proposal later if they felt they had not received sufficient compensation within the total package deal. The winnowing and quality assurance functions of these procedural requirements are perhaps self-explanatory and would broadly parallel the workings of an actual committee. Formally, all Members would be entitled and encouraged to study and comment on the proposal. However, it would suffice in practice if a subset of Members performed these functions. So long as the Members of any such a “subcommittee” had sufficient expertise, credibility, and were broadly representative of the relevant geopolitical interests, their evaluations could be relied on by other Members in making the final determination.²¹⁹

217. Pre-qualification would have to occur within a fixed time period following the round’s launch. Proposals would, thus, have to be ready in a more-or-less final form at the outset. Those proposals that missed the cutoff would have to await the next round or be negotiated as stand-alone agreements. Because of this time pressure and because there might be a number of competing proposals proffered by different nations that take varying approaches on a given issue, the need for advance work to be delegated to a committee, as suggested above, would probably be unavoidable. Here, the goal would be to arrive at a consensus solution that might integrate elements from several different proposals, or at least reduce the number of contenders.

218. This would not necessarily mean that all countries would consider the issue at hand to be a “problem” from their individual standpoint, only that they recognize that a substantial subset of Members *do* in good faith consider the matter as such for reasons beyond pure mercantile advantage, and that the proposed solution constitutes a legitimate component of cooperative global governance.

219. Such a “subcommittee” would likely constitute itself on an informal, *de facto* basis

A decision to “pre-commit” following such vetting would serve as a proxy for mutual benefit. By committing to a specific regulatory proposal, WTO Members would bestow a presumptive legitimacy upon it. Individual member states could always oppose the proposal later on trade-related or fiscal grounds. However, it would be hard to denounce the entire project as fundamentally iniquitous or coercive in the way that TRIPs has come to be seen by some.

A key issue to resolve would be the precise requirements of the “pre-commitment” process. The usual WTO practice is to operate by consensus, which generally means an absence of active opposition.²²⁰ In theory, any Member can block any decision. Arguably, however, requiring a complete consensus in this conventional WTO sense would be counterproductive in that it would set the bar too high. Just as only four votes are required to grant a petition of certiorari in the Supreme Court, versus five to decide a case, there is a functional logic in keeping threshold requirements of admissibility lower than those demanded for ultimate decision-making authority.²²¹ Demanding virtual unanimity might encourage holdouts or lead to logrolling or deliberate recourse to ambiguity that could effectively strip such a collective endorsement of its meaning. This combination of logrolling and vagueness is precisely the problem with the WTO’s current agenda-setting process. Formally, all agenda items are adopted by consensus. However, because any Member can block the entire agenda if its desired issue is excluded entirely, agenda decisions are generally reached in a package deal. Such logrolling blends the good with the bad in a bland stew of non-committal generalities. Encouraging such practices would undermine the impetus to vet regulatory proposals on an individual basis.

Instead, WTO Members might consider relying on some form of voting to gauge support for regulatory proposals. To maximize the legitimizing function of this process, a supermajority of Members should be required to pass approval. The precise composition of this supermajority would need to be carefully calibrated and perhaps require some experimentation to obtain the optimal dynamics. It could be defined through a combination of factors, subject to individual minima

within the committee as a whole based on Member interest. To be legitimate, however, any Member that desired would be entitled to participate, and all Members would remain apprised of discussions.

220. See WTO Charter, *supra* note 11, art. IX(1) n.1.

221. Lower threshold requirements encourage skeptics to keep an open mind and open the door to negotiation across different viewpoints.

and/or a weighted aggregate score.²²² Factors considered could include the number of nations in support of the proposal, the share of world population they represent, their share of global trade,²²³ and—most crucially—a requirement of geopolitical diversity. The latter condition would force proposed agreements to be crafted in as balanced a fashion as possible to appeal to diverse constituencies. Geopolitical fault lines in the WTO vary by issue. They are often hemispheric in nature, but not reliably so. Perhaps the simplest approximation of diversity would therefore be to measure support on a continental basis.²²⁴ A significant degree of endorsement by each continent would be a strong indicator of mutual benefit.

Abandoning the WTO's normal consensus procedures would admittedly be controversial.²²⁵ Member states would be reluctant to surrender their blocking power, although a possible compromise would be to permit countries that vote against the proposal to opt-out of the regulatory scheme if it is ultimately approved.²²⁶ Nonetheless, pre-

222. Cf. Van den Bossche & Alexovicova, *supra* note 36, at 675. A model for this kind of composite weighting of voting factors can be found in the European Community's procedures for qualified majority voting under the Nice Treaty. The Nice Treaty requires the support of two-thirds of European Community Members, which represent two-thirds of the total E.U. population. Treaty Establishing the European Community, art. 205, Nov. 10, 1997, 1997 O.J. (C 340) 3; *see also* Martin, *supra* note 212, at 3 (describing economic and demographic criteria that makes G-20 a representative body of world opinion).

223. Cf. Van den Bossche & Alexovicova, *supra* note 36, at 675–676. Such use of functional criteria has a precedent in the Kyoto Agreement on Global Warming, which required a minimum number of national signatories that collectively accounted for a pre-defined share of the total global emissions. Another example would be IMF voting, which is weighted based on invested shares. *See id.* at 676.

224. Using continental divisions as a proxy for geopolitical representation has a long pedigree in international law. The traditional rotation of the Secretary-Generalship of the United Nations is perhaps the best example. NATO similarly splits its top jobs on a continental basis between an American and an European.

225. Some would argue voting by supermajority would require amendment of the WTO Charter. At present, Article IX of the WTO Charter governing “Decision-Making” permits both consensual decisions and majority voting, although in practice the latter is rarely done. Members could always agree in advance to be bound by the supermajority procedure outlined here for purposes of regulatory agenda setting, with the resultant decisions to be implemented by consensus or, if necessary, forced through by a majority vote. *See* WTO Charter, *supra* note 11, art. IX; Van den Bossche & Alexovicova, *supra* note 36, at 676.

226. Such an opt-out provision would address the objection based on national sovereignty that countries should never be bound by agreements to which they did not consent (even though the issue here is only one of agenda setting). A similar opt-out is contemplated under Article X procedures on amendment. *See* WTO Charter, *supra* note 11, art. X(3). Permitting Members to opt-out of regulatory agreements would leave the remainder to proceed on a plurilateral basis. It might also be worth considering a further amendment of the WTO Charter to eliminate the current requirement of a complete

qualifying regulatory proposals by supermajority vote could prove a real improvement over the WTO's current mode of business.

Another problem with current practice is that the resultant agendas are far too malleable. The vague language in which they are drafted provides ample room for reinterpretation and imposes little constraint on the actual content of negotiations. Moreover, issue agendas can and do evolve as trade rounds progress. The Uruguay Round was particularly notorious for this reason. The very idea of the WTO was only proposed midway through the Round. Such agenda changes require consensus, but so does successful resolution of the round. The agenda is but a starting point for the bargaining that follows

As a result, negotiations throughout a trade round follow a series of moving targets. Nothing is agreed until everything is agreed. Competing drafts may be circulated in multiple variations. Member states are free to play bait and switch, inflating their demands as opportunities for leverage present themselves in the free-for-all of simultaneous negotiations. Compromises are brokered through various insider deals reached in ad hoc meetings.²²⁷ Meanwhile, powerful actors can manipulate the agenda to build a consensus around provisions they favor, while marginalizing proposals from rivals.²²⁸ Consequently, it becomes hard for individual Members (not to mention interested observers) to keep track of negotiations and to participate meaningfully in shaping specific regulatory provisions. Moreover, as the prospect of a package deal beckons, the temptation to lose track of complexities and elide outstanding sticking points grows.

Again, such free-wheeling horse trades present less of a problem so long as the net result is liberalization. However, with regulatory harmonization on the table, such welfare-maximizing outcomes are no longer ensured. The pre-qualifying procedures proposed here address the special concerns raised by regulatory linkage by ensuring that a specific, concrete proposal has been tabled and vetted for regulatory balance prior to the start of the round.

Having a concrete proposal on the table would help to focus the debate and permit subsequent bargaining to proceed from a known starting point. The tradeoff would be that once a proposal is pre-

consensus to bring new plurilateral agreements into the WTO framework. See WTO Charter, *supra* note 11, art. X(9).

227. BRAITHWAITE & DRAHOS, BUSINESS REGULATION, *supra* note 3, at 83–84; Drahos, *supra* note 148, at 167–69.

228. Cf. Helfer, *supra* note 133, at 21; Drahos, *supra* note 148, at 169.

qualified, subsequent amendments would have to be strictly limited. The initial proposal would define the regulatory scope that had been “put in play,” and any amendments would have to be germane to the issues encompassed. Only incremental adjustments would be countenanced, as opposed to wholesale revisions. Furthermore, there would have to be an explicit consensus backing the amendment, which would then supersede the original proposal as the focus of discussion.

In short, these procedures would introduce a measure of discipline to WTO regulatory policymaking that would be analogous to the parliamentary rules that govern legislative processes at the national level. In both cases, the relevant norms would have to be policed by consensus. While controversies might remain over boundary issues, merely defining outer limits would be an improvement over current practice.

D. TRIPs Revisited

How might TRIPs have come out had pre-qualifying procedures been in place during the Uruguay Round? To engage such a counterfactual invites speculation and risks the bias of hindsight. One suspects, however, that the United States would have tendered a much more modest proposal that was focused on achieving the original anti-copying agenda set out at the start of the Round.

Such an agenda would likely have focused on literal copying and emphasized copyright and trademark law rather than patents (or at least have exempted least developed nations from its patent mandates). Greater attention would have been placed on preventing global shipments of counterfeited goods, while providing more leeway for member states to vary protection levels domestically. In order to secure a pre-commitment from developing nations, the agreement would have had to have been more balanced in its content than TRIPs. This might have entailed broader categories of permissible exemptions, more concrete user rights, and more explicit recognition of public domains.²²⁹ Firmer commitments could have been extracted to supply technical assistance and shift enforcement costs onto rich countries and/or multinational firms.²³⁰ Perhaps other creative concessions could have been devised, such as differential fee schedules on patent and trademark applications that could offer Southern innovators greater access to IP

229. See Dreyfuss, *TRIPs—Round II*, *supra* note 96 and accompanying text.

230. See Reichman, *supra* note 48 and accompanying text.

protection in Northern markets.²³¹

It is worth noting, however, that to pre-qualify, such an “alternative TRIPs” need not have been entirely devoid of distributional skews, at least in regard to short-term outcomes. In contrast to WIPO, in which IPR treaties had been blocked, there was ample reason for developing countries to agree to negotiate *some* form of IP harmonization in GATT, even if the burdens were unequal, to eliminate trade frictions over IP issues and to entice the United States to fully commit to the Uruguay Round with its promise of agricultural and textile concessions to come. In this sense, an implicit expectation of linkage would still have played into their decisions. However, this calculus would necessarily have remained at least partly speculative.

To be sure, there is a risk that pre-qualification would merely have frontloaded the logrolling process. The United States might well have whispered certain promises in the ears of influential Members of the developing world bloc. Even in domestic contexts, such informal logrolls cannot be prevented, only discouraged. However, given logistical constraints and time pressures (and assuming prospective logrollers are unwilling to openly violate the rules), such understandings would have to remain private and, thus, contingent on further negotiations among other interested parties. Pre-qualification would only be the start of the process. The only matter actually to be decided at that stage would be whether *this* specific regulatory proposal would be formally placed on the agenda.²³² Negotiations on all other non-regulatory issues (and ultimate approval of the regulatory agreement(s) themselves) would have to await the as-yet uncertain dynamics of the trade round to come.²³³

At minimum, pre-qualification procedures would, thus, significantly raise the transaction costs of logrolling *ex ante* versus *ex post*. Some

231. See Mangeni, *supra* note 30, at 224.

232. Other regulatory proposals would also be subject to *ex ante* voting. Because these proposals would come into play at roughly the same time, agenda-setting logrolls between them would be inevitable. However, most regulatory deals would have a North-South dimension requiring *non-regulatory* offsets in the form of trade concessions. Accordingly, such purely cross-regulatory logrolls would remain of limited value.

233. In this respect, the temptation to engage in *ex ante* logrolls in agenda votes would be less powerful than in domestic contexts in which single-issue, majority voting applies. Under those conditions, blocking leverage may decline once a bill gains momentum. Moreover, because tradeoffs cannot be enforced in package deals, legislators need to exact concrete commitments in advance of their approval. By contrast, under the WTO's consensus rules, member states can always play holdout at any stage thereby reducing the need to settle up front.

nations might prefer to wait and see before committing themselves. Moreover, to the extent that ex ante logrolls do occur, the ability of smaller, less powerful nations to block a specific regulatory proposal from advancing without jeopardizing the entire round would redistribute the bargaining leverage in such deals. One might, thus, expect ex ante logrolls to occur on a more equitable basis.

Furthermore, by separating the pre-qualification decision from the ultimate decision to approve TRIPs as part of a subsequent package deal, developing nations would have had every incentive to negotiate the fairest possible agreement on IP and would have enjoyed maximum leverage to do so. Decoupling the fiscal implications from the regulatory merits would arguably permit a broader assessment of long-term welfare, free from mercantilist bias. Potential stakeholders would have the opportunity to weigh in on the debate and have their interests taken into account before such calculations became subsumed in the machinations of the larger trade round, thereby helping to reduce the risk of capture by special interests. Such ex ante approval would also have gone some ways to blunt post hoc claims of coercion.²³⁴ Moreover, because the pre-qualified draft would be regarded as close to the final version, more careful attention could have been paid to drafting issues than is possible during the fluid negotiations of a typical trade round. Indeed, some of this work could have been delegated elsewhere, well in advance of the round, for example, drawing on the technical expertise of WIPO.²³⁵ Everyone would know exactly what they were getting going in. As a result, no one could claim later “we wuz robbed.”

E. Escaping the Prisoner's Dilemma

The real value of the procedural reforms proposed here must be proven in the post-TRIPs world. Their benefits might be as much systemic as specific. Trade negotiations, like markets, function better

234. Some coercion claims lodged by TRIPs critics relate to pressure tactics exerted outside the GATT process, such as U.S. threats of unilateral trade sanctions under section 301, discriminatory use of trade preferences, or indirect pressure through the IMF and World Bank. See RICHARDS, *supra* note 79, at 125–31; Drahos, *supra* note 148, at 169–70. The inclusion of binding dispute resolution as part of the WTO package has partially defanged such coercive instruments. However, the realities of geopolitical power are such that external coercion can never be eliminated entirely.

235. See Abbott, *Distributed Governance*, *supra* note 27, at 21–23 (discussing distributed governance scheme between WIPO and TRIPs); Reichman, *supra* note 48, at 465 (discussing the same). In this scenario, WIPO would function as something akin to an external committee, much like the law commissions found in other common law systems and in some states in the United States.

when subject to rules. The GATT's free-wheeling, unstructured approach appears increasingly inadequate in light of current trade politics. As trade negotiations continue to grow more complex, with more Members, more diverse interests, and ever more issues to reckon with, trade rounds have become protracted ordeals with a centripetal nature that threatens to spin out of control. The proliferation of linkage claims poses a particular danger. TRIPs set a powerful precedent that continues to resonate. Already, a long-line of "me too" issues is jostling for inclusion.

Some degree of linkage is arguably essential for the WTO to advance its liberalizing agenda. Yet, the politics of trade linkages are torn by a mismatch of North-South agendas. Northern governments are bombarded by interest group pressures to push linkages at every turn. Southern negotiators, backed by their own NGO allies, have recoiled, blocking linkage attempts during in the current Doha Round even on issues that could benefit them—and at the cost of scuttling progress on things they do want, such as liberalization of agriculture.²³⁶ Having felt burnt by TRIPs, developing nations seem to view any linkage proposal—however innocuous—as a potential Trojan horse that could usher in a regulatory fait accompli that they would be powerless to oppose later.

As the Doha Round grinds to a halt, the WTO cannot afford to continue on a path of benign neglect. Already, the recent proliferation of bilateral and regional trade agreements demonstrates a lack of confidence in the multilateral system and has arguably undermined the commitment to Doha.²³⁷ Even flawed agreements in the WTO might be preferable to this patchwork of overlapping regulatory regimes. Yet, the current atmosphere of distrust in the WTO stands in the way. Linkage is not the only source of this distrust, but it is part of the problem. The laissez faire conditions under which trade talks operate offer member states too much room to maneuver and to act opportunistically. Yet, no one comes out ahead if everyone plays the same hand. In short, the WTO may be victim to a form of "prisoner's dilemma." The only way to win in the long run is to cooperate. This requires putting in place procedural rules to which everyone is committed so that trade talks can proceed under an atmosphere of trust.

Pre-qualification procedures for non-trade regulatory proposals

236. See *WTO Under Fire*, *supra* note 51, at 26–28.

237. *The World Trade Organization: 10-Year Review: A World Trading System in Peril?*, INT'L REV. (N.Y. Law Sch., Ctr. for Int'l Law, New York, N.Y.), Spring 2005, at 12.

270 *MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW* [Vol. 10:2

would be a good place to start. Such procedures would give developing nations additional maneuvering space and leverage to block linkage strategies on a more selective basis, without holding up the entire round. This would help thin the queue of aspiring candidates for regulatory expansion of the WTO. Future proposals would have to be more modest in scope, perhaps introduced piecemeal in incremental steps. Yet, as a confidence-building measure, this might not be a bad thing and would help to defuse the stalemate that has paralyzed the past two ministerial meetings at Cancún and Doha. The problem in the WTO right now might be too little linkage as well as too much. Paradoxically, imposing procedural discipline on linkage proposals might solve both problems.

However reasonable these procedural requirements may sound in theory, one must also consider whether they are politically viable. Agreeing to these procedural restraints would mean forfeiting the ability to unilaterally veto trade agendas and limit the freedom of Members to engage in opportunistic maneuvering. Traditionally, powerful nations such as the United States have exploited such freedom to manipulate agendas and to manufacture a consensus around their own self-serving aims.²³⁸ Yet, other nations are learning to play the game too. The developing world has proven much more effective at hanging together during the Doha Round than it did during Uruguay, as the rollback on pharmaceutical patents attests.²³⁹

As trade negotiations continue to get more complex, the ability of any one Member to dominate the proceedings has diminished. Meanwhile, linkage tactics threaten a continued stalemate that is in no one's interest. The rules of GATT have grown outdated. They permit too much license for individual nations to pursue private advantage at a collective and cumulative cost. By undertaking procedural reforms, the WTO would free itself from this destructive anarchy of opportunism and reinvigorate the agenda of global integration.

Even if the specific proposal advanced here is not adopted or appears inadequate, it is still worth considering these larger procedural concerns. As the globalization of law shifts more and more regulatory powers to international institutions, attention to the procedural aspects of global governance has become a matter of growing importance. This

238. See Helfer, *supra* note 133, at 21.

239. See *WTO Under Fire*, *supra* note 50, at 26 (describing emergence of G-22 bloc of developing nations at Cancún that presented a common front across issues); Abbott, *Medicines Decision*, *supra* note 161, at 343–44 (same).

Article engages a small part of a much broader challenge: thinking about how to craft regulatory responses to global problems in a way that can be accepted as both legitimate and efficient. The political science and economy of international lawmaking remains relatively under-theorized. Much can be gained merely by translating insights about domestic lawmaking to the international context and incorporating analogous procedures. Yet, as this Article has highlighted, the international system presents its own unique set of challenges, even setting aside the considerable diversity encompassed within that term. How best to meet these challenges remains open to debate.

CONCLUSION

This Article has argued that the use of linkage strategies to advance regulatory goals in WTO trade rounds represents a double-edged sword. While enabling cross-issue compensation to neutralize distributional skews, the practice carries a risk of unintended repercussions. The TRIPs Agreement demonstrates at least *prima facie* evidence of adverse effects both specific and systemic. Uninhibited use of linkage strategies also invites opportunistic gamesmanship that could have cumulative impact resulting in paralysis. Accordingly, pre-qualifying procedures to control the use of linkage should be instituted. By ensuring the pre-commitment of a geographically balanced supermajority, such procedures would serve to enhance both the rationality and legitimacy of the agreements that ultimately result.

Such reforms would not be a panacea. The challenges of multinational trade negotiations remain numerous and daunting. Procedural rules can always be circumvented when powerful actors are determined to evade them. Linkages would remain problematic even if these procedures were adhered to, as would regulatory harmonization even in the absence of linkage. And regulatory linkage is far from the only contentious item on the WTO's plate. Nonetheless, the experience of domestic lawmaking suggests that procedures can make a difference, even if imperfect or largely symbolic. The WTO would do well to learn from this example.