

## The Structural Imbalances of the WTO Reconsidered A Critical Reading of the Sutherland and Warwick Commissions

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### Abstract

This paper examines the attempt by the 2004 Sutherland and the 2007 Warwick Reports to reform the process of decision-making of the WTO after the collapse of the Cancun ministerial. Among WTO insiders was the fear that negotiations had gone off the rails and member states had lost their interest in concluding the Doha Round. The transfer of power from the club where few decided for the many to the coalition model of trade negotiations where the many decided for the many revealed large organizational imbalances. As a membership organization, the WTO does not have an executive body or management board to steer it or to interact in a regular and purposeful way with civil society. The powerful dispute resolution system overshadows a weak and ineffective decision-making procedure. Of all the international bodies, the WTO's institutional architecture makes it a flashpoint particularly for the global South and the newly empowered coalitions like the G20 and G33. Sharp organizational differences about the role of the Director-General, Committee Chairs and the way negotiations are conducted contribute to the feelings of estrangement among members. The irony is not lost on many observers who note that although the WTO demands tough transparency standards from its members' trade practices, it relies on informality in the way it has conducted negotiations. Not surprisingly without any alternative model of governance neither reform effort had an impact on the way the WTO does business. With their ambiguity, blandness, and shortcomings, these high-level bodies did not address the imbalance between the formal legalism of the WTO's rules and its rule-bending institutional practices. Nor did they propose an acceptable common ground for reform, one that would bridge the deep divisions between members and the G20/G33 coalitions. A critical reading of the Reports reveals that the WTO remains hostage to its narrow gauge legal culture and its inability to rebalance the relationship between law and politics, the DNA of its operating system.

The best that can be said about the Sutherland 2004 and the Warwick 2007 Reports on the future of the WTO and the reform of the multilateral trading system is that both boards of enquiry launched modest trial balloons about modifying voting procedures to reinforce the logic of the system. With their ambiguity, blandness, and shortcomings, these high-

level bodies did not address the imbalance between the formal legalism of the WTO's rules and its rule-bending institutional practices. Nor did they propose an acceptable common ground for reform, one that would bridge the deep divisions between members and the G20/G33 coalitions. Most importantly, no candid answer was forthcoming to the question, would a culture of *adaptive incrementalism* give the WTO new authority to respond to the many challenges the world trading order faced? As such, neither Report was insightful on what Pauwelyn describes as "*the delicate balance between law and politics*" and the need for alternative forms of global governance and a more effective institutional architecture. A critical reading of both Reports helps shed light on the reasons why the WTO has been unable to move forward and renew itself.

### **The Argument in Brief**

The paper is divided into three parts. The institutional and procedural challenges identified by the Sutherland Commission are examined in the first section. This part presents a view from the top of a global governance institution in its prime as it was presented in the report. It examines the principal ideational framework and assumptions of its reform agenda. In the past decade scholars have opened up important vistas on the need to modify and improve both, its rules, processes and organizational decision-making practices. The Sutherland Report was largely tone deaf ignoring a growing body of scholarship on need for reorientation and opening the organization to a development centered trade agenda. The basic lesson of the Sutherland Report is that substantive procedural issues are inseparable from a reform of the negotiating framework. The second section analyzes the importance of the Warwick Commission's big picture findings and recommendations, which were intended to equip the WTO to be a more effective global governance institution. The Commission's failure to understand the importance of the unwritten rules in this rule-bound organization and their formative role in shaping the WTO's institutional culture remains a puzzle and a major flaw. The final section makes the case that neither report provoked much-needed debates on trade liberalization, globalization, or institutional reform, the very purpose of the exercise. The lesson to be learned is that in the absence of a culture of adaptive incremental legalism and a renewed sense of purpose, the world's trade authority will face a sclerotic institutional future accompanied by a pronounced loss of status and effectiveness in the new global order.

### **The Sutherland Report's Insider Discursive Narrative**

After the collapse of the 1999 Seattle meeting and the failure of the Cancun ministerial four years later, the need to re-examine WTO agreements and find common ground took on a life of its own. Countries began to pursue new commercial initiatives to protect their strategic interests. The fact that nearly three-quarters of the WTO's members are developing countries goes a long way towards explaining the current changes underway in the liberalization dynamic. With the Doha negotiations deadlocked, the institution faces

an accumulation of challenges, particularly from the global South about many of its rules and practices with respect to three issues.

As a membership organization, the WTO does not have an executive body or management board to steer it or to interact in a regular and purposeful way with civil society. The powerful dispute resolution system overshadows a weak and ineffective decision-making procedure. Of all the international bodies, the WTO's institutional architecture makes it a flashpoint particularly for the global South and the newly empowered coalitions like the G20 and G33. Sharp organizational differences about the role of the Director-General, Committee Chairs and the way negotiations are conducted contribute to the feelings of estrangement among members. The irony is not lost on many observers who note that although the WTO demands tough transparency standards from its members' trade practices, it relies on informality in the way it has conducted negotiations.

Surprisingly few of these organizational imbalances formed the backbone of the Sutherland and Warwick reports. Scholars have studied with a great deal of interest the different strategies international organizations adopt to renew themselves and their processes. Ramesh Thakur et al. have shown that high-level international commissions of enquiry such as the Brundtland, Brandt and the Commission on Global Governance put new agendas on the table and converted policy ideas into initiatives to transform the architecture of international organization. Peter Haas and Diana Tussie have demonstrated respectively the strategic role of critical thinking by expert policy communities in creating the conditions for coalitions to facilitate the process of institutional reform of global governance institutions.

As we will discover in the case of the WTO, the idea universe was not a key variable in successfully reforming this hide bound international organization. For this reason, the Sutherland and Warwick statements can be thought of as highly functional report cards on the perceptions and codified practices of "*networked insiders*", a term Robert Howse uses to designate the mainstream values and ideas of economic, legal and public policy experts. The policy advice of both Commissions about the WTO's institutional future constitutes a unique narrative about the procedural and foundational problems confronting the organization at a time when it needed to be searching for a new equilibrium point after the collapse of the Cancun meetings.

The two enquiries were very different in their mandate and status. Sutherland was an official enquiry of the organization. Former Director-General Michael Moore "*empanelled*

*a group of eminent insiders for advice to suggest directions for institutional reform,”* and their Report was entitled, Report of the Consultative Board to the Director-General Supachai Panitchpaki, The Future of the WTO: Addressing Institutional Challenges in the New Millennium. The Warwick Commission was a private, non-official initiative composed of a cross-section of academic specialists and key insider WTO experts. The first Warwick Commission was established in 2007 with a mandate to examine the governance of the multilateral trading system and to make recommendations to strengthen it. The report was boldly titled, The Multilateral Trade Regime: Which Way Forward?

The Sutherland Report was the collective work of a consultative board reporting to the WTO's Director-General. Peter Sutherland, CEO of a major petroleum giant and a former powerful and articulate Director-General of the GATT and the WTO chaired the commission. Sutherland had a long, public career committed to the globalization of markets and free trade orthodoxy. Intellectually, Jagdish Bhagwati, the leading free trade theorist of the age, and John Jackson, a world authority on the WTO legal practices and rules, anchored the board. It was extremely ambitious in its ambit covering a wide range of issues including trade multilateralism, legal culture and first principles, the role of the director-general, an expanded role for civil society and possible reform of the single undertaking rule among other topics.

### **The Context Framing the Sutherland Report**

At the height of the Washington Consensus, global dynamics had created imbalances in the world economy. The pillars of commercial security, economic beliefs, as well as political values centered on matters narrowly economic no longer reflected the power dynamics of the world trading system. In response, the Sutherland Report proposed an incomplete roadmap for modest reform, defending the WTO's legal culture as effective and balanced, rather than propose large-scale, innovative institutional restructuring of the organization. In an interview shortly after the Report was issued, Jackson candidly explained its predetermined boundaries and narrow mandate: *"It was not to look at substantial questions such as subsidies, agriculture policy, anti-dumping, intellectual property or services... [It would be] a restricted look at issues that needed further discussing"*. Their examination was a flagging exercise to identify ways to improve the efficiency of the WTO's decision-making and consultative processes, which Director-General Pascal Lamy once described as infuriatingly *medieval*. On close reading, the Sutherland Report was neither timid nor apologetic; instead, it mounted a systematic defence of the organization's first principles, low-profile successes, and procedural needs.

### **The Free Trade Puzzle**

The Sutherland Report begins with a powerful defence of free trade based largely on the primacy of export-led growth as the source of wealth creation for all countries. In the WTO's bargaining process, negotiators assume that the benefits of trade flow from concessions made by other members. Visibly, this perspective is a mirror image of the theoretical model

of trade liberalization, in which the countries making the most concessions receive the greatest gains from trade. In this case, the standard assumption of trade negotiators corresponds to the way negotiations are organized as a complex system of trade-offs and concessions. Operationalizing this model stands in stark contrast to the promise of equitable outcomes for all participants. This fact is underscored by the heavy concessions made by developing countries in the Uruguay Round and their uneven gains from trade over the past decade. Members who made the heaviest concessions in the early 1990s are still fighting for promised agricultural market access in the global North.

The Sutherland Report does not explain why the welfare gains after many rounds of market openness are paltry or negative for a number of countries in the global South as Robert Wade, Dani Rodrik, and Paul Krugman have demonstrated. It does not address any of the findings by these experts about the need for sophisticated public policies or the need to find the balance required to realign commercial security with economic beliefs, and ethical values.

Empirically, the Report did not investigate why the individual prescription to adopt free trade and open domestic markets to foreign competition often failed to fast-track poverty alleviation. Over the past fifty years, while agricultural subsidies have increased steadily in developed nations, industrial tariffs have fallen. The reason for this is straightforward. All countries operate under a mercantilist trade model in which international market openness is purchased with trade concessions. No smart negotiator from the global North will give up market access to a sector that is unable to compete favorably on world markets. Agriculture is not symbolic of the dysfunctional trading system so much as it is the one sector where status quo interventions are inadequate to modernize the sector and alleviate poverty.

Prior to the economic success of the Asian tigers, the global South's share never amounted to more than twenty percent of total exports. Free trade theory cannot take credit for these highly successful state dirigiste policies. Rodrik and many others have rightly argued that the interventionist policies and targeted subsidies of the Asian tigers were precursors for India's and China's highly successful strategic trade strategies after 2000.

The Report does not acknowledge the unequal sharing of benefits in this system of rules and hierarchy of institutions. Many experts argue that leaving the markets to distribute the benefits of strong export growth has yet to improve the lives of the poor. The current deadlock in agricultural negotiations for the global South exemplifies the minefield of complex and competing national interests that hold the WTO to ransom. While developing countries lack the resources, infrastructure, and expertise to benefit from economies of scale in a world of globalization, the Report provides no explanation for the marked unevenness in development outcomes. Equally absent from its analytical perspective is the recognition that, in the global economy, the dividing line between legitimate public policies for development and 'cheating' on trade liberalization is increasingly blurred. This omission is particularly significant because for many experts there

has never been a comfortable fit among the dozens of treaties, conventions, diplomatic understandings, and legal principles that comprise the body of public international law, including WTO trade law.

### **The GATT-WTO's Culture of Exceptionalism**

Compare the most-favored nation and non-discrimination foundational principles of global trade to other international milestones such as the 'polluter pays principle' (1971) or the Convention for the Protection and Promotion of the Expression of Cultural Diversity (2005), which was explicitly developed to challenge and counterbalance to the WTO. One can see how much a laggard the WTO is as a source of innovation, and how few are its legal triumphs over the last decade in addressing the complex issue of trade and human rights linkages. Significantly, many scholars such as Debra Steger and Robert Howse have concluded that the WTO is still not pulling its weight as a global governance institution. Intended to be the epicenter of a new international order, rather than presiding over a bigger and more robust system of international public law, the WTO has become a juridical silo with a narrow focus on the disputes resolution mechanism, protection of private producers' rights and its own trade law.

The Report, however, is factually wrong to assume that the rules of the game can be designed to be symmetrical when conditions in the international economy are so unequal. Since the Haberler Report released in 1958, the disadvantages faced by developing countries in agriculture have been recognized, most importantly in the anti-dumping codes (and later formalized in the 1979 Enabling Clause).

Consequently, there have been always been exceptions to the General Agreement on Tariffs and Trade's (GATT) first principles of deepening market access on a non-discriminatory basis in order for governments to adopt explicit non-commercial goals. These *carve outs* have been part of the GATT-WTO legal culture since its inception. In 1955, the United States insisted on special treatment and demanded that agriculture be permanently exempt from GATT's rules and disciplines by threatening to leave the GATT. The agricultural waiver the United States obtained was in force for almost forty years. The GATT contained a substantial list of exceptions or emergency provisions to assist governments consistent with their need for political and social stability. Most of the subsidies were in the global North and the food products were exported by the richer countries. A majority of developing countries could not afford to provide producer subsidies, but they saw how much latitude there was in the system when domestic prices were not linked to world prices. Indeed, the idea that the postwar order had to have mechanisms to avoid destructive forms of interdependent behavior was an essential part of the design. Asymmetry in the rules paradoxically became the institution's default option. Critically, the Sutherland Report is silent on the legitimacy, variety, and extent of the many exceptions that all states have employed to increase trade protection when legitimately managing a crisis or pursuing their developmental goals.

The Sutherland Report did not entertain that asymmetries in the global trading system were likely to grow as the WTO evolved towards a multi-tier trading system in which bilateral, regional, and multilateral arrangements exist together in a more systematized way. Members, particularly of developing economies, are shifting their energies outside of the WTO in order to leverage new opportunities to capture the spread effects of regional trade, which they perceive as an alternative to the existing Doha Round's agenda.

Finally, the Report's thinking is thin in its failure to recognize that WTO law and the legal paradigm are largely deregulatory and aim to enhance the scope of markets at the expense of strong domestic authority. Armin Von Bogdandy and Markus Wagner are right to conclude that few would buy Sutherland's sweeping conclusion that "*the WTO improves sovereign control...*" [of its member states].

### **Global Governance Co-ordination: Not on the Sutherland Report's Radar**

On a related issue, a huge gap in the structure of global governance co-ordination was already evident when the Sutherland Commission engaged in its stocktaking exercise. However, the Report is strikingly short sighted and proposes no new initiatives to institutionalize governance needs or to strengthen, in practical ways, the co-ordination coherence between the WTO, the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), the World Customs Organization (WCO) and the World Health Organization (WHO). Co-ordination between the WTO and other global governance bodies is largely informal; in addition, the WTO has observer status at the meetings of the World Bank and IMF. Although many backchannels exist and informal linkages have grown, particularly in response to the financial crisis of 2008-09, there is no effective mechanism of policy co-ordination. A significant initiative occurred in 1999, when Madeleine Albright, then United States Secretary of State, proposed the creation of a new post for Dr. Supachai as chief liaison to establish policy coherence between the IMF, World Bank, and the WTO. Nothing came of the proposal to institutionalize relations between the WTO and other global bodies and, subsequently, the Sutherland Report did not make it a priority either.

### **The Rule of Law or the Rule of Lawyers?**

One of the promises of the Sutherland Report was to examine the boundaries of the WTO as an institution that had expanded into new trade and non-trade areas. As such, it needed to generate a high level of jurisprudence in order to handle this expanded mandate into public health, the environment, and services. To add new agreements and new undertakings requires a consensus decision of the General Council. The argument could be made that with all the deviations from the *single undertaking*, the membership needed to revisit the institution's fundamentals in order to make decision-making and its legal culture more inclusive, and less ad hoc and secretive. None of the bolder suggestions made it into the Sutherland Report. Instead, the Report recommended the creation of a new advisory body, over the Appellate Body (AB), composed of experts tasked to give guidance and direction and in some cases 'a definitive interpretation' of the rule making process. The

Report was adamant that such a body should not politicize decision-making nor change the existing system.

According to Steger, this mantra has left the WTO ill equipped to confront the challenges of the new economic order and divorced from the real world of states, governments and parliaments, and citizens. In his celebrated article, "*The Rule of Lawyers and the Ethos of Diplomats*," Joseph Weiler argued in 2000 that the WTO's legal revolution had come at a high cost. Seven years prior to the Sutherland Report, Weiler emphasized the need for flexibility and deplored the limits of a highly legalized culture:

Whether the shift in legal paradigm has been a victory for the Rule of Law or merely a victory for the rule of lawyers is a very serious matter on which the jury is still out. There are some very thoughtful actors and observers who are seriously wondering whether the *historical deal* has truly been beneficial to some of the deeper objectives of the WTO such as establishing stability and "*peaceful economic relations*." But given that for now, and the foreseeable future the shift of paradigm has taken place, the persistence of diplomatic practices and habits in the context of a juridical framework might end up undermining the very rule of law and some of the benefits that the new DSU [Dispute Settlement Understanding] was meant to produce.

The WTO's legal paradigm shift and the rigid application of law in the Dispute Settlement Mechanism (DSM) panels continues to raise systemic questions of *relevance and consequence*, in lawyers parlance, that diminishes the WTO's legitimacy among many domestic constituencies in precisely the way Weiler predicted. The Report failed to examine in any depth the power imbalances in the WTO rules and practices that many developing countries believed put the global South at a permanent disadvantage.

In 1999, Martin Khor proposed, in ways that anticipated Joost Pauwelyn's critical appraisal of the Sutherland Commission some years later, criteria to introduce new issues into the organization. Khor argued that this should not be a decision of the most powerful. The relevant criteria ought to be "*whether the entry of a particular issue would add benefit to the members of the WTO (especially the majority, i.e. the developing countries, and to the majority of people in those countries) and to the WTO system, with the ultimate goal of equitable and sustainable development*." A very large debate in the scholarly literature examines ways that would require members to work together and define new architecture for institutional reform, but the Report neither acknowledges nor utilizes this literature.

Instead, the Report fails to make the classic distinction between treating rule making in Howse's provocative words as "*superconstitutional law set in stone*" with little need for evolution and as a functional legal framework that is constantly evolving and adapting to new circumstances. The former is an ideological perspective that treats law as an invariable part of global neo-liberalism with its deregulatory restrictions on the state. The latter treats the WTO's legal culture as evolutionary, reflecting shifting aspirations, particularly of its global South majority membership.

## **Reform of The Consensus Rule and Variable Geometry**



Sutherland did not confront this conundrum in an imaginative forward-looking way and erred on the side of rigidity putting itself squarely in the first camp. It was very cautious about altering the decision-making process and moving away from the WTO's consensus rule by replacing it, in part, with the idea of variable geometry. The Report took no position and only recommended, without a strong endorsement of the principle of qualified majority voting, the issue for further study. The idea of consensus flexibility is that members could have different obligations and undertakings, not on all issues, but presumably on the most divisive. Variable geometry was hardly a new idea. The Uruguay Round and the negotiations on the General Agreement on Trades in Services (GATS) had opened the service sector to WTO discipline. Under GATS, countries could make different commitments and the principle of flexible consensus also extended to plurilateral agreements, special and differential treatment, as well as regional trade agreements.

Departure from the consensus principle was most stark at the Singapore Ministerial in 1996 when the European Union attempted to add new issues including investment, competition, government procurement, and trade facilitation. Martin Khor writes, "*[D]eveloping countries were opposed to even discussing these issues at the Ministerial but despite the lack of consensus the issues became the main subjects of a Green Room meeting of about 30 members that was dominated by the major developed countries.*"

Developing countries have been adverse to any reform that in the name of flexibility would reduce their bargaining leverage. In plainer language, they prefer no deal to a repeat of the Uruguay Round Agreement process and outcomes that were skewed to benefit industrialized economies. Therefore, while Sutherland only called for further study of the principle of variable geometry, it was not an attractive instrument for a majority of WTO members. The downside, if adopted, is that it would, *de facto*, create two classes of members making it more difficult for developing countries to defend their legitimate interests.

### **Unilateral Gradualism: The Importance of Unwritten Practices in a Rule-Bound Organization**

Organizational theory instructs us to pay attention to the informal and unacknowledged practices that do not appear on any organizational chart. Within global governance institutions like the WTO, many rules are couched in quite general terms that require interpretation in their application. In Howseian terms, politics belongs front and centre in the mix, in the day-to-day *to-ing and fro-ing*. A member's self-interest has to be advanced pre ante, before WTO processes are interpreted with the consequences interpreted post-ante. Recent history of trade negotiations testifies that it is very difficult to block or reverse interpretations subsequently.

At the height of the Washington Consensus, developed countries had no qualms about introducing the TRIPS (Trade-related aspects of intellectual property rights) agreement against the wishes of many members, effectively redrawing the dividing lines of what was acceptable or unacceptable domestic legislation. Howse's writings are pre-

eminent on analyzing the institutional decision-making conflicts raised by these issues and he does not mince words. By adding TRIPS to the WTO agenda "*intellectual property rights were in ...and labour and the environment were [out]*". Member states would not be able to make "*unilateral regime changes to them [labour and the environment]*" for their own domestic needs because "*that [would be] illegal*".

Whether the trade community would concur with Howse's basic observation is not the issue. The lesson here is that when democratic consent is not given in a rule-bound organization like the WTO, it does not mean that the rules are not modified substantively. Theoretically, the Warwick Commission had, at a minimum, a responsibility to deconstruct the official narrative and to look at recent history of unilateral rule-changes and the enlargement the trade agenda with the addition of TRIPS in the Uruguay Round. Howse, Steger, and Ismail head a long list of WTO experts who underline the presence of a corrosive imbalance between legal formalism and institutional practice. Until the collapse of the Cancun ministerial, the unspoken practice was for the powerful industrial economies to fudge the rules, bending them when necessary to advance their deregulatory agenda by using their leverage and insider knowledge to work the system.

### **More Power at the Top: Transferring Power Upwards**

Two chapters of the Sutherland Report propose to strengthen substantially the executive powers of the DG and to give more decision-making influence to trade insiders. The idea of transferring power upwards, giving new power to the DG to be *the guardian of the treaties*, as well as establishing a consultative board to help guide the membership in its deliberations was very controversial. While the DG might have wanted to fulfill 'row and steer' functions similar to the EU Commission, the parallel was a non-starter. Ideologically, the WTO is a strongly deregulatory governance institution driven by the principle of the efficiency of open markets while the EU has to strike a balance between the social market and economic deregulation. Developing countries wanted to have their views strongly represented around the negotiating table, and it was controversial to advocate a leading role for the Secretariat in the bargaining process.

Developed countries have relied upon 'divide and rule' strategies to pressure developing countries into agreements by controlling the drafting and directing of texts that often ignored the views of developing countries as Martin Khor, Aileen Kwa, Faizel Ismail, Amrita Narlikar and Diana Tussie have amply documented. Pyramidal bargaining has exposed the thinness of the conceptual idea that the WTO is simply a membership organization.

A closer look reveals that actual, on-the-ground practice is highly divergent from the idealistic model. A recurring theme in the scholarly literature presented WTO decision making as a high stakes game "*with few rules and no referee.*" Over the objections of many members, various DGs have had very large behind-the-scenes influence over the bargaining process during the Uruguay Round and in launching the Doha Round. As proposed by Sutherland, giving the executive more power over negotiations would add to existing

transparency problems. If members were not prepared to promote the organization after the collapse of negotiations at Cancun, putting the bureaucracy into the driver's seat would only increase the sense of disenfranchisement amongst developing countries that experience the WTO as a closed organization, rhetoric to the contrary notwithstanding. Post-Uruguay procedural deficiencies and the lack of formal management governance structures had produced widespread resentment among developing countries, and creating a new advisory body and giving the DG wider powers would not be seen as a positive contribution to the democratization of the WTO rulebook.

### **Sutherland's Principal Shortcomings**

In sum, the basic lesson the Sutherland Report missed is that substantive procedural issues are inseparable from reform of the negotiating framework. In Ann Capling's apt words, internal governance reforms are "*intrinsically linked to developing country problems in the WTO*"; for developing countries, the WTO's free-trade agenda has a built-in bias favoring industrial sectors where the developed countries are winners. Sutherland's principal recommendations for strengthening the role of the executive and creating two so-called eminent advisory bodies in the policy and legal realms were largely non-starter propositions. The trial balloon floated to study the practicality of a qualified majority voting sparked only modest interest from the membership. The narrow focus on procedural reform, timid as it was, must be thought of as backward looking. There was no clear strategy articulated for the future of the WTO in an increasingly complex global trading system.

The world trade authority lacked adequate management structures for a complex and highly diverse membership organization. Except for the consensus rule, members could not act collectively should they wish to expand their mandate to address the social and developmental impacts of trade. In terms of greater global co-ordination of the governance agenda, the Sutherland Report proposed little that was new to the operating system. The relation of the WTO to other bodies such as IMF, World Bank, or UN organizations would remain, largely formal, distant, and not substantive .

With respect to civil society groups the Sutherland Report defended the status quo. Steve Charnovitz shows how out of step the WTO is compared to other international bodies, both in and outside the United Nations system, with respect to admitting civil society organizations into its deliberations. With the decline of economic neo-liberalism's rationale – that the WTO is only for state actors – the question should be why has Oxfam, or other transnational actors, not been invited into the WTO council and its deliberations?

From another angle, Joost Pauwelyn calls for an end to the pretence that the WTO is a neutral zone where political decisions are left at the door. The issue of accepting amicus briefs from third party interveners in trade dispute panels is one area where some progress has been made, but this small step does not address the larger, substantial question with respect to the WTO's formal relation to non-state actors.

Some scholars rightly describe the permanent imbalance between this global governance institution's legislative and legal arms as a *decision-making trap* accounting for the growing dysfunctionality of its practices in organizational terms. Craig VanGrasstek and Pierre Sauvé blame the current strategy of top down gradualism as an operational mode for failing to move the organization to the next level of its development. Instead, gradualism has pushed the organization towards deadlock and uncertainty about its purpose.

### **The Larger View of the Warwick Commission**

The 2007 Warwick Commission was the brainchild of Richard Higgott, a leading academic scholar and globalization expert, who provided the intellectual leadership and drive. The Honourable Pierre S. Pettigrew, Canada's energetic and high profile trade minister, a key player at Cancun and part of the WTO's inner circle of experts, chaired the Commission. He was staunchly committed to reviving the Doha Round and its deregulatory agenda. Significantly, Warwick had no formal standing with the WTO or its membership, and many member states were unaware of its work and mandate. Warwick's enquiry into the future of the global trade regime was seen as both a continuation of the Sutherland Panel and a visible departure from it. The Report was organized into six short chapters. Chapter one and two can be read together as highlighting the need for global co-operation at a time when the world trading system is facing intense political pressure from states, the public and powerful transnational corporate groups. These chapters argue in favor of new measures to provide the oversight and discipline to ensure that the explosion in regional, mini-multilateral deals maintained WTO compliance. The last three chapters about rule making, trade, development, and the need for increased international co-ordination and interstate diplomacy cover much the same ground as the Sutherland Report.

Early on, Pettigrew set the parameters to be practical, work within the WTO's culture and be realistic enough for the Geneva trade brass to take the report seriously. At the time the Commission was struck, members from the global North had disengaged from the Doha Round, and the single undertaking rule was seen to be the principal obstacle to successfully concluding the Round. The Commission's re-examination of the decision-making procedures was timely and welcome. In terms of vision, its remit, at least, was less procedural than the Sutherland panel, more organizationally focused, and more substantial with several chapters of the final report devoted to mapping and analyzing the changes in the global economy.

By the time of the Warwick Commission, advancing the development dimension of the WTO in the Doha Round had become the most important institutional issue for developing countries as the cornerstone of a reinvigorated multilateral rules-based trading system. In the Doha Round, developing countries had argued that their particular situation required rules that took their interests and situation into account. Joseph Stiglitz and others demonstrated that international institutions had created unfair rules of the game particularly with respect to trade. Countries need first to develop their policy space and that need must be embedded in the WTO's constitution and rules. Importantly, the WTO had

resisted this challenge and lacked both clarity about its goals and objectives. It needed to construct an institutional framework with clear parameters for conceptual clarification. Practically, it had overvalued the benefits from deepening market access and had created new uncertainties for emerging economies about whether trade liberalization would help them diversify into new markets. Pro-free traders had not made a convincing case that benefits from new rules outweighed the costs of state-led mercantilist strategies. Reaching any agreement was made more difficult because there was no agreement among economists that rapid liberalization would benefit countries with high unemployment.

### **Warwick's Big Idea: Modification to the Single Undertaking**

The Warwick Report's principal recommendations for reform were to finesse the rule of the Single Undertaking and introduce a system of qualified voting as a way to overcome the chronic deadlock of the ten-year-old Doha Round. Members were in need of prodding to negotiate more meaningfully. In addition, the Development Round had put new issues on the table that often clashed with the WTO's goal of universal commitments. Finding a *procedural equivalent* to the consensus rule seemed like a radical departure, however, members were already looking at bilateral and regional trade agreements as alternatives to deadlocked negotiations. In such a polarized negotiating environment, it was increasingly uncertain whether the consensus principle was salvageable as a *modus operandi*. While it had been the cornerstone of WTO decision-making, legal experts pointed out that Articles IX, X, XII, XIV permitted majority voting.

The Report also suggested technical proposals for alternative dispute resolution mechanisms through mediation and arbitration by third parties. In place of retaliation, a member state that lost under the current Dispute Resolution system would be given the right to pay compensation. At end of the day, the Warwick Commission makes a modest proposal to the universe of ideas. If the Report were bolder, it would have addressed issues of fairness, the role of justice in the WTO's institutional culture, and, of course, the most pressing topic of social justice. In the words of Celso Amorin, Brazil's trade minister, the new global landscape required that global governance institutions learn how "*to combine development with social justice*". This would be the starting point from which to construct a more viable and sustainable rules-based trade system in the interest of developed and developing countries. The Warwick Commission did not provide leadership for reducing the differences amongst diverse country groupings or propose ways to forge deeper relationships based on mutual trust. With so many difficult issues still facing developing countries, it did not engage any of these top-level subjects to the disappointment of many experts.

Instead, its ambition was to tack close to Sutherland's earlier enquiry in order to reassure members that the organization's decision-making procedures and rules could be become more effective by reducing the opportunities for larger countries to resort to blocking measures. Blocking measures enabled large countries to declare that a matter was of vital national interest much to the frustration of many developing countries. The

developing countries feared that any system of weighted voting would institutionalize their secondary status and create a two-speed/two-track system in which a small group of powerful members could strengthen the WTO as a trade body and not a development institution. (See the earlier discussion of 'variable geometry' in the Sutherland Report.)

### **The New Environment of Consensus Building**

In following the thinking of the Sutherland Report in key aspects, the Warwick Report failed to examine any issues of greater significance to the future of the world trading system than the micro-side of the WTO's procedural practices. The standoff in the Doha Round had raised many questions about the WTO's troubled architecture. In Steger's formulation, linking trade to non-trade issues such as labor and the environment was the most critical challenge facing the WTO. To achieve greater coherence in global policymaking, the organization would have to develop an interest in "*operat[ing] as an open rather than a self-contained regime*", in Marco Bronckers' words. The WTO's conceptual framework needed four elements for a development-oriented multilateral, trading system based on the principles of "*fair trade, capacity-building, balanced rules and good governance*" according to Ismail. "*Consensus building*," Amrita Narlikar writes, "*worked when the GATT-WTO culture was a rich man's club*". The principal supplier rule gave players from the global North a modus operandi to reach bilateral deals among themselves. It was a highly effective form of deal making that gave the industrialized countries leverage to extract concessions from developing countries particularly during the Uruguay Round and earlier.

However, the Warwick Commission's perspective, centered on advocating significant procedural change, was overtaken by the global financial crisis that focused all eyes on the near collapse of the global banking system. The handful of recommendations proposed by the Commission hardly began to address the magnitude in the structural shift in power between member states at the bargaining table.

By the Cancun meetings, the environment of consensus building had been radically transformed by the Southern countries for which knowledge-based bargaining provided new advantage and leverage at the bargaining table. Also new to this round was the increasing politicization of the trade agenda with issues such as access to generic drugs and price supports. For the millions of global South farmers who live on \$2 a day or less, the WTO became a lived reality on the ground largely due to media focus and the new information technologies. The result was that agriculture and public health became game changers highlighting the fact that trade negotiations were no longer the preserve of the *technicos*, the trade negotiators and politicians. New coalitions such as the G20, G33, and the Cotton 4 differed from previous coalitions that had fallen apart in the final end game. Narlikar notes correctly, "*what is special is that these coalitions remain solid and united in the negotiations phase*"; they hold tight to their objectives and do not back off.

Also new, as Martin Khor has argued recently, the perennial theme about "*leveling the playing field*" became a political issue. As rule-bound, membership organization, the WTO requires the formal consent of all members. Only when democratic consent is given, could

the WTO rules be modified. Like many organizations though, the everyday practice often diverged from the written rules and procedures. Not surprisingly the WTO's official narrative of *networked insiders* does not admit to this practice of *unilateral informalism*.

### **Unilateral Informalism: Not a Model for Problem Solving**

Post-Cancun, with the global South opposed to any further unilateral informalism, *rule fudging* is no longer possible. However, despite the need for reform, the WTO has been unable to find a new direction, and the Warwick Report failed to shed new light on the case for institutional problem solving; particularly for designing a development strategy that requires an unconventional response to global structural change. Fernand Braudel put his finger on the conditions for radical and incremental change in a member-driven organization such as the WTO: an institution defined by both *traditionalism and rigidity*, cannot respond easily to the new political and structural realities. Such an institution needs to rebalance its decision-making processes with a new mandate and to develop change-oriented structures and processes. Debra Steger and others contend that the WTO has a "*long, torturous legal history*" and the dispute settlement bodies have never clarified its scope or recognized its competence to bend the rules in order to equip the organization to face challenges of the new economic order. Steger's point, shared by many experts, is that there has been little room for a culture of adaptive legal exceptionalism to emerge. In its place, the legal culture of the WTO has not allowed broader kinds of policy goals to balance the drive for open markets.

It is often noted that organizations evolve and adapt to structural change most often incrementally, but sometimes, faced with a near-death experience an organization in denial will address the basic question of its survival. The Warwick and Sutherland Reports needed to explain how and why the WTO remained trapped by its existing architecture. In the end, both failed to put the metaphoric knife to the institution's throat and shape a new epistemic consensus about the organization's future.

### **Adaptive Incrementalism: The Ambiguous Legacy of Sutherland and Warwick Reports**

With its narrowly cast rules, the organization charged with a mandate of global trade governance has not been able to evolve into a revitalized institution designed for the complexities of the twenty-first century. Paradoxically, what Joost Pauwelyn calls "*its operation system*" is underpowered for what it is required to do institutionally and overloaded by the weight of its bloated trade agenda. If there is a proverbial lesson learned to be learned from these high-level enquiries, it is that as the multilateral system continues to unwind, the WTO, one of the world's most powerful global governance institutions will become slower moving and more unwieldy, unable to arrive at any broad consensus most particularly about its own uncertain future.

The institution's inability to rethink its mandate and its legal culture remains the road not taken. As a mirror, the Sutherland and Warwick Reports studied the institution through the lens of the past. As real-time report cards, they tell us little about the new equilibrium point that is essential for the future.

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