An Emerging International Rule of Law?—The WTO Dispute Settlement System's Role in its Evolution

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More than 2,000 years have passed since the idea of the "rule of law" appeared in Western culture. But only recently has it entered common usage—we have become the "rule of law generation." With the growth in the number of international courts and tribunals, the question arises whether the same principles surrounding the rule of law that have been developed in many national legal systems also apply in international arenas. Despite the fact that the international system lacks a centralized legislative authority, and despite the scepticism of many observers, I argue that institutions like the dispute settlement system of the World Trade Organization ("WTO") significantly contribute to moving toward a full-fledged *international* "rule of law."

In the first part of this Comment, I explore what the concept of "rule of law" means in a domestic setting, and address the problems arising from applying this concept in the international arena. In the second part, I analyse the role of the WTO's dispute settlement system, and in particular of the Appellate Body, in the progressive development of an international rule of law. In the third part, I address the question of whether the WTO's dispute settlement system can constitute a valid model for how the rule of law can be applied in other international arenas. In the fourth part, I examine the potential obstacles in the path of establishing a genuine rule of law at the WTO—namely the absence of a balance between a highly functioning adjudicatory system and a weak legislative arm.

Voilà plus de 2 000 ans que la culture occidentale a vu naître la notion de « primauté du droit ». C'est toutefois récemment que ce principe est passé dans l'usage courant—nous faisons en effet partie de la « génération de la primauté de droit ». Le nombre croissant de tribunaux judiciaires et administratifs internationaux soulève la question suivante : les principes sous-jacents à la primauté du droit, élaborée par maints systèmes juridiques dans différents États, s'appliquent-ils également dans les arènes internationales? Bien que le système international soit dépourvu de toute autorité législative centralisée et malgré le scepticisme de nombreux observateurs, je soutiens que des institutions comme le système de règlement des différends de l'Organisation mondiale du commerce (« OMC ») contribuent de façon déterminante à l'évolution qui mène à une authentique « primauté du droit » *internationale*.

Dans la première partie de ce commentaire, j'explore la signification du concept de « primauté du droit » dans un contexte national pour m'attarder ensuite aux problèmes qui découlent de l'application du concept dans l'arène internationale. Dans un deuxième temps, j'analyse le rôle du système de règlement des différends de l'OMC, et en particulier l'Organe d'appel de l'OMC, dans le cadre de l'évolution progressive d'une primauté du droit internationale. En troisième lieu, je me penche sur la question suivante : dans quelle mesure le système de règlement des différends de l'OMC peut-il constituer un modèle valable pour ce qui est de l'application de la primauté du droit dans un contexte international? En dernier lieu, j'examine les éventuels obstacles qui se dressent sur la voie de l'établissement d'une véritable primauté du droit à l'OMC — notamment en l'absence d'un équilibre entre un système juridictionnel pleinement efficace et un outil législatif plutôt faible.

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I. INTRODUCTION: THE RULE OF LAW

Given that this lecture is dedicated to Hyman Soloway, one of Ottawa's leading practitioners of the law and a strong supporter of sound legal thinking, I thought it would be appropriate to say a few words about the rule of law. The concept of the rule of law—by which I mean the legal maxim that no one is immune to or above the law—is certainly nothing new. Indeed, as far back as 350 BC, Plato and Aristotle were writing about the need for laws rather than people to govern, and for those in power to be "servants of the laws" rather than the other way around.[1] When King John subjected himself and the future Kings of England to compliance with the rule of law, by signing the original *Magna Carta* in 1215, the concept of the law as king became more widespread.[2] With the writings of John Locke and others in the 1600s, the notion of rule by law spread throughout Europe, and then on to the fledgling United States.

But the phrase "rule of law" is relatively new. It does not appear in the US Constitution or the American Declaration of Independence, and it was not a phrase that law students of my generation heard being debated while attending American law school. Canada, however, with its young constitution, was ahead of its time. When Canada enacted its Constitution in 1982, the phrase itself was included in the preamble, recognizing that "Canada is founded upon principles that recognize the

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1 Aristotle, *A Treatise on Government*, translated by William Ellis (London: George Routledge and Sons, 1888) ("[F]or this is law, for order is law; and it is more proper that law should govern than any one of the citizens; upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and the servants of the laws ...." at 117).

2 "NO Freeman shall be taken or imprisoned ... or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right." *Magna Carta*, 1297 (UK) c 9, s XXIX, online: legislation.gov.ca <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/ XXIX>.

supremacy of God and the rule of law."[3] Perhaps due in part to this wise leadership by Canada, the phrase "rule of law" has now entered common usage, becoming a part of popular parlance. All of us have seen this principled sounding phrase emerge and be used (and misused) time and again. We talk about the rule of law, we attend lectures about the rule of law, and we read and write about it, even if we cannot quite define it.[4] As such, we have become the "rule of law generation," dedicated in many ways to consistently promoting this somewhat vaguely defined notion of a rule of law.

II. THE RULE OF LAW IN THE INTERNATIONAL ARENA?

Today we are seeing this lofty phrase spread into various international arenas. The UN General Assembly has considered the rule of law as an agenda item since 1992, and has focused ever-increasing attention to the rule of law at both the national and international level.[5] The World Justice Project was launched in 2007 to define and lead a global, multidisciplinary effort to strengthen the rule of law, and has just recently released its international *Rule of Law Index* providing a ranking of the level of adherence to the rule of law in 35 countries throughout the world.[6] The International Bar Association passed a resolution in 2009, stating that the rule of law is "the foundation of a civilized society" and called on its members to speak out in support of the rule of law within their respective communities.[7] Indeed, then UN Secretary-

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3 *Canadian Charter of Rights and Freedoms*, Preamble, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

4 The concept and definition of the rule of law has been the subject of much debate and discussion, leaving one scholar to comment that if one were to "[r]ead any set of articles discussing the rule of law '. . . the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another." Rachel Kleinfeld, "Competing Definitions of the Rule of Law" in Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) 31 at 32.

5 Declaration on the Protection of all Persons from Enforced Disappearance, GA Res, UNGAOR, 1992, Supp No 49, UN Doc A/RES/47/133, 207; The Rule of Law at the National and International Levels, GA Res, UNGAOR, 61st Sess, UN Doc A/Res/61/39, (2006); The Rule of Law at the National and International Levels, GA Res, UNGAOR, 62d Sess, UN Doc A/Res/62/70, (2008).

6 The WJP's *Rule of Law Index* 2010 "is a new quantitative assessment tool designed by The World Justice Project to offer a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice," "About the Rule of Law Index," online: The World Justice Project <http://www.worldjusticeproject.org/rule-of-law-index/>. The World Justice Project developed its definition of the rule of law as encompassing four principles. First, "[t]he government and its officials and agents are accountable under the law." Second, "[t]he laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property." Third, "[t]he process by which the laws are enacted, administered and enforced is accessible, fair and efficient." Fourth, "[a]ccess to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve." "About the WJP," online: The World Justice Project <http://www.worldjusticeproject.org/about/>.

7 "The Rule of Law is the foundation of a civilized society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect." "Commentary on the IBA Council 'Rule of Law' Resolution of September 2005" (October 2009) at 2, online: <http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx>.

General Kofi Annan noted that the concept of the "rule of law" is at the heart of the UN's mission, adding that it:

> [R]efers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[8]

Given the mentioned interpretations of the rule of law, can one safely state that it fits squarely in the international arena? Does an "*international* rule of law" exist?

Many would contend that the rule of law does not exist at the international level. They see war crimes, crimes against humanity and genocide being committed around the world and question how anyone can find justice and order, much less an adherence to the rule of law in such atrocities. Others look at the world and see a rule of law that has been undermined by its most corrosive threat—corruption—which often destroys the integrity of government, or perverts the legislative process, or even infects the judiciary—leaving those affected by the corruption with little faith that a rule of law exists, at even a local level, much less an international one. Critics may also point to the absence of an international legislature, an international executive, or an international judiciary to contend that the rule of law cannot exist in the international arena given the impossibility for a necessary separation of power between those who make the law and those who adjudicate the law.

I would argue that despite places in the world in which there is an absence of the rule of law, we can see that institutions like the World Trade Organization (WTO) and others amongst this "rule of law generation," continue to move toward a full-fledged "international rule of law." As such, it is fair to question what role the WTO's dispute settlement system is playing in this development.

III. THE RULE OF LAW IN A DOMESTIC SETTING

In looking at this issue, it might be useful to explore what the rule of law means in a domestic setting. In a meeting of international law judges that I attended recently, Richard Goldstone, who was, among other things, a Justice of the Constitutional

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8 The Secretary-General, Report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UNSCOR, 2004, UN Doc S/2004/616, at para 6.

Court of South Africa, the Chief Prosecutor of the UN International Criminal Tribunal for the former Yugoslavia and Rwanda and the head of the UN Fact Finding Mission on the Gaza Conflict, noted that the starting point for thinking about the rule of law in an international setting is its meaning and effect in sovereign democracies.[9] There, the core of the rule of law lies in: first, the separation of powers between the legislature, the executive and the judiciary; second, the independence of the judiciary; third, equality before the law for all; and fourth, due process and the transparency of the laws themselves.

In describing the rule of law, one of my colleagues at the Appellate Body, David Unterhalter, stated: "first, there are rules that are of universal application;" second, "the rules have a determined and transparent content;" third, "they are capable of being accessed by everybody through a process that is available to all;" and fourth, "they can be uniformly applied with consequences for non-compliance."[10] He noted that at its core, the concept of the rule of law is a standard against arbitrariness.

Both these definitions find their roots in the writings about the supremacy of "rule of law" by the noted nineteenth century English constitutional law authority, AV Dicey, who set out three concepts that are equally embodied in the concept of the rule of law: first, the "absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;" second, "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts;" and third, the "formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[11]

What becomes more problematic is the application of these definitions or concepts of the rule of law within the international setting. Professor Goldstone noted, for example, that his four core items raise a number of questions for the

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9 Richard Goldstone, Address (Toward an International Rule of Law, delivered at the Brandeis Institute for International Judges, Salzburg, 29 July 2010), [unpublished].

10 Mr. Unterhalter explained that the rule of law in an international law context is comprised of several components. First, "rules of law stand for standards against arbitrariness. In this sense, the rule of law speaks to regularity, clarity, and the uniform application of rules. Having an institution capable of interpreting the rules and ensuring that they are predictably applied is another essential element of the rule of law. This is also true of the rule against vagueness, which is to say that the content of rules must be clear or at least capable of authoritative determination. As a final component, he noted the compulsory nature of dispute resolution under rules." David Unterhalter, "Promoting Global Governance by Strengthening the Rule of Law" (Global Problems, Global Solutions: Towards Better Global Governance, delivered at the WTO Public Forum, 29 September 2009), online: World Trade Organization at 6:32 <http://www.wto.org/audio/forum09_session16.mp3>. See also Keith Rockwell & María Pérez-Esteve, eds, WTO Public Forum 2009: Global Problems, Global Solutions: Towards Better Global Governance (Geneva, Switzerland: WTO Publications, 2010) at 36-37, online: World Trade Organization <http://www.wto.org/english/forums_e/public_forum09_e/public_forum09_e.htm>.

11 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co, 1965) at 202.

connection to international law such as: whether there is a judiciary that is independent of the international organization it serves or its members; how a rule of law system can function in those areas in which there is no equivalent of an international legislature or an international executive branch; whether there can be equality before the law when those appearing before the courts may be nations of very differing size and power; or whether one can say that the rule of law applies in the international context when some countries see its very application as a threat to their sovereignty.

In an address to a meeting of the International Bar Association, President of the International Court of Justice, Hisashi Owada, highlighted a number of difficulties in transposing the concept of the rule of law into an international setting. As he put it, "can a principle that was originally conceived to control the exercise of power within the domestic constitutional framework, be successfully duplicated in the international legal system where no central power exercises control over the community?"[12] He noted at least two aspects of the rule of law that must be reconceptualized when transposing the concept from the domestic setting to the international one. First, the definition of the rule of law must be read expansively to include not only procedural, formal aspects of "the rule by the laws," but also the content of the laws themselves, if the end result is going to be the achievement of justice. Second, the concept of the rule of law may need to extend beyond the relationships between sovereign states to the rights and duties on an international level of individuals.[13]

IV. WTO'S DISPUTE SETTLEMENT SYSTEM: DOES IT FIT WITHIN THE NOTION OF AN INTERNATIONAL RULE OF LAW?

Assuming that one accepts this very broad and general definition of an "international rule of law," the question remains whether the WTO's dispute settlement system fits within this notion of an international rule of law, and how the system has fared in living up to these key principles.

My own view is that for now, it is functioning quite well and making important contributions to the advancement of an international rule of law. However, there are still a number of clouds on the horizon.

V. OLD DIPLOMATIC GATT SYSTEM

To date the WTO dispute settlement system is fifteen years old, having been created as part of the Uruguay Round of negotiations that transformed the 1947 General Agreement on Tariffs and Trade (GATT) into the WTO. As part of that process,

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12 Hisashi Owada, "The Rule of Law in a Globalizing World—An Asian Perspective" (2009) 8:2 Wash U Global Stud L Rev 187 at 188-89.

13 *Ibid* at 189.

the old dispute settlement process of the GATT, which was seen primarily as a diplomatic or soft law approach to settling disagreements, has been transformed into an ever increasingly legal or juridical system. Under the old GATT system, parties had the ability to block the formation of a panel to hear a dispute, or could block the adoption of the panel's report at the end of the process if they did not like the results. Moreover, there was no formal mechanism to hold countries accountable to comply with decisions of those adopted panel reports. As Professor Joseph Weiler noted, the premise of requiring consent of the parties to proceed with a case or to conclude one "compromised foundational principles of the rule of law and chilled the utility of dispute resolution, especially for the meek and economically and politically unequal."[14]

Indeed, much of the old GATT dispute settlement system was permeated by a culture of diplomacy. This was one that included a limited number of people engaged in dispute settlement, most of whom knew each other or had previously worked together in some fashion. Amongst them there was an understood objective of resolving a specific dispute in a manner that would reflect a compromise that all sides could accept. This culture perpetuated the custom of selecting panelists among adept diplomats, who were skillful at forging compromise and the practical setting of time frames, designed to ensure that the matter was ultimately settled and did not spill out of the GATT/trade context. Within the GATT system, disputes were seen as discrete items with limited carryover from one case to the next, and were tied to the governments involved with little thought or desire to address the concerns of any non-governmental actors, whether they were private companies, non-governmental organizations, or private citizens. The system focused on the needs and concerns of governments alone, and it did so in private, with the diplomatic culture of confidentiality and the notion that governments should not be asked to make compromises in public. The key goal was finding a solution, rather than crafting exhaustive legal analysis or the best application of the law to the facts at hand, or determining the exact rights and obligations of the parties to the dispute. For those limited number of disputes that were allowed to go through the entire panel process, that is largely what happened—acceptable solutions were found and decisions largely complied with.

VI. WTO DISPUTE SETTLEMENT SYSTEM

Fast forward fifteen years—WTO dispute settlement process has now taken on many of the key attributes of a rule of law system, and thus a more purely legal culture. Due to compulsory jurisdiction, all members must bring any disputes arising under WTO law to the WTO dispute settlement system for adjudication. There are now binding outcomes at the completion of each dispute. A separate

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14 JHH Weiler, "The Rule of Lawyers and the Ethos of Diplomats—Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35 J World Trade 191 at 192.

appeals process with a standing Appellate Body to hear appeals from panel decisions was created. With the many cases that have now been decided, there is a growing body of precedents, which, while not binding, is raised frequently and consulted often as new cases are litigated. Even the parlance of the disputes has shifted from one of compromise and settlement to one of winners and losers, victories and defeats. Those appearing before WTO panels or the Appellate Body are less frequently diplomats and more often than not private lawyers hired to appear on behalf of the government or governments involved in a given case. The general notion of a system with equal access by all, under which the final outcome depends on an objective and consistent application of laws rather than the power or relationships of the parties—indeed a system governed by a rule of law—has begun to take shape.

A. Number of Cases

So far, it appears that the members of the WTO are finding the system quite usable and useful. The numbers alone are quite staggering, particularly when compared to the old GATT system or to other international courts. Since the start of the system on January 1, 1995, 427 disputes have been initiated.[15] Compare that number, for example, to the International Court of Justice, before which just 41 contentious cases were initiated over the same 17 year period,[16] or the International Tribunal for the Law of the Sea, which came into existence about one year after the WTO's dispute settlement system and is now beginning to hear its 19th case.[17] Of the 427 disputes filed at the WTO, many (97) have been resolved through mutually agreed solutions or discontinued,[18] but 159 panels have been composed to handle 202 disputes.[19] To date, panels have issued 149 reports in regular disputes and 29 additional reports in disputes over compliance.[20] Historically, nearly two-thirds of these panel reports have been appealed to the Appellate Body. To date, the Appellate Body has issued 84 reports in original cases and 18 more in appeals related to compliance.[21]

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15 World Trade Organization, *Chronological List of Disputes*, online: <http://wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

16 International Court of Justice, *List of Contentious Cases*, online: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>. This figure is limited to cases in which the International Court of Justice is requested to exercise its contentious jurisdiction, as opposed to advisory jurisdiction. In addition, disputes brought by one complaining State against more than one responding State are counted as one.

17 International Tribunal for the Law of the Sea, *Contentious Cases*, online: <http://www.itlos.org/index.php?id=37>.

18 *Supra* note 16. This figure includes all cases where the parties reached a mutually agreed solution, signed a memorandum of understanding, or where the complainant(s) has withdrawn its/their complaint(s). There are also 12 cases in which the authority of the panel elapsed because of the inactivity of the complainant(s).

19 *Ibid.* In some cases where there have been decisions by the DSB to establish a panel, the dispute has been settled before the actual constitution of the panel; in other cases, panels are still in the composition stage.

20 *Ibid.*

21 *Ibid.*

In looking at the states involved in these cases, it becomes apparent that a significant portion (63 percent) of the 153 WTO members is participating in dispute settlement at some level.[22] However, a clear shift in which countries are most active is evident from the first five years of the WTO, when 71 percent of the complainants were developed countries, to the most recent five years, when the majority (53 percent) of the complainants were developing countries.[23] To date, the largest users of the system are the United States, which has initiated 98 cases and defended 113, the European Union, which has initiated 85 cases and defended 70, Canada, which has initiated 33 cases, but only defended 17, followed by Brazil and India, with Mexico, Argentina, Korea, Japan and Thailand also appearing as significant users of the system.[24] The biggest trend in recent years has been the rise of China, first as a defender of cases, but more recently as a country bringing complaints against others.[25]

B. Compliance

One of the other measures of the fit between the rule of law and the WTO dispute settlement system is how members view their obligations to comply with its rulings. The recent death of one of the world's greatest international lawyers, Louis Henkin, brings to mind once again his now famous sentence that launched a thousand articles: "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.*"[26]

Do nations really observe international law—or in this instance—WTO law almost all of the time? From the numbers to date, it appears that, at least with respect to compliance with final decisions of the WTO dispute settlement system, Professor Henkin may indeed be right.

In nearly 90 percent of the cases adjudicated to date, the panel or the Appellate Body has found violations of members' WTO obligations.[27] In virtually every case, the losing party has indicated its intent to comply, and in most cases,

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22 World Trade Organization, *Disputes by Country*, online: <http://wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>. As of November 30th, 2011, 97 WTO Members have participated in at least one dispute (whether as complainants, respondents, or third parties, and whether at the consultation or at the adjudicatory stage). However, only 44 WTO Members have participated in dispute settlement as complainants.

23 *Ibid.*

24 *Ibid.*

25 *Supra* note 16. Over the period of its membership to the WTO, that is, between 2001 and 2011, China has initiated 8 disputes and defended 23. 7 out of the 8 complaints brought by China are concentrated in the period between 2007 and 2011.

26 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d ed (New York: Columbia University Press, 1979) at 47 [emphasis in the original].

27 WorldTradeLaw.Net, *Percentage of Adopted Disputes in Which at Least One Violation Was Found*, online: <http://www.worldtradelaw.net/dsc/database/violationcount.asp>. As of November 30th, 2011, in 138 out of the 156 adopted disputes a panel or the Appellate Body made at least one finding of violation of WTO covered agreements.

compliance has been achieved, although in six cases compliance problems persist. In a little less than one fourth of the cases, there is a disagreement over whether the measures that have been taken to comply do indeed result in full compliance with the rulings of the Dispute Settlement Body (DSB).[28] These disagreements over compliance have led to further litigation under Article 21.5 of the DSU, resulting in 29 additional compliance panel reports, 19 of which have been appealed as well.[29] At the end of the day, if there is no compliance, a winning party can seek authorization to retaliate against the infringing country. Out of the 427 disputes to date, only 19 or 4.5 percent (and essentially only 2.8 percent if you do not count each of the Byrd amendment cases separately) have gone all the way to the authorization of retaliation.[30] Perhaps even more important to the establishment of an international rule of law is the growing amount of "anticipatory compliance" when countries refrain from taking actions or imposing measures simply because they would breach WTO commitments.[31] Indeed, it was not infrequently during the debates in the US Congress, for example, over stimulus programs, "cash for clunkers" programs and others that we heard the argument: "We can't do that. It violates the WTO." Even if that argument did not always carry the day, it demonstrates clear movement toward an international rule of law to act in anticipation of compliance with WTO obligations.

VII. IS WTO A MODEL?

Does the WTO dispute settlement system represent the application of the rule of law in an international arena where: many cases being heard and decided with substantial reliance on jurisprudence (or what others might call something much less charitable); there is a standing Appellate Body rendering appellate decisions to clarify points of law or interpretations of the WTO Agreements; and, where there is strong compliance, including anticipatory compliance, with its rulings? Is it, dare I say, a potential model for how the rule of law can be applied in international settings?

To a large degree, but not entirely, I think the answer is "yes." Clearly many of the points my colleague and the current chairman of the Appellate Body, David Unterhalter, pointed to in setting up his notion of the rule of law as a standard against arbitrariness are met. It starts with the compulsory jurisdiction for the WTO's dispute settlement system to adjudicate all complaints arising under WTO law, which for starters puts the WTO in a different position from the International Court of Justice, where jurisdiction is non-compulsory. Then, by placing a standing

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28 *Supra* note 16. As of November 30th, 2011, there were 41 complaints brought under Article 21.5 of the DSU.

29 *Ibid.*

30 WorldTradeLaw.Net, *Article 22.6 Arbitration Decisions*, online: <http://www.worldtradelaw.net/dsc/database/ suspensionawards.asp>.

31 Tina Potuto Kimble, "Anticipatory Compliance with WTO rules and the Erosion of U.S. Sovereignty" (2006) 25 Quinnipiac L Rev 97 at 97.

Appellate Body over the panels, the WTO system ensures a good deal of regularity, clarity and uniform application of the WTO rules themselves, along with ensuring that there is a body capable of interpreting them and ensuring that they are predictably applied and clarified in those instances where the rules may be vague.

A. Independent Judiciary

While the exact definition of, or requirements for, the rule of law may not be clear, there is no doubt that it includes, at a minimum, an independent judiciary—one which is truly free to render decisions on the merits of a case, based on an objective assessment of the facts and a fair and appropriate interpretation of the law, without regard to who the parties may be.

At the WTO, the "trial court" consists of three panelists selected to hear one particular case. The rules, again coming out of the diplomatic era, permit the parties to agree on the three individuals who will decide their case, with the basic stipulation that no panelist should be a citizen of any country who is a party to the case. The rules, again in a nod to the development of a more legal culture, also provide that if the parties cannot agree on panelists, then the Director General of the WTO appoints the panelists. To date, 60 percent of the panelists have been appointed by the DG, while the parties agreed upon the other 40 percent.[32]

The ability to achieve a sense of a truly independent judiciary is difficult in some panels, as the panelists come together for a single case with little cross-dispute consistency or debate. Depending on the legal expertise and competing time commitments of the panelists, the legal staff of the WTO may play a larger or smaller role in helping the panel reach its decisions and craft its report.

At the appellate level, an Appellate Body was established, in part, to address the concerns of some countries that, in moving to a binding dispute settlement process, in which reports of panels could not be blocked from being adopted, there needed to be a guard against "rogue" panels and a check on the consistency of the legal interpretations across a number of panels addressing the same legal questions.

Here, the Appellate Body is made up of seven people—from countries around the world, appointed to serve a four-year term, which can be renewed for another four years. The members are chosen after having been nominated, typically by their home governments, interviewed by interested WTO members and after having appeared before a selection panel chaired by the head of the Dispute Settlement Body. Certainly, it is impressed upon all members that they are selected in part for their knowledge of WTO law, but also, and perhaps most importantly, for their ability to be impartial, either from their own government or from any particular philosophy or position. It is well understood that members of the Appellate

32 As of November 30th, 2011, 96 out of 159 composed panels have been selected by the DG.

Body are primarily tasked with clarifying and interpreting the WTO Agreements in accordance with principles of public international law. The members are subject to a very strict code of conduct and to a tight interpretation of the *ex parte* contacts rule. Moreover, the budget of the Appellate Body is done as a separate matter to ensure that the power of the purse does not control the ability of members of the Appellate Body to meet when and for as long as necessary (within the mandate of rendering reports in 90 days). The Appellate Body members are not paid as or considered to be staff of the WTO and receive no pensions or any on-going strings that attach the Appellate Body members to the WTO as an institution, to its Director General, or others. Furthermore, at the appellate stage, there is no concern over the nationality of the parties or the Appellate Body members. All seven Appellate Body members come to Geneva to resolve the basic direction of every case, even if one or more members hail from the nation of one of the parties. Three Appellate Body members are selected, through a random process, to serve as the division responsible for conducting the hearing and writing the report in each case, again without regard to their nationality or that of the parties. Indeed the WTO's dispute settlement system has come very close to many of the ideals of an independent judiciary.

Scholars who write about the prerequisites of having an independent judiciary, would fault the WTO for the fact that the Appellate Body members can be reappointed for a second four-year term, as such reappointments carry with them the prospect of some members expressing doubt about a particular member's re-appointment based on whether they "won" or "lost" a given case.[33] Scholars would also fault the WTO for its nomenclature in referring to the Appellate Body as a "body," rather than a court, since, as Professor Weiler noted, "the Appellate Body is a court in all but name ...."[34] He contends that failure to call it a court "actually diminishes the external legitimacy of the WTO in general and the Appellate Body more specifically...[robbing it of] the authority and respect which its decisions would have by matching its name to its real function and power ...."[35]

B. Equal Access

Another aspect of the rule of law is the notion that everyone is equal before the law and has equal access and opportunity to have grievances heard. With the WTO,

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33 The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, "The Burgh House Principles on the Independence of the International Judiciary" (June 2004) s 3.2, online: Project on International Courts and Tribunals <http://www.pict-pcti.org/activities/ILA_study_grp.html> ("The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner").

34 Weiler, *supra* note 14 at 201.

35 *Ibid* at 202.

as we have seen from the numbers, many countries, and increasingly developing countries, are discovering that they too have access to the dispute settlement system. From the outset, WTO members supported the establishment of the Advisory Center on WTO Law, which functions, in essence, as a legal aid society to provide no or low cost legal advice to developing countries wishing to participate in dispute settlement cases. Even small nations, such as Antigua, have found it possible to access the system to take on the largest trading nation—the United States—and win.

The difficulty with respect to equal access for all to the WTO system may come not once a case is filed, but rather up front, as a former GMF colleague, Chad Bown, recently outlined in his book, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement*.[36] For many traders and exporters, or potential exporters in developing countries, a case at the WTO must start with an understanding that one's exports are being blocked or pushed down by some measure or activity in another country, which is prohibited by the WTO rules. Whether such exporters can get their hands on the required information to know what is preventing their access to foreign markets, to discern that the blockage is a violation of WTO rules and, to then persuade their government to file a case and to marshal the needed evidence to win may be a very tall order for some.

C. Transparency

Also embedded in the rule of law are notions of due process and open and transparent processes. Here, again, the WTO's dispute settlement has moved very far in the direction of a rule of law, but would still fall short of the ideal for some legal scholars. The amount of transparency is increasing year by year. More and more countries are posting all of their briefs on their home websites, making them available to all. Furthermore, all of the panel and Appellate Body reports themselves are made public once they are adopted by the DSB, and these reports are made available in their entirety on the Internet in each of the three official languages of the WTO—English, French and Spanish. An increasing number of parties to disputes are requesting that the hearings in their case be open to the public. Indeed, the Appellate Body has granted all six such requests to date to permit the public to observe its hearings. For the WTO in these cases, open still means that one must travel to Geneva and sit in a room next to the hearing room where the proceedings will be broadcasted, but it is an opening of the process far beyond the prior days of closed-door GATT panel proceedings.

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36 Chad Bown, Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Washington, DC: The Brookings Institution, 2009).

D. Separation of Powers?

Perhaps the biggest difficulty for a pure application of the rule of law concept to the WTO lies in one of the issues touched on by Richard Goldstone in his definition of the rule of law regarding the need for a separation of power between the judicial branch—the interpreters of the law—and the legislative branch—those that write the laws. At the WTO, it is through the negotiation process and the completion of a round of negotiations that new or amended rules are written. Today, that round of negotiations is the Doha Development Round, which has been stalled. While most everyone agrees that considerable progress in resolving a number of fairly intractable issues has been made over the course of the now nearly nine years since the Round was launched in November of 2001, the deal is not finished, and it is not clear whether it will be finished in the near term. Even the financial crisis, and the quite credible threat of major protectionist actions, has not been enough to drive the round over the finish line. As such, there is no immediate prospect of a change to the rules.

VIII. CLOUDS ON THE HORIZON?

This brings me to the clouds on the horizon of this march towards an "international rule of law" at the WTO. I am concerned that the success of the dispute settlement system and the generally high rates of compliance with its decisions cannot continue in absence of a functioning legislature—a rules-writing function to match the adjudicatory function. I believe that the WTO is currently somewhat out of balance. It has a highly functioning adjudicative system, with a small, less powerful but competent executive wing, but with a legislative arm that is much harder to keep moving forward, for a whole variety of reasons.

Indeed, a number of my major concerns for the future of the WTO as an institution stem from these fundamental issues surrounding the separation and balance of power between the adjudicatory, legislative and executive parts of the WTO. The absence of an effective legislative branch means many things, including that the rules that are being applied are purely historical, rather than rules which are dynamic and which speak to the problems and issues facing the trading world today. Moreover, it means there is a limited ability for WTO members to overrule decisions of the Appellate Body should the members believe that the Appellate Body has gotten it wrong. In the absence of a legislative function waiting in the wings, judges often become very conservative, fearing to branch out very far since there is such a limited chance for timely course correction. Yet, this very real and understandable conservatism will come under ever increasing strain if cases come in areas in which there is little WTO law to apply, such as climate change or financial regulation, and little ability for the WTO to write new law in those areas if the negotiating process is not working efficiently.

I also fear that the absence of a balance between the adjudicatory, legislative and executive functions of the WTO could ultimately result in declines in compliance with WTO dispute settlement rulings. The importance of this balance is exemplified by the fact that one of the many reasons countries comply with adverse dispute settlement decisions is that they are also currently negotiating with the same countries that they may have lost a case to yesterday. If they want that country to agree to new binding rules for tomorrow, they cannot be seen as flouting compliance with the rulings of today. However, in the absence of any negotiations, or the prospect of serious negotiations, the incentive to comply is severely diminished.

IX. CONCLUSION

What should be done to keep this move toward an international rule of law going?

First, I think it is critical that countries reaffirm their commitment to multilateral institutions like the WTO, who are functioning in an ever more complex world, doing important work, including the furtherance of the rule of law. Second, we should finish the Doha Round. I will leave it to others to discuss the specifics of how that might be done. There are certainly many ideas out there and much work being done on it, but it needs to be completed in part to restore this critical balance and separation between the writing of laws and the application of them, which lies at the foundation of the rule of law. Finally, we need to ensure that the WTO's system of decision-making, the strength of its executive branch and its ability to make and amend rules are modernized to reflect the realities of today and to permit the WTO to remain a vibrant, dynamic and balanced institution.

If we can do all of that, we can ensure a bright future, not only for the WTO, but for the much broader possibility of living in a world in which there is a genuine rule of law in the many international arenas out there—be they economic justice, environmental protection or human rights for all.