

## A CLOSE LOOK AT A FEW POINTS

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For many decades, international agencies or their executives have occasionally tasked an independent panel to give advice on how to move intergovernmental cooperation forward. The typical model is to select a balanced group of eminent persons who will study the assigned issues, issue a cogent report, and then disband. An early (if not the earliest) instance of such an independent advisory function in international economic affairs was the establishment of the Bruce Committee in 1939 by the Council of the League of Nations.<sup>1</sup> Decades later in 1983, the Director-General of the General Agreement on Tariff and Trade (GATT) established a group to study and report on problems facing the international trading system. That ensuing report (known as the ‘Leutwiler Report’)<sup>2</sup> is often credited with building support for the Uruguay Round negotiations. Twenty years later, in June 2003, the Director-General of the World Trade Organization (WTO) commissioned eight prominent individuals to serve on a ‘Consultative Board’, and to prepare a report on adapting the WTO to the twenty-first century. This 81-page Report is titled *The Future of the WTO*.<sup>3</sup>

On the whole, the Consultative Board’s Report (‘CB Report’) is stellar and makes several important recommendations.<sup>4</sup> The thoughtfulness of the CB Report no doubt results from the wisdom of its authors and the significant attention they devoted to the project. I want to say this at the outset, because space limitations require that my essay be short, and thus I will be emphasizing a few areas where I disagree with the CB Report, rather than the many areas where I agree.

Before turning to the substance of the CB Report, I will comment briefly on the composition of the Board chosen by the Director-General. Although

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<sup>1</sup> The Development of International Co-operation in Economic and Social Affairs, Report of the Special Committee (‘Bruce Committee Report’), Special Supplement to the Monthly Summary of the League of Nations, August 1939.

<sup>2</sup> *Trade Policies for a Better Future* (Geneva: GATT, 1985), known as the ‘Leutwiler Report’.

<sup>3</sup> The Future of the WTO, Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, January 2005 (hereinafter CB Report). The CB Report contains a 70-word Disclaimer to distance it from the WTO.

<sup>4</sup> The Report received considerable praise upon its release. See, e.g., Pranay Gupte, ‘Elimination of Global Tariffs, Stronger World Trade Organization Urged’, *New York Sun*, 18 January 2005, 12; ‘Trading Up: Panel Says WTO Ain’t Broke, but Still Needs Fixing’, *Financial Times*, 18 January 2005, 14. For a critical review, see C. P. Chandrasekhar & Jayati Ghosh, ‘The Future of the WTO’, *Global News Wire*, 25 January 2005, available on Lexis. Chandrasekhar & Ghosh charge that ‘this is clearly a report by and for the WTO Secretariat’.

each of the appointees is a great choice, the group as a whole lacks balance. Let me mention just one problem – the absence of any women among the group of eight. This ratio should be embarrassing to the WTO and falls below international standards. Although the Report explains that the WTO is a ‘sui generis’ intergovernmental organization, and ‘not a specialized agency of the United Nations’,<sup>5</sup> the more inclusive practices of the United Nations (UN) regarding gender diversity are relevant to the WTO. Consider two recent, high-profile advisory groups appointed within the UN system. The World Commission on the Social Dimension of Globalization was composed of 21 members – 13 men and eight women.<sup>6</sup> The UN Secretary-General’s High-level Panel on Threats, Challenges and Change was composed of 16 members – 12 men and four women.<sup>7</sup> In my view, the prevailing standards for composing advisory boards in multilateral organizations are unlikely to be ineffective or inappropriate for the WTO.

In this essay, I consider three issues: Part I looks at what the CB Report says about the impact of the WTO on domestic policy autonomy. Part II looks at the Report’s discussion of coherence and coordination between the WTO and other intergovernmental organizations. Part III evaluates what the Report says about the role of non-state participation in WTO rulemaking and the role of the WTO Secretariat *vis-à-vis* non-state actors. The essay ends with a brief conclusion.

## I. WTO SUPERVISION OVER DOMESTIC POLICY

Chapter III of the CB Report provides a textured discussion of ‘Sovereignty’ which explains that in a WTO context, sovereignty is not unitary (not ‘all or nothing’), but rather consists of disaggregated slices of relationships.<sup>8</sup> The Report looks at these slices and concludes that for any WTO Member, whatever that member loses in domestic ‘policy space’ at the national level is more than made up for by gains for that member from ‘cooperation and the rule of law at the multilateral level’.<sup>9</sup> As a multilateralist, I share this conclusion, but as an analyst, I do not think the Board has adequately supported its conclusion. Let me mention a few areas where the CB Report is unsatisfactory.

The CB Report points to market failure as a central rationale for international cooperation.<sup>10</sup> For example, the Report says:

<sup>5</sup> CB Report, above n 3, para 148.

<sup>6</sup> World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: ILO 2004), v.

<sup>7</sup> UN, ‘A More Secure World: Our Shared Responsibility’, December 2004, <http://www.un.org/secureworld> (visited 13 March 2005).

<sup>8</sup> Above n 3, paras 110.

<sup>9</sup> *Id.*, para 143.

<sup>10</sup> *Id.*, paras 135–38.

If market failure needs to be avoided or treated then it will increasingly happen at the multilateral level. That is why the WTO plays such a crucial role – for developed and developing countries alike – and why arguments about loss of ‘sovereignty’ are often ill-considered and misplaced.<sup>11</sup>

Nevertheless, the Report does not explain what, if anything, the WTO contributes to solving market failure. In my view, the challenge of market failure is addressed only marginally in WTO rules,<sup>12</sup> and correcting for market failure is not the current mission of the WTO. Instead, most WTO rules seek to restrain government failure, to prevent discriminatory state action, or to establish a minimum standard of treatment to the alien (e.g. the Agreement on Trade-Related Aspects of Intellectual Property Rights).

The real issue regarding market failure, which the CB Report barely discusses, is whether WTO rules inappropriately constrain national measures to address market failure. As the Report notes, the issues dealt with by the WTO ‘increasingly touch on sensitive aspects of domestic policy-making and crucial choices among welfare objectives’.<sup>13</sup> Thus, it is conceivable that many WTO rules – such as those on subsidies, regulation, and standards – do erode important state authority. At one point, the Report claims that ‘there is nothing about freeing trade that removes or minimizes society’s right to oversee and regulate corporations’,<sup>14</sup> but at another point, the Report concedes that WTO rules ‘reach deeply into domestic policy-making fields, including economic regulation’.<sup>15</sup> The Report’s conclusion is that the gain to governments from WTO cooperation and rule of law exceeds the ‘loss’ in ‘policy space’.<sup>16</sup>

That conclusion about overall welfare may be right, but how can one possibly know unless there is a careful evaluation of all the areas where states lose useful governmental authority? In my view, if any WTO rule impedes legitimate regulatory/tax functions or impedes internal redistribution policies that are not protectionist, then we should acknowledge that fact and consider the implications. As the CB Report explains, citing the Appellate Body, the WTO

<sup>11</sup> Id, para 140.

<sup>12</sup> For example, see the General Agreement on Trade in Services, art. VI:6 (calling for adequate procedures to verify the competence of foreign professionals). Sometimes, WTO officials portray the WTO as having a responsibility to regulate markets. For example, the WTO Director-General gave a speech recently at the Council on Foreign Relations in New York where he described the WTO as an organization ‘where the governments of the world come to negotiate the continued reduction of trade barriers and to set the rules which govern international business activity’. Supachai Panitchpakdi, ‘The WTO After 10 Years: The Lessons Learned and the Challenges Ahead’, 10 March 2005, [http://www.wto.org/english/news\\_e/spsp\\_e/spsp\\_e.htm](http://www.wto.org/english/news_e/spsp_e/spsp_e.htm) (visited 13 March 2005) (emphasis added). In my view, the main role of the WTO is to set some of the rules which govern *government* activity, and not to set the rules that govern business activity.

<sup>13</sup> Above n 3, para 275.

<sup>14</sup> Id, para 13.

<sup>15</sup> Id, para 138.

<sup>16</sup> Id, para 143 and p 79.

Agreement reflects a ‘bargain’ among its governmental authors.<sup>17</sup> In such a bargain, any particular rule may not serve the global (or national) commonweal, and yet is part of the WTO because a powerful government demanded it. Accepting the WTO as a salad of healthy and rotten rules may be acceptable in an imperfect world, but if that’s what the Report is saying, then greater clarity would be helpful about what, if any, useful domestic policy space has been lost.

Analysts using a ‘law and economics’ framework would probably claim that WTO rules do not restrain any efficient government action at the national level. For them, WTO rules seek to restrain *inefficient* government action, particularly action that redistributes income while simultaneously lowering national welfare and hurting other countries too. Seen in that way, a government following WTO rules is not losing any useful policy space, and so the equation proving the benefits of WTO membership is not driven by the gains from ‘rule of law’. In that school of thought, there would probably be criticism of the Board’s statement that ‘If governments are losing the capacity to regulate meaningfully at the domestic level, they are reclaiming some control of their economic destinies at the multilateral level’.<sup>18</sup> One should not lightly jump over the issue of whether governments are truly losing the capacity to regulate meaningfully at the domestic level.

In addition to being more nuanced, the Report’s discussion of domestic policy space could have been more attentive to the ongoing international debate on that topic. Last year, the World Commission on the Social Dimension of Globalization criticized the WTO for encroaching on essential domestic policy space.<sup>19</sup> Nevertheless, the CB Report does not engage those arguments and, for that matter, does not even mention the 168-page World Commission Report. That oversight is ironic in view of the broad overlap in the two reports on the topic of globalization, and the CB Report’s attention to coherence with other intergovernmental organizations.

## II. FUNCTIONAL INTERNATIONAL GOVERNANCE AND THE COHERENCE CHALLENGE

The CB Report quite rightly observes that the WTO does not cover every policy area that touches on international trade and investment, and notes that there is a need for the WTO to engage in ‘horizontal coordination’ with other intergovernmental organizations.<sup>20</sup> Nevertheless, the Report points to ‘one obvious limit to the scope of horizontal coordination’, namely, ‘the need to preserve both the creation and interpretation of WTO rules from undue

<sup>17</sup> Id, para 111.

<sup>18</sup> See id, para 140.

<sup>19</sup> World Commission report, above n 6, paras 361–86.

<sup>20</sup> Above n 3, para 146.

external influence'.<sup>21</sup> The Report states that the WTO legal system cannot be changed from the outside by other international organizations.<sup>22</sup> That much is obvious. But the Report does not offer a principle for determining when, if at all, WTO processes should be open to *due* influence by other international organizations.

The Report does not address the tension between the status of the WTO as functional *lex specialis*,<sup>23</sup> and the way in which the Report admits<sup>24</sup> that the WTO influences general international law. If WTO negotiations and adjudication cause effects outside the WTO, then one wonders why the Consultative Board is 'convinced that the creation and interpretation of WTO rules is for WTO Members alone and should be preserved from undue external interference'.<sup>25</sup> A less isolationist perspective would be that the WTO is so important that other international organizations should be able to offer views on rule creation. Moreover, non-member governments should be able to do so too.

A more inclusive attitude about 'external influence' on the WTO would seem especially warranted given the Report's recommendation that 'Political leaders must signal their expectations of the WTO in a broad political, social and economic context', and that a 'Summit of World Leaders' be held in the WTO every five years.<sup>26</sup> This recommendation seems inconsistent with the compartmentalized perspective of the WTO presented in the CB Report. For anyone who thinks that the GATT/WTO system has been successful over the years due to its tunnel vision, the last thing one should want is to convene world leaders at the WTO for anything other than a ceremonial occasion because such leaders will likely see the WTO in a larger context, and demand that the WTO be more responsive to it.

### III. NON-STATE PARTICIPATION AND THE ROLE OF THE WTO SECRETARIAT

The idea for the high-level Summit is related to another policy disconnect in the CB Report. On the one hand, the Report urges greater political involvement in WTO processes and indeed urges that 'Senior Policy-makers should be in Geneva more frequently'.<sup>27</sup> On the other hand, when it considers institutional changes that might pull in more political actors – such as the more active involvement of parliamentarians, business, and civil society – the

<sup>21</sup> Id, para 166.

<sup>22</sup> Id, para 168.

<sup>23</sup> See id, para 168.

<sup>24</sup> See id, para 225. See also para 12.

<sup>25</sup> See id, p. 79.

<sup>26</sup> See id, para 319 and p 82.

<sup>27</sup> Id, paras 316–20, 321.

Consultative Board proceeds cautiously, and observes that WTO is a government-only organization.<sup>28</sup>

Although it states that a manner for parliamentary participation in WTO rulemaking needs to be addressed,<sup>29</sup> the CB Report does not address it, and merely reports that the idea for a parliamentary assembly under the aegis of the WTO is opposed by many developing countries.<sup>30</sup> Of course, we knew that already.<sup>31</sup> Here the CB Report missed an opportunity either to debunk that opposition, or instead to present a coherent argument against parliamentary involvement.

With regard to a role for the private sector in the WTO, the CB Report says almost nothing. Even though it notes that ‘business and consumers’ are the ‘key stakeholders in multilateral trade negotiations’,<sup>32</sup> the Report does not foresee any direct role of these dynamic actors in moving the WTO forward. Given the ongoing practice in the UN for business leader presentations – for example, at the 2002 UN Monterrey Conference on Financing for Development and the 2002 World Summit on Sustainable Development – the timidity of the CB Report is regrettable.

With regard to civil society, the CB Report, to its credit, does state that the WTO can gain knowledge and expertise from dialogue with civil society, business and other stakeholders.<sup>33</sup> Furthermore, the Report concedes that managed properly, WTO engagement with civil society organizations might make them ‘active agents in support of multilateralism’.<sup>34</sup> The Report also states that improved external WTO transparency and engagement with civil society can assist governmental policymaking to overcome domestic barriers.<sup>35</sup> WTO engagement with consumer groups would be one example. Despite these potential synergies, however, the Report does not call for any direct consultation and cooperation between the WTO General Council and civic society organizations.<sup>36</sup> This dismissive treatment ignores the potential contributions of nongovernmental and expert opinion in an era of globalization. Indeed, over 60 years ago, the Bruce Committee had attained a consciousness of understanding that ‘It is by international discussion, and by the association in the work of independent experts, that Governments can best safeguard themselves against the danger of being pressed by one sectional interest or another

<sup>28</sup> See *id.*, paras 187, 200, 206, 210, 212.

<sup>29</sup> *Id.*, para 204.

<sup>30</sup> *Id.*, para 205.

<sup>31</sup> See the articles on parliamentary participation by Gregory Shaffer, David E. Skaggs, and Erika Mann in the Mini Symposium published in Volume 7 (September 2004) of this Journal.

<sup>32</sup> Above n 3, para 278.

<sup>33</sup> *Id.*, para, 193.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, para 195.

<sup>36</sup> See *id.*, paras 200, 207, 212.

to assist it at the expense of the general well-being'.<sup>37</sup> The Consultative Board does not question the value of nongovernmental opinion for the setting of trade policy, but seems to want those discussions to be held away from the WTO. The CB Report states that the 'primary responsibility for engaging civil society in trade policy matters rests with the Members themselves'.<sup>38</sup>

Unfortunately, the Board does not offer the members any useful advice for stepping up such decentralized engagement at the national level. Twenty years ago, the Leutwiler Report noted that 'An essential first step in developing support for better trade policies is public awareness'.<sup>39</sup> To that end, the Leutwiler Report suggested the use of national advisory groups 'made up of influential and active representation of the main stakeholders in international trade – business, finance, labour and consumers'.<sup>40</sup> It would be interesting to know how many of such advisory groups now exist among WTO member countries. Regrettably, the CB Report does not provide any data. Moreover, the Board apparently did not study (and seek to learn from) how governments responded, or failed to respond, to the recommendations of the Leutwiler Report regarding public awareness. Most incredibly, the Consultative Board does not even mention the Leutwiler Report!

Perhaps the authors of the CB Report imagine that they are being progressive in recommending more engagement between the WTO Secretariat and civil society organizations.<sup>41</sup> This recommendation betrays a confusion about the proper role of the Secretariat. Dialogue between the bureaucrats in the Secretariat and the public may be useful, but is hardly a substitute for opportunities for nongovernmental organizations (NGOs) to observe WTO subsidiary bodies and to occasionally speak at them in the same way that they do routinely in many UN subsidiary bodies. As the Third World Network has aptly stated: 'Citizen groups and the public in general must be able to follow what is going on [at the WTO], and have channels open to them to make their views and their voices heard'.<sup>42</sup>

Unfortunately, the approach taken by the CB Report is far from progressive. An NGO consultative role in the WTO could be accomplished under the legal authority in Article V:2 of the WTO Agreement.<sup>43</sup> Without offering any evidence, the CB Report states that the inclusion of Article V:2 was 'arguably a more conscious and deliberate decision than the faint and guarded

<sup>37</sup> Bruce Committee Report, above n 1, at 8–9.

<sup>38</sup> Above n 3, para 212.

<sup>39</sup> Leutwiler Report, above n 2, at 36.

<sup>40</sup> *Id.*, at 36–37.

<sup>41</sup> See above n 3, paras 208, 212 and p. 80.

<sup>42</sup> Third World Network, *The Multilateral Trade System: A Development Perspective* (New York: UNDP 2001), 96.

<sup>43</sup> Article V:2 states that 'The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.'

clause [about NGOs] in Article 71 of the UN Charter . . .'.<sup>44</sup> As I read the history, this conclusion is unwarranted, but leave that aside. The more serious problem with the analogy to the UN experience is that the CB Report fails to acknowledge the divergence between its recommendation for more interactions between NGOs and the WTO Secretariat, and the significantly different UN practice, namely NGO involvement in intergovernmental meetings. A world of difference exists between those two approaches.

Consider the contemporary practices regarding NGO participation in the UN Environment Programme (UNEP) in comparison to the WTO's feeble practices. In February 2005, UNEP convened its 6th Global Civil Society Forum in Nairobi a few days prior to the intergovernmental meeting of UNEP's Governing Council and Global Ministerial Environmental Forum. The NGO and private sector participants in the Civil Society Forum produced a report that then fed into the Ministerial Conference.<sup>45</sup> Accredited NGOs were able to attend the Ministerial Conference as observers and make a closing statement to the governments. By contrast, the practices in the WTO are primitive by comparison. The WTO does hold an annual Public Symposium, but it is not temporally or geographically connected to a WTO Ministerial Conference. For example in 2005, the WTO Public Symposium will be held in April in Geneva. But the 2005 WTO Ministerial Conference will be held in December in Hong Kong. Another difference is that the WTO's Public Symposium is not designed to elicit any recommendations. The Symposium is merely a show-and-tell event in contrast to the UNEP Forum which is built into the environmental negotiating process.

The efforts of the Consultative Board to relegate NGO relations to the Secretariat is part and parcel of the general thrust in the CB Report to expand the Secretariat's resources and give it new duties in interface with the public. According to the Report:

The WTO needs a convincing and persistent institutional voice of its own. If Members are not prepared to defend and promote the principles they subscribe to, then the Secretariat must be free to do so. Indeed, it should be encouraged, even required, to do so.<sup>46</sup>

Despite its use of the word 'free', I doubt that the Board is asking the Secretariat to act autonomously. Instead, I assume that the Board is calling on WTO member governments to authorize the Secretariat to become the voice of the WTO 'system'.<sup>47</sup> Specifically, the Board is recommending that the

<sup>44</sup> Above n 3, para 188.

<sup>45</sup> For the UNEP documents, see [http://www.unep.org/DPDL/civil\\_society/GCSF/index.asp](http://www.unep.org/DPDL/civil_society/GCSF/index.asp) (visited 13 March 2005). For background, see *Natural Allies. UNEP and Civil Society* (Nairobi: UNEP, 2004).

<sup>46</sup> Above n 3, para 361.

<sup>47</sup> See *id.*, paras 173, 360, 364 ('system').



Secretariat answer the WTO's critics and make a politically sensitive presentation of a coherent WTO system.<sup>48</sup>

In my view, this recommendation is not well considered. Selling the benefits of the WTO should be the role of elected officials, cabinet ministers, advocacy organizations, journalists, educators, etc., not the role of international civil servants. WTO employees should not be sent on a mission to preach the virtues of their employing organization. The Director-General of the WTO is an exception to some extent and I would give her or him greater latitude to act as a human voice for the WTO. But it is wrong, in my view, for regular WTO staff to serve as a truth squad and respond to critics of the WTO.<sup>49</sup>

### CONCLUSION

Let me state again that in presenting brief comments on the CB Report, I have focused on a few areas where the Report is deficient. I have not discussed the many areas where the Report is right on target, such as the case for liberalizing trade, the erosion of nondiscrimination, and dispute settlement. Indeed, it is because I think the Report is very good that I am worried that the Board did not give sufficient attention to a strategy for communicating and disseminating its work.

As we learned in the United States with the September 11 Commission, the role of a modern advisory committee should not end when its report is released. The Consultative Board stated its vision for the future of the WTO, but did not visualize a role for itself in communicating and advocating its findings and conclusions. Some members of the Board wrote op-eds around the time of the Report's release,<sup>50</sup> but in an Internet era, that is not an adequate dissemination strategy. As far as I can tell from the WTO website, the Board did not hold any public hearings during the Report's gestation or any press conferences afterward. That is a pity.

With due respect to the eloquence of the individuals on the Consultative Board, I doubt that a dense 81-page report to the world can sell itself.

<sup>48</sup> *Id.*, para 363.

<sup>49</sup> The WTO Secretariat is already doing this on the WTO website and sometimes in an inaccurate or offensive way, as I have elsewhere noted.

<sup>50</sup> For example, see Peter Sutherland, 'The Real Trade Barriers that Hinder Poor Countries; Reforming the WTO', *International Herald Tribune*, 29 January 2005, 6.

