INTEREST GROUPS, POWER POLITICS, AND THE RISKS OF WTO MISSION CREEP

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To its detractors, the WTO is an ominous international bureaucracy.[1] It is purportedly plagued by a democratic deficit that will gradually usurp the domestic regulatory prerogatives of sovereign states.[2] My presentation suggests that these concerns of judicial and bureaucratic overreaching by the WTO are exaggerated and reflect a misconception of the relationship between domestic political actors and the WTO.

First, the WTO's substantive mission is unlikely to extend much beyond its current scope. The reason for this is rather straightforward: such mission creep would be unpalatable to the politically salient groups that currently benefit from the international trade regime. My argument assumes that trade agreements are ostensibly contracts among self-interested politicians seeking to maximize their political fortunes and that these politicians would be reluctant to alienate the core political constituency that benefits from such trade agreements. *Second*, the significant role of power politics in the WTO legal regime renders unnecessary the adoption of traditional judicial avoidance techniques, such as the political question doctrine. The most powerful members of the WTO—the United States and the European Community (EC)—also happen to be the most active consumers of the WTO's dispute resolution mechanism. Because the United States

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1. *See, e.g.*, PATRICK J. BUCHANAN, THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY 107, 266 (1998) (noting the significant concession of sovereignty necessary for the formation of the WTO); *see also* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 512–13 (2000) (discussing critical views of the WTO including claims that WTO is a threat to United States sovereignty); William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1233–35 (1998) (same).

2. *See* McGinnis & Movsesian, *supra* note 1, at 512–13 (discussing critical views of the WTO).

and the EC both benefit disproportionately from this dispute resolution mechanism, these entities also have an incentive to protect the WTO from "politically loaded" claims that are likely to undermine its credibility.

At the outset, it is clear that the most obvious innovation of the Uruguay Round is its implementation of the WTO's dispute resolution mechanism.[3] This dispute resolution mechanism has played a powerful and effective role in resolving international trade disputes. The WTO renders decisions that seem to be authoritative, and, by and large, the disputants tend to comply with these decisions.[4] Indeed, the WTO could be considered the most successful contemporary example of an international adjudicatory body. But its relative effectiveness as an international institution may understandably be a source of concern to proponents of limited government. After all, mission creep by powerful governmental agencies is an everyday reality of modern bureaucratic life. Is the WTO going to succumb to such mission creep and try to extend its role into that of a transnational regulatory authority? Or is it going to try to resolve disputes that do not substantially involve market access concerns?

The answer to both questions, I would venture, is "not very likely." As a practical matter, the WTO's effectiveness and power stem from the very circumscribed and limited role it plays in resolving market access disputes. Or, to put it more bluntly, I would predict that, if the WTO's mission is extended much beyond resolving disputes about market access, it would cease to play the prominent role it does today in the regulation of international trade.

What kinds of forces are likely to hold the WTO in check? One such force is the interest groups who benefit directly from the free trade regime. In this sense, I agree with those commentators who describe the WTO/GATT regime as a transnational bargain in which political leaders from different countries agree to trade access to each other's markets.[5] In this picture, the politicians involved in the

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3. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1145, 1226–47 (1994).

4. *See* Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 303 (2004) ("The WTO has become one of the world's most dominant international institutions, established a reasonably effective system of dispute resolution, and developed a nearly universal membership.").

5. *See* Kyle Bagwell et al., *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 59 (2002) (describing the GATT/WTO as "a forum within which its member governments may negotiate over market access"); *see also* Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative*

bargain are simply responding to pressures from various domestic constituencies that desire such market access. If the politicians bargain successfully and are able to obtain significant liberalization concessions (i.e., reductions in particular tariffs), we would expect those groups that benefit from trade liberalization to handsomely reward those politicians.[6]

This description of the bargain for international trade is, of course, highly stylized and incomplete. Indeed, the bargain also generates substantial but diffuse benefits for consumers, who because of rational ignorance do not often play a significant role in the bargain itself.[7] More importantly, bargaining for international trade usually has significant political costs in terms of lost political patronage by protectionist groups, who benefit from higher tariffs and other non-tariff barriers.[8] Therefore, at the early rounds of trade negotiations, we might expect to see significant resistance from such protectionist groups, and the optimal political bargain at these stages may leave a range of protectionist measures in place. Indeed, as one commentator has noted, certain escape clauses in the GATT, such as Article XIX, which allows parties to back out of their trade commitments when local industries face increased foreign competition, explicitly cater to such protectionist interest groups.[9]

As subsequent trade rounds chip away at these protectionist measures, however, we would expect to see the protectionists' mettle

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Speculations, 58 U. CHI. L. REV. 255, 255 (1991) (noting that while the "GATT can largely be justified by sound arguments about the public interest in a liberal trading order, it is best understood with the aid of public choice theory").

6. *See* Jide O. Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES IN L. (forthcoming 2005), *at* http://www.bepress.com/til (manuscript at 6, on file with author).

7. *See id.* (manuscript at 5). But in certain contexts consumers may be able to overcome collective action problems, especially if they are intermediate industrial consumers importing capital inputs. *See id.* (manuscript at 22).

8. *See id.* (manuscript at 5–6).

9. *See* Sykes, *supra* note 5, at 255–57. Article XIX(1)(a) reads:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

See id. at 255 n.5 (citing General Agreement on Tariffs and Trade art. XIX, § 1(a), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194).

start to crumble.[10] In other words, inefficient protectionist groups will gradually shrink as they face new import competition due to trade liberalization.[11] This contraction reduces the funds available to these protectionist groups to lobby politicians. If protectionist groups do not adapt, they will eventually go out of business. Thus, the decline in political influence of these protectionist groups is not due to a lack of willingness, but rather because these groups cannot both withstand the onslaught of new competition and continue to finance heavy lobbying campaigns.

Ultimately, the export groups that drive international trade negotiations may seek a bargain that grants completely open access to each other's markets. In other words, the Pareto frontier for such exporter groups is probably a tariff-free world with little or no entry barriers. If the WTO's mission deviates from moving towards a free trade frontier, we would expect to see political backlash from the export groups that benefit from international trade negotiations. One relatively easy way in which the WTO may deviate from its core mission of trade promotion is to expand its mission to deal with issues that do not deal squarely with the promotion of increased market access. There are clearly many groups that would like to see the WTO go down this path, but I do not think they will likely succeed.[12] In other words, I think that politicians are likely to be more sensitive to the concerns of export groups seeking market access than to the concerns of those other interest groups.

But why are export groups likely to win the battle for political relevance? The proof is in the pudding. The export groups have succeeded in getting politicians to establish a relatively robust regime that successfully adjudicates international trade disputes. Other non-export interest groups, primarily those advocating labor rights and environmental causes, have also tried to persuade politicians to establish international bodies similar to the WTO, but they have not achieved nearly the same degree of success.[13] Moreover, it is unlikely

10. Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S195 (2002) (observing that "the political balance of interests favoring and opposing the results of a trade agreement may be expected to tilt quite systematically toward those favoring the agreement as time passes").

11. *See id.* at S194–95.

12. *See* Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 321, 351 (2004) (discussing efforts by various groups to use the effectiveness of the WTO's enforcement mechanism to promote human rights, including workers' rights).

13. *See* Guzman, *supra* note 4, at 313–15 (observing that there is no world organization that protects environmental interests and, while the International Labor Organization does

that such ideological interest groups will become more influential than export groups in the foreseeable future. As various commentators have noted, interest groups that organize around economic interests are usually more influential in the political process than those that organize around ideological concerns.[14] For the same reasons, it is equally unlikely that these interest groups will succeed in getting the WTO to be a regulatory body that promotes labor, environmental, or human rights concerns, especially if it involves derailing the WTO from its trade-promotion mission.[15]

Most of what I just discussed deals with the substantive scope of the WTO's mission. Another important but related concern in the topic selected for this panel is the judicial management of politically controversial trade disputes. In other words, like its domestic judicial counterparts, the WTO may find itself entangled in disputes that are better resolved in political or diplomatic forums.[16] Does the WTO, then, need a judicial avoidance technique, like the political question doctrine, to weed out politically explosive cases?

My answer is no. I do not think the WTO needs to employ such judicial avoidance techniques in order to protect its institutional legitimacy. I believe the reason why has more to do with great power politics than interest group dynamics. The most powerful members of the WTO are the United States and the EC. For good measure, you can also add Japan, Canada, and China to this list. In any event, since these powerful entities are the most active consumers of the WTO's dispute resolution mechanism, they also have an incentive to protect the WTO from "politically loaded" claims that are likely to undermine its credibility.

To get a sense as to how these powerful states exercise forbearance in litigating politically controversial disputes before the WTO, one need look no further than the EC challenge to the United States

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exist to protect labor rights, it is not as influential as the WTO).

14. *See, e.g.*, Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 195–96 & nn.6–7 (1988) (arguing that most active, politically organized special interest groups tend to be motivated primarily by narrow economic concerns, because it is too costly to advance an ideologically-motivated agenda at the expense of private economic concerns).

15. *See* John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT'L L.J. 353, 362 (2004) (suggesting that the WTO's rigorous enforcement mechanism may actually inhibit cross-issue bargaining among member nations, as nations would avoid subjecting themselves to a politicized (but still binding) Dispute Settlement Understanding (DSU)).

16. For a discussion of how domestic courts use judicial avoidance techniques to protect their institutional credibility in foreign affairs disputes, see generally Jide O. Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004).

Helms-Burton legislation, which penalized certain companies doing business in Cuba. The posture of the EC dispute over Helms-Burton involved a strategic game of sorts. The United States threatened that, if the EC brought the suit, it would not formally respond, and that, if the EC prevailed, it would not comply with the WTO decision.[17] The EC was understandably in a dilemma. The EC knew that its chances of prevailing before the WTO were pretty high, but it also knew that the political stakes in the Helms-Burton legislation were high enough that the United States threat of non-compliance was very credible. If the EC had pressed on with the suit, and the United States had carried out its threat of non-compliance, then both entities would be worse off because they would have effectively undermined the credibility of the WTO. In the end, both parties decided that they would be better off if the dispute were resolved diplomatically, outside the WTO framework.[18]

As the most frequent repeat litigators before the WTO, and as the prime beneficiaries of its dispute resolution mechanism, both the EC and the United States have strong incentives to protect the WTO from litigation that will undermine its institutional credibility. In other words, the United States and the EC are likely to internalize the costs of politically sensitive trade disputes. In domestic litigation, on the other hand, private parties appearing before a court are likely to be indifferent to the institutional costs of bringing lawsuits that may undermine the institutional credibility of the courts. In such circumstances, the relevant group interested in the public good that the courts provide—all potential litigants—is very large, but the share of the total benefit that goes to any one litigant is fairly minimal. Therefore, no one litigant may have an incentive to protect the courts from politically loaded lawsuits.[19] Understandably, in such circumstances, domestic courts tend to resort to judicial avoidance techniques to protect their institutional credibility. But where the membership of the organization is relatively small, such as in the

17. *See* Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel*, WASH. POST, Feb. 21, 1997, at A1.

18. For a discussion of the EC challenge to the Helms-Burton legislation, including the strategic dynamic of this challenge, see Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement*, UCLA INTERNATIONAL INSTITUTE OCCASIONAL PAPER SERIES 13-14 (July 31, 2002), *at* http://repositories.cdlib.org/international/ops/wtogarrettsmith; *see also* Nzelibe, *supra* note 6 (manuscript at 36).

19. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (analyzing the concept of public goods and observing that individuals acting independently rarely have an incentive to provide the optimal amount of a public good).

WTO, large members like the United States and EC have an incentive to bear a disproportionate share of the costs of maintaining the institutional credibility of the organization.

In the end, I suppose that, as the WTO becomes more respectable and effective as an institutional organization, it will face challenges from both interest groups and states that desire to use its institutional credibility to promote their own narrow objectives. I do not believe, however, that there is any risk in the near future that the WTO will significantly displace the domestic regulatory prerogatives of sovereign states. The role of interest group dynamics and power politics is sufficient to deter any foreseeable threat of mission overreach by the WTO.