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THE SUTHERLAND REPORT AND DISPUTE SETTLEMENT

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Ten years after the organization's founding, an air of disappointment surrounds the WTO. The great promise of a global trade regime, dedicated to the principle of comparative advantage, seems to have stalled. The Doha Development Round, launched in 2001 in an attempt to redeem the disastrous Seattle Ministerial Conference of 1999, has been stymied by familiar disputes between North and South, mostly with respect to agricultural issues, but with respect to nonagricultural market access and services as well. Frustrated by impasses at the WTO, members have increasingly bypassed the organization in favor of discrete "preferential trade agreements", or PTAs, that address trade issues in regional and sub-regional units. According to critics, these PTAs are creating a "spaghetti bowl" of trade regimes that threatens to make the global organization irrelevant.

The dissatisfaction extends even to dispute settlement, long seen as the WTO's major contribution to international law. Although the DSU has had some notable successes, particularly in comparison to the often desultory GATT dispute settlement mechanism, commentators have voiced concerns. For example, one hears complaints that the retaliation remedy is too lenient, particularly in the context of asymmetric disputes between large and small economies;[1] there are proposals to cure this problem by allowing for monetary compensation as a remedy.[2] Commentators denounce the idea that members can violate their treaty obligations indefinitely – that members have the option to "breach" or to "buy out" their victims by accepting retaliation.[3] Still others argue that the

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[1] J. Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules Are Rules – Toward a More Collective Approach", 94 *American Journal of International Law* (2000), pp. 335, 338.

[2] H.T. Pham, "Developing Countries and the WTO: The Need For More Mediation in the DSU", 9 *Harvard Negotiation Law Review* (2004), pp. 331, 362-63 (discussing proposals).

[3] J.H. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?", 98 *American Journal of International Law* (2004), p. 109. For an argument in favor of the buy-out option, see W.F. Schwartz & A.O. Sykes,

Appellate Body should be more willing to supplement WTO treaty text with other substantive international law, including customary international law.[4]

The Sutherland Report – more properly, the Report by the Consultative Board on The Future of the WTO – reflects this sense of unease about the organization's apparent drift.[5] While affirming that the WTO represents "the most dramatic advance in multilateralism" since the 1940s,[6] the Report worries that the organization "is not by any means fully equipped" for the tasks ahead.[7] To remedy this situation, the Report makes numerous recommendations in a wide variety of areas. The language is moderate in tone and the proposals mostly moderate in scope; the authors clearly understood the dangers of a radical transformation of the organization. And, as one would expect in a work done by committee, there are some tensions in the Report; its endorsement of plurilateral negotiations, for example, seems a bit at odds with its condemnation of PTAs. But one can fairly say that several important elements of the Report tend in the direction of strengthening the WTO as an institution, of making it a more independent and less "Member-driven" body.

Reaction within the WTO membership has been tepid. There is little chance that the General Council will consider the Report before the end of the Doha Round, which could mean indefinite postponement. This lack of enthusiasm is not all that surprising. Enhancing the rigor of the WTO as an institution seems unlikely to solidify members' commitment to the organization. On the contrary, increasing the demands of WTO membership – for example, by enlarging the organization's scope and making its rulings more binding – seems more likely, at this point, to result in greater suspicion and resistance. Empowering the WTO in some of the ways that the Report suggests could actually retard, rather than advance, the cause of freer global trade.

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"The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization", 31 *Journal of Legal Studies* (2002), p. 179.

4 J. Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", 25 *Michigan Journal of International Law* (2004), pp. 903, 909-15.

5 Consultative Board to the Director-General, "The Future of the WTO", 2004 [hereinafter Report].

6 *Ibid.*, p. 9.

7 *Ibid.*, p. 5 (Sutherland Preface).

The Report is quite comprehensive – addressing matters as diverse as PTAs (the Report expresses concern about their spread), the desirability of plurilateral negotiations within the WTO (the Report argues they should be considered as a way of avoiding impasses), and relations with civil society and other intergovernmental organizations (the Report supports some greater transparency) – and it is impossible to conduct a thorough review in a short essay. Nonetheless, the Report's discussion of one important area, dispute settlement, demonstrates my point. The Report argues, correctly, that the dispute settlement mechanism has been a "remarkable success", noting that the rate of cases submitted far exceeds that under the old GATT regime and highlighting the increased participation of developing countries.[8] It urges caution with respect to "dramatic changes".[9] Indeed, the Report's proposals are mostly small-bore suggestions for things like somewhat greater transparency and the possibility of remands from the Appellate Body to panels.

But other important elements of the Report hint at a more rigorous role for WTO dispute settlement. For example, with respect to compliance, the Report vehemently rejects the idea that members have a buy-out option. While "not 100% explicitly clear in the DSU language", the Report argues that the better reading of WTO documents is that members must comply with adverse rulings by changing their laws. The Report points out the practical problem with allowing members to "'buy out' of their obligations by . . . enduring" retaliation indefinitely: Retaliation from a much poorer country is unlikely to have an effect significant enough to cause a richer member to alter its WTO-illegal practices.[10] The Report maintains, cautiously, that "[s]ome experimentation" with monetary compensation as a remedy "could be useful" in these circumstances.[11] Finally, the Report expresses frustration with the fact that some nations require legislation, as opposed to executive action, to implement WTO rulings. The need for legislation can delay compliance; the Report argues "that governments which have this problem need to seriously consider institutional changes in executive-legislative relationships to avoid this risk."[12]

The Report's discussions of "gap filling" by WTO tribunals also hint at a more expansive role for dispute settlement. While at one point the Report notes

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8 *Ibid.*, p. 50.

9 *Ibid.*, p. 49.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, p. 55.

simply that the use of general international law to supplement WTO treaties is a controversy that needs further elaboration,[13] at others it suggests pretty clearly that the controversy should be resolved in favor of gap filling. Gap filling, the Report maintains, is an inescapable part of any juridical mechanism.[14] It recommends that the Secretariat take steps to educate members that "a certain amount of limited gap-filling" along with "the resolution of ambiguities" and "the need for various interpretation techniques are all part of the natural scenery of dispute settlement."[15]

Members are likely to resist these suggestions for more rigorous dispute settlement, and not simply because of obstinacy or interest-group capture. For example, it might well be valuable for all concerned to preserve some ambiguity about the buy-out option. While the risks that the Report describes with respect to asymmetric disputes do exist, one can fairly ask whether the Report exaggerates the dangers. The rate of compliance with rulings has been remarkably good so far;[16] there apparently have been few cases in which members have attempted to buy out injured parties while refusing to comply with adverse rulings for a long period of time. Definitively eliminating the buy-out option might be an example of a theoretical solution in search of a real-world problem.

Moreover, the buy-out option can serve as a useful check against the potential for overreaching by the WTO. At the moment, the WTO has a fairly narrow trade compass, and the threat to representative democracy in member states is slight. But there are persistent calls for the WTO to take on more in the way of substantive regulatory authority.[17] Indeed, at times the Report itself seems to support those calls. While noting the legitimate claims of subsidiarity, the Report nonetheless argues that coordination benefits and market failures, like externalities, might well justify transforming the WTO into "essentially an international economic regulatory level of government", at least with respect to certain issues.[18] The Report does not identify precisely which issues these

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[13] *Ibid.*, p. 52.

[14] *Ibid.*, p. 55.

[15] *Ibid.*, p. 58.

[16] D. McRae, "What is the Future of WTO Dispute Settlement", 7 *Journal of International Economic Law* (2004), pp. 3, 5.

[17] See, e.g., A.T. Guzman, "Global Governance and the WTO", 45 *Harvard International Law Journal* (2004), p. 303.

[18] Report at p. 34.

would be, though it does hint that environmental issues that pose the risk of "races to the bottom" are a likely category.[19]

If the WTO were to expand into substantive regulatory areas like environmental protection, the potential for interference with sensitive domestic legislation would be significantly greater than exists today. Nations often have different interests and values in such areas that justify different regulatory regimes; developing countries, in particular, complain that developed countries fail to give appropriate consideration to the difficult conditions they face. Members, including developing countries, might find it useful to retain the ability to enforce sensitive domestic legislation in the event that the WTO oversteps its bounds. Indeed, in a sensitive case, the claim that an offending nation would have to change its law in response to a WTO ruling could lead to a nationalist backlash that would cause the member to reconsider its WTO commitment altogether – especially if, as the Report suggests, the WTO were also to call on the member to rearrange constitutional relations between executive and legislative branches in order to avoid delays in compliance with the organization's rulings.

Experimentation with monetary compensation as a remedy seems similarly ill advised. Even assuming that the buy-out strategy is as much a real-world concern as the Report suggests, a monetary-compensation scheme would not really solve the problem. Members could buy out an injured party by paying a fine just as easily as they could by accepting retaliation – a fact that the Report, to its credit, concedes.[20] Indeed, assuming that the fine really were compensatory in nature, i.e., limited to the amount of the injured party's loss, a monetary-compensation regime would not be all that different from the present one. As it is, the DSU provides that retaliation must be limited to an amount equivalent to the loss that the offending measure has caused the complaining member.[21] (There are occasionally proposals for *retroactive* monetary-compensation schemes, which would be very different from the current remedies system, but the Report does not take an express position on those proposals).[22]

A monetary-compensation regime would also eliminate one of the great advantages of the retaliation remedy in securing compliance with WTO rulings.

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[19] *See ibid.*, p. 32.

[20] See *ibid.*, p. 54.

[21] DSU art. 22.4.

[22] See A. Porges, "Settling WTO Disputes: What Do Litigation Models Tell Us?", 19 *Ohio State Journal on Dispute Resolution* (2003), pp. 141, 177-78 (discussing proposals).

As I argue in detail elsewhere, the retaliation remedy works by harnessing an important domestic interest group.[23] By imposing burdens on the products of a nation that adopts a protectionist measure, retaliation creates incentives for exporters in that nation to lobby for the removal of the measure. The exporters can, over time, counter the influence of the interest groups that lobby for the protectionist measure. The retaliation remedy thus promotes compliance from within, without directly imposing demands from an international body that nationalist groups could use to rally opposition to global free trade norms.

A monetary-compensation regime, by contrast, would do nothing to motivate exporters to lobby against a protectionist measure. Presumably, the money for the fine would simply be appropriated from the national treasury, meaning that the cost would ultimately be borne by the nation's taxpayers as a whole – the very people who, as consumers, are already bearing the burden of the protectionist measure in question.[24] As the insights of public choice theory suggest, the fine would likely do little to induce these people to lobby for the measure's removal.[25] Because the effect on individual taxpayers would be relatively small, the fine would do little to mobilize collective opposition. Moreover, as a punishment imposed directly by an international body, a fine could be a symbolic rallying point for resistance to the idea of the WTO more broadly.

Finally, the Report's insouciance with regard to substantive gap filling by WTO tribunals also gives cause for concern. As a purely legal matter, it is very doubtful that tribunals have authority to supplement WTO treaty provisions with other sources of international law. The DSU does seem to contemplate that, in "clarify[ing]" WTO agreements, tribunals will resort to the "customary rules of interpretation of public international law."[26] But that is as far as it goes: the DSU does not provide for the application of substantive international-law rules not found in WTO agreements. Indeed, the DSU indicates that tribunals "cannot

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[23] M.L. Movsesian, "Enforcement of WTO Rulings: An Interest Group Analysis", 32 *Hofstra Law Review* (2003), p. 1.

[24] See J. Nzelibe, "The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism", 6 *Theoretical Inquiries in Law (Online Edition)*, (2005), at <www.bepress.com/til/default/vol6/iss1/art7>.

[25] For a fuller discussion of this point, see J.O. McGinnis & M.L. Movsesian, "The World Trade Constitution", 114 *Harvard Law Review* (2000), pp. 511, 523-24.

[26] DSU art. 3.2.

add to or diminish the rights and obligations provided in" WTO treaties,[27] and the WTO Charter provides that only the Ministerial Conference and General Council have authority to adopt interpretations of WTO treaties, on a three-fourths vote.[28] Clearly, the drafters of the WTO agreements desired to limit the capacity of tribunals to stray beyond treaty text when resolving disputes.

The drafters were right to limit tribunals' discretion in this way. Allowing WTO adjudicators to engage in substantive gap filling would present serious practical dangers. The rules of international law, especially the rules of customary international law, are frequently quite malleable. Because they typically are drawn up without an eye to juridical enforcement, in the WTO or elsewhere, such rules are often open-ended, even hortatory, in nature. Increasingly, they address regulatory areas traditionally seen as the prerogatives of nation states, including environmental protection, labor, and public health. It thus would be easy for tribunals engaged in gap filling to use international-law rules as vehicles to impose the tribunals' own views on nations' substantive regulatory policies, including in sensitive areas of domestic concern. In such a regime, WTO members could find themselves bound to substantive obligations to which they never consented, either in the organization or anywhere else.[29]

The possibility of unpredictable regulatory obligations that touch on important national interests would hardly be a reason for members to increase their commitment to the WTO. Indeed, enlarging the scope of tribunals' discretion in this way could well lead members to look outside the organization when making trade agreements – the very sort of thing that other sections of the Report condemn. Developing countries, in particular, would have reason to be suspicious of a gap-filling regime. These countries generally lack the litigating resources that developed countries possess to present their case.[30] Moreover, they have less representation among the experts who comprise WTO tribunals; these experts, with predominantly Western backgrounds, or at least Western training, can be expected to have predominantly Western views on the proper

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[27] DSU art. 3.2.

[28] WTO Charter art. IX.2.

[29] J.O. McGinnis, "The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO", 44 *Virginia Journal of International Law* (2003), pp. 229, 252.

[30] J.O. McGinnis & M.L. Movsesian, "Against Global Governance in the WTO", 45 *Harvard International Law Journal* (2004), pp. 353, 362.

accommodation between trade and non-trade values.[31] Developing countries could easily perceive an adjudicatory system stacked against them – one that would fill gaps in ways that would systematically slight their interests – and decline to participate. Expanding tribunals' discretion in the way the Report suggests thus could work against one of the WTO's central goals: extending the benefits of freer trade to those countries that need them most.

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While the Sutherland Report does not contemplate an immediate transformation of the WTO, significant elements of the Report, including the ones I have described here, do hint at further aggrandizement of the organization. Yet there is a real irony in the notion that we can rescue the WTO by making it more powerful as an institution. Enlarging the scope of the WTO could easily backfire, thereby jeopardizing the substantial contributions that the organization has made, and continues to make, to the cause of global trade. It is worthwhile to remember that the breakthrough of the Uruguay Round came only after a couple of generations' experience with GATT. It may be that we will have to wait a while – more than ten years, anyway – before nations are ready for the next big step in multilateral trade negotiations. In the meantime, the WTO can continue its useful work of policing protectionism and providing a forum for the reduction of tariffs around the world.

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[31] *Ibid.*, p. 363.