See you in Geneva?
Democracy, the Rule of Law and the WTO

Abstract. This paper is a constructivist attempt to understand a global political space where states as actors (the traditional domain of international relations theory and international law) are joined by international organizations, firms, NGOs, and others. Today we know that many supposedly private or international orders (meaning sources of order other than the central institutions of the territorial state) are engaged in the regulation of large domains of collective life in a world where the sources of power are multiple, sovereignties are overlapping, and anarchy is meaningless. The paper begins with an attempt, discussed in the first section, to sort out what the rule of law might mean in the context of the WTO, where we soon see that it can only be understood by also considering the meaning of Administrative Law. Much of the debate about rule of law depends on positivist and centralist theories of “law,” whose inadequacy for my purposes leads, in the second section, to a discussion of legal pluralism and implicit law in legal theory. These approaches offer an alternative theoretical framework that respects the role of the state while not seeing it as the only source of normativity. The third section looks directly at WTO law and dispute settlement. I try to show that the sources and interpretations of law in the WTO and the trading system cannot be reduced to the Dispute Settlement Body. I conclude in the fourth section with some suggestions on how a WTO rule of law could be understood as democratic.
The WTO dispute settlement system represents an enormous advance towards the rule of law in international trade and indeed perhaps in the evolution of international law more generally. (Trebilcock and Howse, 1999)

The WTO has the power to reach into national government jurisdictions and challenge the laws, policies and programmes that interfere with trade. ... These powers are both legislative and judicial and trample on the rights and freedoms of democratic societies. The only rationale for the WTO’s actions is corporate-led free trade.¹

The first statement above, by two distinguished legal academics, would be taken as heretical by the authors of the second, an activist civil society organization, even if the first statement would be seen as canonical by the scholars, journalists, and officials who value the World Trade Organization (WTO) because it is a “rules-based system.” The two statements are in fact mirror images of each other. The first seeks to constrain what the second values; the second is appalled by what the first claims to accomplish; and, neither offers a path to a fully democratic multilateral trading system. My intent in this paper is to suggest an alternative formulation of the relationship between democracy, the rule of law and the place of the WTO in global governance. If officials maintain a hierarchical state-centric view of the trading system, then the mirror image of the state, so-called “civil society,” will maintain the same view, which leads to demands either that the WTO should be dismantled, or that civil society groups should have standing in the dispute settlement system because disputes have come to be seen as the most important way of making policy for the world. The theoretical and policy challenge that motivates this paper is the attempt to find ways of understanding WTO law that allow a more open and participatory but still effective process. In short: the growing tendency of officials when faced with an intractable disagreement in negotiations to say “see you in Geneva,” meaning we will resolve this difference in the WTO dispute settlement system, should be seen as antithetical to democracy and the rule of law between as well as within states.²

In the aftermyth of the battles in Seattle the challenge globalization poses for democracy is a subject of lively debate. Both democracy and the rule of law can mean different things to two groups of people. For some, the rule of law is essential to ensure that the WTO is democratic rather than being a mask for power. For others, the rule of law is antithetical to democracy. Debate about the WTO is not really about levels of trade—WTO does not affect transaction flows directly, something that it is hard for policy to do in any case. The debate is really about how policy should respond to the pressures of globalization. What we see in the debate is a strong belief in the capacity of a self-regulating global market to deliver prosperity for all, on one side; and a strong belief, on the other side, that free trade hurts individuals, communities, and the environment. Both of these extreme positions are held by relatively small portions of the population (Mendelsohn and Wolfe, 2000), but the positions are widely understood, and they dominate public discourse. At the extremes, the debate can be characterized as one between the options of ensuring that individuals have the maximum opportunity to profit from a global market, and of ensuring that communities have the maximum opportunity to take collective action to sustain democratically determined values.
For the first group, democracy is associated with individual liberty, and the rule of law can be understood as the way to use courts to ensure that the will of the legislature is undistorted by administrative discretion. It follows that in the context of global trade, the WTO helps governments to bind themselves against protectionist backsliding. On the capitalist right, this tendency can be seen as an effort to create codified law at global level to restrain the ability of states to interfere with open markets. In the public choice account of political economy, government is perpetually subject to capture by special interests. The value of rules, therefore, is that policy can be safeguarded from venality, or at least from protectionism. Others worry that the rules are made by the strong. For most international lawyers, the WTO is seen as the ‘trade constitution’ establishing the basis for a ‘rule-oriented’ diplomacy in the face of the stipulated alternative, ‘power-oriented’ diplomacy (Jackson, 1997).

On the anti-capitalist left, in contrast, we see a demand that states resist the efforts of global corporate rule to do away with politics. Democracy and the rule of law within states is said to be threatened by democracy and the WTO rule of law among states because it undermines domestic policy instead of being the enforcement arm for global rules on, for example, environmental and labour standards (Scheuerman, 1999). Both the hopes and fears for the role of the WTO often centre on the WTO dispute settlement mechanism—one side sees it as the most important feature of the WTO because the “law” means formal adjudication of explicit texts; the other sees that vision of WTO as the devil incarnate, because it is meant to be an attack on national Administrative Law; they also see the dispute settlement system as secretive, out of touch and harmful to citizen engagement in democratic decision making because of its intrusion in domestic policy. In this debate, more engagement by citizens could be seen to undermine the rule of law; while excessive legalism could be seen to inhibit democratic participation in decision making.

My intent is not to reconcile these positions but to show their weaknesses. I suggest that we should avoid any artificial separation between a “law of commercial exchanges” that structures every day commercial interaction and some international trade law that exists in the interstate ether. As three former Directors-General of the GATT and WTO recently warned, over-reliance on formal adjudication in the dispute settlement system can harm the trade regime. The WTO is not part of a world central government, although it is part of global governance, in the context of the multiple sets of formal and informal rules contributing to an integrated and orderly trading system. I argue that the WTO exists primarily to reduce conflict among its Members. Its secondary reason for existence is to promote liberalized international exchanges. The WTO, however, is not a free trade agreement. (I have elaborated on this claim in chapter 2 of Wolfe, 1998.) The WTO embodies the idea that trade liberalization is useful in the broader objective of promoting economic growth, and that liberalization in itself can help to prevent political conflict. But liberalization is not a trumping norm in the WTO; it certainly does not trump the non-discrimination norms of national treatment and most-favored-nation. Liberalization is always balanced against domestic autonomy. And an agreement that reduces conflict is preferred to an attempt to stand on principle.
This paper is a constructivist attempt to understand a global political space where states as actors (the traditional domain of international relations theory and international law) are joined by international organizations, firms, NGOs, and others. Today we know that many supposedly private or international orders (meaning sources of order other than the central institutions of the territorial state) are engaged in the regulation of large domains of collective life in a world where the sources of power are multiple, sovereignties are overlapping, and anarchy is meaningless. The paper begins with an attempt, discussed in the first section, to sort out what the rule of law might mean in the context of the WTO, where we soon see that it can only be understood by also considering the meaning of Administrative Law. Much of the debate about rule of law depends on positivist and centralist theories of “law,” whose inadequacy for my purposes leads, in the second section, to a discussion of legal pluralism and implicit law in legal theory. These approaches offer an alternative theoretical framework that respects the role of the state while not seeing it as the only source of normativity. The third section looks directly at WTO law and dispute settlement. I try to show that the sources and interpretations of law in the WTO and the trading system cannot be reduced to the Dispute Settlement Body. I conclude in the fourth section with some suggestions on how a WTO rule of law could be understood as democratic.

1. Rule of Law

Few would disagree with the statement in the Canadian government’s last foreign policy review (Canada, 1995) that “The rule of law is the essence of civilized behaviour both within and among nations.” Nevertheless, the meaning of “rule of law” is neither simple nor uncontested (Dyzenhaus, 1999; Hutchinson and Monahan, 1987b; Shapiro, 1994). The basic elements are familiar, however. In Carothers’ simple description (1998, p. 96),

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

The “rule of law” can mean “a government of laws not of men.” In international relations, (Davis, 1972, p. 15), it can mean little more than that “the law should in great measure replace the use of force.” In the UN Millennium Declaration (A/RES/55/2, paragraph 9) it seems to mean compliance with judicial determinations, including of the International Court of Justice (ICJ). It can also be the rallying-cry for those who favour judicial intervention to constrain the administration.

Of the many meanings of rule of law, the one that interests me is its meaning in contradistinction to Administrative Law, “the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action (Davis, 1972, p. 1).” In the nineteenth century, Dicey saw the main threat to the rule of law in the development of administrative agencies, which could not be neatly fitted into the separation of powers
between legislature, courts, and an executive or administration supposedly confined to implementing determinate law (Dyzenhaus, 1999, p. 11). Law, for Dicey, was a “bridle for leviathan”, a device to hold the administration accountable and protect citizen’s rights. This view of the rule of law as “accountability” is often a weapon used to frustrate the state intervention favoured by groups who think governments have a role to play independent of courts and wealthy private interests (Arthurs, 1997, p. 46). This rule of law concern with limitations on state power values individual liberty more than democratic governance (Hutchinson and Monahan, 1987a, p. 100). The rule of law can be said to be either about enabling human agency, therefore being central to autonomous participation in democratic politics or, in contrast, about denial of human agency, therefore displacing politics into neutral adjudication designed to rein in the state (Sypnowich, 1999).

Legislation is clearly good for articulating a consensus of policy directions, but it cannot be used for the day to day work of public administration, nor can the courts, or any other dispute settlement system, replace administrative action. Much administrative work is not reviewable in the ordinary way. Issuing licenses, for example, depends on specialized knowledge of a domain and an exercise of judgement. Some mechanisms, like allowing a greater role for the market, can reduce the chances of an administrator giving an arbitrary preference to an incumbent or local firm rather than a new entrant from abroad. But we should not forget that the rise of administrative agencies in North America as in Europe in the 1870s and 1880s was a response to the excesses of an unfettered market (Polanyi, 1944). Where the interests of the parties are inextricably bound together, adjudication can be difficult. Attempting to make decisions in such circumstances without discretion is impossible. The power of agencies is often seen arising not from explicit legislative purpose but because the rules as drafted are vague. The power of agencies can be implicit, because the rules agencies are asked to enforce require interpretation; or the power can be explicit, if the legislation requires them to draft rules. In contrast, Davis describes the vast area between legislation that cannot possible foresee all matters requiring decision in advance, and courts that cannot possibly make all administrative decisions—for example about who is eligible for a pension under the rules. Administrative action has long been needed; it is essential in the postwar welfare state.

Davis (1972, pp. 16-17) attributes the most “extravagant version of the rule of law to Hayek who “praises what he calls ‘the great principles known as the Rule of Law’ and says: ‘Stripped of all technicalities, this means that government in all its action is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”’ Davis dismisses this statement as an absurdity. For liberal positivists “law” is the legislature’s text and rule by anything other than such law is rule by men, not laws. Rule by Courts is acceptable, because Courts exist to interpret the law. For such people, Administrative Law has been problematic ever since it first arose. One aspect of the problem is a means/ends confusion (Fuller, 1981). That is, are administrative rules and practices law, or are they simply the means to a legislative end? It is soon clear that the agencies also consider ends,
that indeed means and ends are inseparable.

The concept of civil society is an alternative to rule of law and Administrative Law as a way of thinking about the relations between individuals and the state (Kaldor, 1999). By the nineteenth century it was used to evoke the existence of a plurality of citizen organizations as a countervailing pressure on the state. The term came back into popular discourse first in describing the massive transnational European peace movement of the early 1980s. Ronald Reagan’s apparently reckless stimulation of the nuclear arms race provoked political mobilization by groups who thought it wrong that decisions affecting the survival of millions of people could be taken by a handful of unrepresentative politicians. Later in the decade the term was applied to dissident human rights groups in central and eastern Europe. Communist governments had occupied the entire political space; civil society groups were a transnational force demanding democratic participation in the determination of collective life. In the 1990s, globalization became the focus of civil society groups who believed that consequential matters affecting hundreds of millions of people are determined in discussions in remote organizations dominated by business and isolated from democratic control. These new transnational social movements, therefore, are very much a countervailing force to the state and not its adjunct. But however strong the components of civil society become, the state must continue to act in the interests of all its citizens (Walzer, 1995, pp. 2-3). Since we have no democratically constituted global institutions, and no democratic global polity (yet) that would perform such a constitutive role, the alternative to governance by states would be a “undemocratic structure of private governance (Bellamy and Jones, 2000, p. 12).” A hierarchical view of rule of law provokes a civil society response, a mirror image, and neither actually promotes democracy in the pluralist’s sense.

**WTO and an International rule of law**

The quote at the head of the paper suggests that WTO might be a step towards an international rule of law. The first question this idea faces is whether there is an international legal system? If the UN Charter is accepted as a constitutive basis for international law, the problem disappears (Kingsbury, 1999, p. 689). But international relations scholars would not accord this centralist role to the UN, seeing all sorts of other actors, and no other political underpinning for a unified international rule of law exists. Ostry observes that many legal scholars see the WTO as embedding a global constitution overseen by a supranational juridical system—in the familiar rule of law formulation mentioned earlier, the WTO dispute settlement system is seen to create a rule-oriented rather than a power-oriented system, a quixotic attempt to eliminate the vagaries of politics. Some scholars think that an international rule of law means that the WTO can enforce compliance on the United States. (The suggestion is made by Woods, 1999, p. 30) Does the WTO thus become a vehicle for reducing the world’s inequality, or does it perpetuate it? The existence of the WTO would be pointless if states felt free to do as they please, or if small states (willingly) followed rules announced by large states. The usual positivist understanding of the force of law is coercion. In what way does WTO law coerce the USA? If one replies that it only coerces small members, then it is tyranny, not law. If one says that WTO law has some sort of normative force for
the USA, then the positivist and centralist debate about law and the WTO faces difficulties.

The second question about an international rule of law is its relation to Administrative Law. Although it is not common to make this point explicitly, Administrative Law is the province of the WTO. It is an old debate in the trading system: to what extent should global rules leave national administrative agencies free to get on with things? In the ultimate in liberal positivist views of the WTO, Petersmann (1998b) sees the rule of law as essential to protecting the rights of citizens against their own governments. He tends to think that foreign policy somehow escapes the constitutions of most liberal democracies because foreign policy elites claim theirs to be a special domain. It is not clear that this is true empirically, nor that it could be remedied either by a rule of international law or an international rule of law. His solution is to strengthen adjudication and so the WTO dispute settlement system becomes a shining example of an attempt to strengthen the international rule of law. It is fascinating that is people on the right who think that a centralized global constitution that derives from no legitimate authority would be a better guarantee of “liberty.”

Petersmann (1998a, pp. 179, 197-8) claims that international economic law is citizen-oriented. “It is not the nation state and its national economy, but their global integration and deregulation for the benefit of individual producers, traders and consumers that are the objectives of modern international economic law.” He imagines that it is possible to “to treat citizens not only as objects of paternalistic Hobbesian government policies but as beneficiaries of WTO law with substantive and procedural rights vis-à-vis protectionist restrictions of individual freedoms and property rights.” This claim to difference from the rest of state-centric international law seems odd—international human rights law, for example, is about individuals. It also seems an odd distinction for the WTO, which is demonstrably concerned with how states achieve their economic objectives, which may in turn be centred on their citizens.

Traces of the rule of law response to Administrative Law can be seen most obviously in Article X of GATT 1947. Ostry (1998a; 1998b, p. 16) attributes this text to the US Administrative Procedures Act of 1946, whose language it replicates. That Act was a compromise—the New Deal reliance on a flock of new administrative agencies provoked the usual Rule of Law response (Davis, 1972). But the GATT provisions are traditional. Transparency and independent judicial review had been part of English administrative law since the seventeenth century. By the middle of the nineteenth century, English administrative law had all the features familiar to us today, including independent agencies, regulation-making, and sunset clauses (Arthurs, 1979; Arthurs, 1985). It follows that the extension of these principles to traded services in the Uruguay Round was a change for the trading system, but perhaps not as radical change as Ostry suggests, since the administrative agencies subject to GATT scrutiny have been subject to Administrative Law rules since their creation. In contrast, the extension of this system to China when it joins the WTO will pose novel challenges, since China does not have a western Administrative Law tradition. Not surprisingly, therefore, the concepts of “transparency” and of “judicial review” have been a sticking point—for example, in negotiations about how GATT Article X will apply to China. There is no reason to believe that
admission to the WTO will cause a western rule of law to appear immediately.

Rule of law carries the implication that it leads to “predictability” by removing decisions from administrative or political whim. That is certainly seen as one of the virtues of the WTO system, though the predictability takes a number of forms. Tariff “binding,” for example, provides assurance that a tariff will not rise suddenly. Rule of Law in the context of the WTO can be thought of as elevating the dispute settlement system to the status of courts responsible for defending individual rights, procedural fairness and the supremacy of written texts over discretionary interpretation. It could also be seen as an attempt to defend liberalization as a transcendental value that trumps “protectionism,” ignoring other democratically decided values. The more positive view is that GATT Article X (and its GATS equivalent, which also provides for transparency and independent tribunals for reviewing administrative action), along with such provisions as requirements for advance notification and affording opportunity to comment promote principles of good government at the national level. When combined with national treatment and MFN as elements of its rule of law, WTO could be said to promote the certainty and predictability conducive to sound economic decisions.

Is the WTO becoming the ultimate form of judicial review, the court of last resort for reviewing the actions of administrative tribunals in Member countries? WTO panels are indeed a kind of judicial review of administrative action. But they are a last resort, since other aspects of the surveillance system play a similar role. The WTO can try to ensure that there is judicial review, but it cannot itself be the court of last resort for all the world’s tribunals. And what is the standard of review? Can WTO review substitute for national decision? Or ensure that certain international principles are respected? WTO can more easily review how administrative agencies made a decision than whether it was the right one. Firms may want to predict their treatment in advance, and feel appropriately aggrieved when they are proved wrong, but there are risks in assuming that a far away (in space and or time) tribunal can offer a remedy (compare Macdonald, 1990, p. 473). The biggest risk is that of replacing how the participants have characterized or framed the issue with an arbitrary alternative that is merely responsive to a different substantive norm. It is not helpful to think that there is a right answer to subtle conflicts using formal rules when useful criteria for adjudication do not exist and the “harm” is not to a person or institution but to the distribution of benefits from exchange.

The WTO is an administrative agency populated with the representatives of administrative agencies. It would be a true reductio ad absurdum to reduce the trading system to the WTO and the WTO to the dispute settlement system. In the next section I try to suggest an alternative conception of “law” that might point a way out of the impasse.

2. Implicit Law

“Unless the US and EU think the trade system’s stability of no importance,” worried the Financial Times after Seattle, “they need urgently to agree to strengthen the WTO’s disputes procedures, use them less capriciously and abide by their results. Otherwise, the WTO’s attempts to enforce the rule of law will give way to the law of the jungle.” My goal in this section is try to suggest a view of law in which the dispute settlement
system is not the only bulwark between an orderly trading system and the abyss. The usual story about WTO law is positivist, which motivates a concern with textual interpretation in the dispute settlement system. I want to show that law is pervasive throughout a global trading system of which the WTO is only a part. The empirical proof must await further research; the burden of this paper is to elaborate a theoretical framework, in this section, and then show how it leads to an alternative understanding of the place of dispute settlement, in the next section. For constructivists, legal pluralism and implicit law offer an alternative to the usual positivist approach to international law (Brunnée and Toope, 2000).

Legal pluralism is far from the mainstream approach to legal theory (Macdonald, 1998). It is easier, therefore, to begin with what it is not. Legal pluralism should not be confused with pluralism in political science, nor is it the same as the rational literature on decentralized cooperation exemplified in the transactions cost approach. It is not a way to understand how interest groups compete for control of the state nor is it a way to think of the possibility of governance as if the state did not exist. It is a way to move the state out of the centre of the frame, to develop an overview of world politics that can accommodate the different and competing forms of power or law that we face as members of families, workers, consumers, participants in our community, citizens, and as nation-states interacting with others (Santos, 1995). Critical legal pluralism goes farther, denying the homogeneity of any normative order (Macdonald, 1997).

Legal pluralism can be defined as “a contemporary image of law that has been advanced by sociolegal scholars in response to the dominant monist image of law as derivative of the political state and its progeny (Kleinhans and Macdonald, 1997).” Scholars have found empirical counterfactuals to this dominant view in the observation of more than one law operative in a territory, both under colonialism and in the diverse manifestations of non-State law in modern, Western, multicultural and polyethnic societies. Legal pluralism does not accept the centrality of the state, as if law is only what the sovereign wills; it lets us see the state as only one of the sources of order. Much of international life can be law-governed without being state-governed. We also have an empirical counterfactual in the way that firms and social actors respond to and create a host of informal and implicit “regulations” most of the time.

Legal pluralism as description does not contradict legal centralism as ideology. It is possible to observe competing sources of normative authority while believing that the authority for which they compete is unitary. Such pluralism can refer to the territorial levels of authority involved, but that is simply a reformulation of centralist assumptions. I prefer to think of a plurality of norms emerging from different institutions, or ultimately of a pluralism in the forms of norms, not least in the dimension from implicit to explicit normativity.

Pluralism, therefore, is not a hypothesis about “fragmentation.” For example, much of what some people think is a crisis of the state in the era of globalization does not appear unusual for legal pluralism, which gives us the tools to expose the old state-centric fictions, and to ask what is actually new. Similarly, civil society as the mirror of state centralism has a curious place in a legal pluralist analysis. Legal pluralism does not merely look for things that have an as-if relation to state law, rather than other forms of normative
authority. Law is not merely official enactment. The import of the legal pluralism hypothesis is obvious within a federal state, where national, provincial and municipal governments claim authority. It should also be obvious within the administrative state, where legislatures, tribunals, courts, administrative agencies and even political parties have degrees of legitimate authority. Legal pluralism suggests that the state is not the fount of all law, law need not be explicit, and no institution has a normative monopoly within its domain (Macdonald, 1998, p. 74). This view of law as implicit and plural has echoes in the interactional approach to law of Lon Fuller.10

I want to cut into the extensive body of Fuller’s writings, and of commentary on them, by looking at how they bear on sovereignty, a central concept in international relations. Sovereignty seems generally to be understood as a natural or inherent characteristic of all states, something solid and immutable, at least until it was undermined by globalization. But does sovereignty lie with some overarching power (a personal sovereign), or with the people? Is the basis of sovereignty in supreme power, or political authority? Lon Fuller, in his critique of legal positivism, argues that sovereignty is a device to introduce unity in the legal order, but the device assumes an identification of the law, the state and sovereignty in a kind of holy trinity. We can no longer believe in a personal sovereign, yet “He, or it, is intended to introduce into governmental phenomena a unifying principle which will make possible at least a formal answer to the question, ‘What is the law?’ The answer is, of course, ‘That which the sovereign adopts as its will (Fuller, 1940, pp. 34, 45).” Leff (1979) shows the difficulties in seeing law as the command of any sovereign, whether God or a Constitution. That is, law is not given to us, and it is not something we can find somewhere, perhaps in observing patterns of behavior. Law is what we make of it. The law we make, moreover is also implicit; that is, explicit law depends on custom (Macdonald, 1999b).11 The state claims sovereignty on the basis of where we live, where a church might claim sovereignty in a different domain on the basis of what we believe. Sovereignty is a metaphor for telling us who is in and who is out. The sovereign is neither absolute nor the source of order in all domains. We live with many sovereigns.

Globalization does not create a new situation, it merely exposes the fiction that the world could be parcelled up under territorial sovereigns whose formal official law had absolute regulatory control. Indeed much international life is organized on the basis of the activities to be regulated not the characteristics of the actors or the territory they inhabit. (This idea is suggested by Mitrany, 1943, pp. 18-19). This modernist mythology of territorial sovereignty took hold in part because of the idea that some domains are private and others public. The fact that the sovereign can only command in the sphere agreed to be public is thereby naturalized rather than properly being seen as undermining the centralist understanding of sovereignty. If we assume that such an absolutist state never existed, then its supposed loss of control looks less serious. We might then recognize that the state is not the only source of law, and that maintaining the rule of law does not require the creation of a uniform supranational order; indeed, in a world of overlapping sovereignty, we should expect to find sources of law that exist outside or beside states. As discussed in the previous section, Fuller would not expect to find a rootless “international legal system.”
If law is not the expression of the sovereign’s will, what is it? Fuller (1969b, p. 106) defines law as “the enterprise of subjecting human conduct to the governance of rules.” He rejects defining law by its tools (e.g. courts), or by its results (e.g. order). “Unlike most modern theories of law,” he says, “this view treats law as activity and regards a legal system as the product of a sustained purposive effort.” It is also unlike those theories of law that “explicitly assert, or tacitly assume, that a distinguishing mark of law consists in the use of coercion or force.” Fuller’s definition is opposed to legal positivism. The difficulty for positivists lies in separating the text of an agreement from the purpose sought by the parties, which may or may not have been well expressed in the text, and which may or may not be consistent over time. The law of the WTO, therefore, is not separable from the objectives of the officials who read the law, in Geneva or a capital. The most obvious difficulty in calling something “law” because it comes from an established law making authority is “the fact that the established authority which tells us what is law is itself the product of law (Fuller, 1969b).” What then makes the WTO legal? It is not enough to say that a rule is legal because the WTO says so if we have no way to explain why the WTO itself is legal. Is the WTO authoritative because the largest states say so, or because it is somehow part of an “enterprise of subjecting human conduct to the governance of rules”?

Fuller comes closest to a traditional statement of the rule of law when he argues that laws must be general, promulgated, not retroactive, understandable, not contradictory, not require conduct that is beyond the parties’ capacity, not change frequently, and not be subject to a failure of congruence between the rules as announced and their actual administration (Fuller, 1969b, p. 39). These eight principles are mostly negative; they are “routes to disaster” in failing to make law. Fuller (1969b, p.p. 41-2) does not see striving for utopia as a useful enterprise, but the eight principles are helpful standards for assessing legal excellence. “The meaning and content of laws,” Postema (1999, p. 261, 265) says in the same vein, “depends on interaction between citizens and officials; compliance thus depends on a kind of reciprocity—officials have to anticipate what citizens will understand to be law; the legal subject has to anticipate that the government will abide by its own rules in judging acceptable action.” Without reciprocity of this sort, social order might be maintained, somehow—perhaps through an exercise of power—but “it would lack a feature essential to law. For it could no longer adequately provide baselines for self-directed human interaction, which, according to Fuller, is the central task of law.” Fuller’s argument, in sum, is that legal norms can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in society generally. Rules are a means to avoid and to resolve disputes, but the trading system also creates the things we can bargain about. Macdonald (1999bp. 298, 300) suggests that “All administrative lawyers know that the key to successful regulation is to get the related clientele to accept the legitimacy of the questions that the agency poses. Far from answering questions, law asks questions. Like a language, law gets at the structures through which people can make sense of their world.” The WTO can hope to keep up with a rapidly evolving globalized economy, but the possibility that the written rules can anticipate those changes is remote. The implication is that WTO rules must be written in the “language” of the trading system, must
emerge from it; and, to the extent that it affects citizens who do not feel part of this interactive process, it will face difficulty.

If the positivist search for the “sources of law” in formal state texts is at best insufficient, where else should we look? In a sophisticated explanation of Fuller’s ideas about implicit law, Postema (1999, p. 257) observes that “While they arise from conduct, implicit rules are not mere regularities of the behavior in view; they are rules for that behavior.” This concept is not intuitive. Fuller (1975, pp. 94-5) remarked that “The notion that human subjects of law can, through their interactions, generate rules of law is something that legal theory has never felt comfortable with. In reality, a modern system of written statutory law depends for its successful functioning on what may be called a form of customary law, in the sense of a system of stabilized interactional expectancies.” So one function of the WTO as law is to create shared reciprocal expectancies about how the parties will behave in the trading system. Like rules about which side of the road we drive on, it can shape what we do without “compliance”.

The WTO provides the grammar of the trading system without which states do not understand each other. Contracts and treaties often furnish a kind of framework for an ongoing relationship, rather than a precise definition of that relationship. The WTO is contract-based, but the “law” created by a contract may often be determined by the interaction of the parties after the creation of the agreement (Fuller, 1969a, p. 15). Luban (1999) argues that positivists mistake the contract for the agreement, and think that the role of the contract is to create an enforceable obligation rather than structuring the future interaction of the parties. By the time a contract is ready for signature, the parties do not really need it to shape their behaviour.

Individuals, firms, associations, states, international (non)governmental organizations—all are in “interaction,” to use Fuller’s term, with the effects of globalization every day. Because it is in the nature of being human to do so, and because some order and predictability is essential, this interaction produces law. It is in our nature to try to write those rules down, to publish them and make them general. It is not the fact that they are promoted by states or incorporated in a WTO treaty that makes them law, however, nor are areas not explicitly mentioned by the WTO areas where there is no law at all, even if it is inherent in the process that people will wish to keep filling such gaps as they become apparent. The WTO is now grappling, for example, with the law of the internet as it affects something called electronic commerce. I do not see this process as “norm generation,” however. The WTO can only add this issue to its negotiating agenda because Internet law is already taking shape in the practices of millions of people, not because an analytic gap was waiting to be filled. It is in this sense that the WTO “discovers” rather than makes rules. It is also in this sense that participants in e-commerce are law-creating as well as law-abiding, which illustrates why “norm application” is not the central task of the legal system. In this view of law as plural, implicit and pervasive, any formal dispute settlement system only plays a small, if important, part in the maintenance of a rule of law.

3. Dispute Settlement

In the aftermath of the failure of the WTO’s last ministerial meeting in Seattle, one of the subjects for debate is whether
“rounds” of multilateral trade negotiations are still needed. Even some WTO officials were said to wonder about a new round when “sorting out disputes case-by-case— as is happening now—may be more productive than seeking extensive WTO mandates on specific issues.” 16 In this section I try to show that the argument is pernicious, in two respects: it reduces the normative role of WTO law to the outcome of a small number of disputes; and, it reduces the collective process of elaborating the rules of the trading system to litigation by rich countries that can afford the cost, and who then seem to ignore the results.

I am interested in the law as guidelines for behaviour and not in law as command (Macdonald, 1999a). The WTO is not merely an episodic disconnected set of negotiations, or the home of a legal text, but a set of continuous practices for implementing those agreements, including settling disputes about them, and for ensuring the harmonious evolution of the trading system. That means I do not try to reduce the trading system to the WTO dispute settlement body, as if no other international organizations or entities play a role in the trading system, and as if no other part of the WTO matters. The significant instrumental elements of the WTO include the agreements, a set of committees, a secretariat, the Members and their practices, and surveillance procedures.

Members are associated with each other in the WTO because of their shared purposes in creating a dynamic trading system. The test of a good agreement is not how a panel would interpret a matter, but how it shapes the actions of participants. Their common ends include developing a consensus on improving allocative efficiency in their trade policies, while their reciprocal commitments often require them to resolve distributive conflict. States need some means of understanding other states. It is one thing to argue in the abstract about “optimal” policies, or new obligations; it is another to interpret ambiguous and complex reality. Part of what the WTO does, therefore, is provide a forum for this kind of intersubjective communication among states about such things as which GATT norm takes precedence in a given situation, and whether a given action is trade-related and/or legitimate. Members talk to each other in the routine work of WTO committees, which often discuss, for example, “notifications” of new or modified measures, and in the Trade Policy Review Body.

Most of the trillions of dollars of world trade does not occasion disputes between governments, but some does. The dispute settlement system is the way in which states develop a common understanding of the sources of a conflict and the elements of a resolution. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) both codified accumulated GATT practice and created a new integrated dispute settlement system that is sometimes seen as the crowning glory of the WTO. Creation of this system was not an act of will, but the consolidation of decades of practice (Winham 1998b, p. 365). In the DSU, Members state that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. It helps to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law (Marceau, 1999; Palmeter and Mavroidis, 1998). Recommendations or rulings made by the Dispute Settlement Body (DSB) must be aimed at achieving a prompt and
satisfactory settlement of situations in which a Member considers that any benefits accruing to it are being impaired by measures taken by another Member. The preferred outcome is always a solution mutually acceptable to the parties to a dispute. In the absence of a negotiated solution, the first objective is usually to secure the withdrawal of the measures found to be inconsistent. Compensation to the complaining Member is considered only if the immediate withdrawal of the measure is impracticable and only as a temporary measure pending the withdrawal of the offending measure. The last resort is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis—that is, imposing sanctions, if authorized by the DSB. The dispute settlement system is still ‘diplomatic,’ therefore, because rulings can only be decided, implemented or enforced by Members. The Appellate Body is far from being a Supreme Court, since its rulings must be accepted by governments in the DSB. The new system can help clarify a huge, complex agreement, but its interpretations cannot be used in place of new negotiations.

How important is WTO dispute settlement? Some people respond by noting that the system has been exceptionally active, with over 214 cases initiated in the first six years, a rate far in excess of complaints handled under the GATT, or in the ICJ in its first half century. The largest single set of disputes as of June 2000 concerned the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements with 26 disputes between them, but that is a very small number for the first years of experience with such novel agreements. More significant, in its review of the Agreement, the SPS Committee “welcomed the fact that a substantial number of SPS-related trade matters had been resolved following their discussion at formal meetings of the Committee or bilaterally.” It follows that by defining the unit of analysis as “disputes,” we lose sight of the broader universe of non-disputes, as if the only point of the system is residual conflict rather than avoided conflict. The WTO shapes state behavior in the trading system so effectively that the USA, whose annual trade in goods and services is now over US$2.2 trillion, has filed only 53 disputes since the creation of the WTO.

So what is the point of the disputes process? In testimony to the US Congress praising the WTO dispute settlement system, Charlene Barshefsky, then US Trade Representative, said that “Our goal in filing cases is two-fold: first, to protect U.S. rights in cases of high economic interest or precedential importance to American industries, farmers and workers; and second, to ensure that our trading partners understand the importance of compliance with WTO rules.” She also said that in seeking improvements to the system, the USA would stress “ensuring prompt release of panel findings and other documents; enhancing the input of citizens and citizen groups; providing the opportunity to file amicus briefs in dispute settlement proceedings, and opening those proceedings to public observers.” Barshefsky’s reasons can be reformulated as advanced three reasons for launching a dispute: to solve a specific problem; to create a precedent; and for compliance. I think only the first reason is fully valid; standing in the process is separable, but just as problematic.

a) solving problems or setting precedents?

Legal scholars (e.g. Jackson, 1997, pp. 136-7) seem to think that the systemic implications of a dispute (clarifying and
providing predictive guidance about a rule) are of more importance than an immediate resolution acceptable to the parties.\(^2\) I want to explore this tension through a significant problem identified by Trebilcock and Howse in their chapter on dispute settlement. They worry (1999, p. 54) about “elements of a supranational regulatory regime that embodies certain substantive trade-offs between free trade and other values, most spectacularly on environmental matters.” The Council of Canadians in the quote at the head of this paper would no doubt agree. Does rule of law thinking help, or should we see resolution of conflict as requiring reconciliation of differing views of Administrative Law? Some of this tension between international liberalization and domestic solidarity is not news—Ruggie saw the trade-off as a central feature of post war order that he called “the compromise of embedded liberalism.” (Ruggie, 1983) Trebilcock and Howse worry (1999, p. 55) that in these circumstances “dispute settlement may entail more than the evolution and application of a set of norms to identify and distinguish ‘cheating’ from legitimate state behaviour, and may require a direct regulation of national and international public policy outcomes that implicate diverse values and constituencies.” They explain (Trebilcock and Howse, 1999) p. 58) why in the past GATT legalization was more oriented to resolving disputes amicably than to systemic integrity. Now that WTO intrudes more on policy in domains of other international organizations, or of non-trade departments of government, they think that merely settling the dispute is not as legitimate.

Trebilcock and Howse recognize that positivism has limits, but in the end they have a procedural rather than a substantive understanding of what the rule of law might mean with respect to the WTO dispute settlement system. They understand that the WTO shows and should show explicit deference to other normative orders in some areas, rather than blindly imposing a trade standard (1999, p. 67). But they seem reluctant to recognize the possibility of implicit deference. One example of the problem is in the insistence of some countries, notably Canada, on using the “science principle” in preference to the “precautionary principle” in the SPS agreement. The choice has become intensely political, but it also illustrates a conceptual problem because the appeal to “science” does not necessarily resolve a matter in the way its proponents hope. We may want to assume that science speaks a universal language of “truth” but it does not. Scientific knowledge is especially contested in such complex domains as human health. (For a related discussion, see Atik, 1997.) Rather than trying to resolve such debates, Members might be better to use the flexibility that they have given themselves in WTO agreements to defer to sites of normative authority where the actors have the capacity to discuss scientific controversy.

Environmentalists have long argued that the limited expertise of WTO officials hinders good environmental decisions (Kingsbury, 1994). But that is not the point. WTO has a political logic based on comparative advantage and reciprocity that makes it ill-suited to global commons issues (Bagwell and Staiger, 2001). This logic, whoever applies it, gives no purchase on environmental issues. Environmental rules often require a derogation from WTO principles, which can be readily accepted, but WTO would be better to take advice from bodies with environmental expertise. The WTO dispute settlement system is ill-suited to being used for
environmental matters if the rationale is merely that it exists and that it is strong. Its effectiveness comes from the shared commitments on which it rests. In the absence of shared commitments (e.g. the transatlantic beef hormones dispute) resort to dispute settlement can shake the whole system. Formal dispute settlement is no substitute for new negotiations, or for further efforts to "discover" the rule, and thereby also fails even to resolve the specific dispute. As Davis shows, this is a traditional Administrative Law problem. To the extent that the WTO is asked to act like a court applying trade principles where they may not be relevant, it can actually subvert the rule of law.

It shows foolhardy hubris for a political scientist to suggest that two law professors might then be misguided in their criticism (Trebilcock and Howse, 1999, p. 73) of WTO panels for tending to pay attention to the "objects and purposes" of a text, overlooking the exact wording. Trade policy experts are not well placed to judge other administrative agencies, as if the WTO were a master Rule of Law limiting discretion. The Trebilcock and Howse solution is positivist. They write (1999, p. ?) "If, however, the text of an agreement constitutes or reflects a painstakingly negotiated set of tradeoffs between liberal trade values and interests and other policy values and interests — hence between diverse, legitimate constituencies or stakeholders — attention to the exact text is essential to preserve the balance of the bargain." They acknowledge that some inquiry into purpose and object is important, but only when considering the exact words of the text.

If we think, in contrast, that the text of the agreement is not the thing itself, but only a framework for the future interaction of the parties, then panels acting under the rule of law should be less concerned with precedent than with encouraging the relevant administrative agencies to settle the difference informally. Settling the dispute should be paramount. If a WTO dispute panel can only apply trade concepts, it would be better to limit the role of the panel. What troubles many commentators is not the adjudication by trade experts of inherently trade issues, such as the application of a tariff, but the application of trade policy concepts to the actions of administrative agencies in other domains, since much international trade may be structured by forms of law that are only indirectly or informally linked to the WTO. Legal subjects, participants in global commerce, are "law-creating" and not merely "law-abiding." The WTO does not have a monopoly of law in its domain, nor does it stand in hierarchical relation to all other sources of order in the trading system.22

b) precedent

In the list of goals for WTO dispute settlement, positivists stress resolving disputes by clarifying the general rule, thereby filling in gaps in WTO law without new negotiations. Jackson thinks (2000, p. 279) that the dispute settlement system should not be in the business of formulating new rules, filling gaps, or whatever, in part since the WTO cannot have much 'judge made law' because an Appellate Body report has to be adopted by the DSB, and because the status of precedent is uncertain, at best.23 Petersmann (1998a, pp. 196-7), in contrast, thinks it better to fix lacunae in WTO rules through case law than new negotiations because some seemingly procedural points in the Uruguay Round texts were inserted at the behest of e.g. anti-dumping lobbies. This proposed role for the dispute settlement system only makes sense if one thinks that
all “politics” is determined by power, that only “law” and the courts can protect individual citizens from abuse of power by lobbies and interest groups—and even from the state. Petersmann analogy of the WTO to the EU is misplaced. He does not ask how citizens could have effective access to the WTO, nor how it would be possible to create anything like equal access to WTO justice in any but the most aridly formal terms when many developing country governments themselves are less than full participants.24

Bronckers (1999) worries about the temptation to make law through disputes, given the difficulty of changing WTO rules. What he means is, it is hard to change the written text of WTO agreements outside of a Round, and Rounds come along at best once every decade. But that is an impoverished understanding of the nature of law and of WTO rules. Positivists and centralists (of left and right) search for precision so that they can exert hierarchical control over others, and so that the rule will be applied as they intended. They see people as only law-abiding and have no conception of how people through their daily lives can be law-creating—or if they do understand it, they fear it.

Bronckers advises negotiators to seek clarity where none is possible. The answer to his worries is not better rules but more humility in the WTO community about what the WTO can accomplish, and more trust in national and other authorities. Fuller also counsels humility, since “As lawyers we have a natural inclination to judicialize every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources (Fuller, 1969b, p. 176).”

Arthurs agrees that adjudication is an “inappropriate way to debate and decide important issues of public policy.” He worries that “the logic of litigation is circumstantial, not systemic: wrongs are ascertained, remedies are awarded and rights are declared on the basis of the particular facts and arguments presented on the record, not with a view to comprehensively assessing and reconciling conflicting social needs, institutional possibilities, financial implications and competing public policies (Arthurs, 1999).”

In my view, solving new problems by reference to past principle is no solution. New negotiations are always preferable, because it is better to discover than deduce the rule.

c) compliance

Barshefsky formulated her third reason for filing a dispute in an interesting way as “to ensure that our trading partners understand the importance of compliance with WTO rules.” This reason could be re-cast as being for the demonstration effect, where the specific matter is less the issue than making sure that the relevant audience—at home or abroad—gets a message about compliance. This view of compliance seems little discussed, although constructivists should look more closely at it. The studies in a book on compliance (Friedland, 1990) show the value of many different techniques for securing individual compliance, including the demonstration effect. High profile symbolic prosecutions can be very important, because actors learn about appropriate action from the sanctions meted out to someone else. What they “learn” about “compliance” may of course be shaped by the party that brings the dispute.

While the USA might try to serve some broad compliance purpose with carefully
selected disputes, is there any evidence that anything outside Geneva changes as a result of a dispute? The answer would depend on an analysis of whether firms or officials know about WTO actions. Ellickson (1991, p. 280) observes that economists in the legal centralist tradition over-estimate the state’s ability to make and enforce rules, not least by missing the implications of their own theories. Information is costly, which implies that actors do not always know what the legal rule might be. Do firms know the GATT? Do officials in environment ministries? He concludes that contra Coase, law (he means formal rules) can be less relevant when transactions costs are high. The logic of judicial review (Hutchinson and Monahan, 1987a, pp. 115-6) assumes that courts can trump power, thus becoming a vehicle for justice, which assumes that court decisions shape behaviour, although it is arguable that protest did more than Brown v. Board of Education in altering civil rights in the United States. As Kingsbury argues (1998, pp. 368, 371), the problem is that law as effect or cause is not merely an empirical question: “compliance” is not obvious, and depends on underlying theories of “law.” Positivists separate law and behavior in order to examine the relation between them. Constructivists focus on the continuous intersubjective constitution and reconstitution of social relations and of the very identities of actors.

It is interesting that Barshefsky did not use the word “enforcement” in connection with the WTO role in ensuring compliance. Discussions of “enforcement” usually assume that the law commands rather than guides behaviour, but enforcement is especially amorphous in something as diffuse as the trading system.25 No police officer stands on the intersections of the trading system ensuring that participants obey the rules, and the USA would be the first to deny the authority of any such official. “Violations” can only be observed by other participants. They can only understand something as a “violation” in the terms constructed by the trading system itself. Winham (1998b, p. 361) notes that the WTO is contractual, in contrast to the ITO which had considerable scope to initiate investigations, interpret the charter, and decide disputes. WTO ‘rule-oriented’ practice does not stress collective decision-making or collective action. Only states can decide if something is a dispute (either violation or non-violation nullification and impairment), because only a government can decide if its own expectations have been impaired.

\textit{d) third party access}

When government is “judicialized,” in Fuller’s phrase, access to courts becomes a major issue. The antimony between a WTO rule of law and democracy suggested at the outset of this paper is rooted in part in perceptions of citizen engagement in decision making. Who should have standing in “court”? In Canada it is a well-known story that the creation of the Charter of Rights and Freedoms in 1982 was part of a process of turning citizens into rights holders who pursue essentially political goals through litigation. The Charter is often blamed for a displacement of political activity from Parliament to courts. This attitude to the courts is found elsewhere, of course, especially among American environmentalists. When the tuna/dolphin dispute began a decade ago, Kingsbury (1994) argues, people who were accustomed to full access to the domestic courts where they could participate actively, for example by filing amicus briefs, suddenly thought a major decision affecting Congressionally-determined environmental policy was being made by far away bureaucrats operating in secret.
Activists have never recovered from the shock. At some level this shock is a misunderstanding of the WTO process, which they think is analogous to a court. Environmental activists are worried that the world is now populated by such “courts” open to governments alone. They think that since democracy is served by having rights decisions adjudicated in the familiar domestic courts, democracy is not served by these global courts. Since they cannot influence a WTO panel in the way they can influence a domestic court, the WTO must be undemocratic. If the liberal rule of law view of dispute settlement is accepted, then the civil society response has merit. Why should only states have access to such an important forum? McRae shows (2000, p. 33-5) how complicated it might be to provide civil society with greater and more formal access to the process, a problem Trebilcock and Howse also recognize. If we downplay the role of panels, access to them becomes less important.

When most issues do not go to adjudication, a misleading impression is created by elucidating the changing status of “WTO law” only by reference to panel reports. Many commentators then fret about provisions given a vague interpretation in panel reports. But perhaps we should be asking if Members are having trouble interpreting the agreements. If states know what to do, is there a problem? Take agriculture. The Uruguay Round agreement was not the end of history. WTO rules have continued to evolve, even if there have been few disputes. The Committee in its formal and informal processes has reviewed hundred and hundreds of required notifications and ad hoc queries about the practices of members under the agreement. An ‘analysis and information exchange’ process was initiated to consider issues that might be ripe for future negotiations. (see p. 49-50 of the 1999 WTO Annual Report for more detail)

WTO seems to be seen as “enacted law” but it is not. And the dispute settlement system is not the most important way in which the parties seek to interpret their contract. Interpretation is interactional. Courts are only useful when people cannot decide themselves how to apply the rule. Dispute settlement is demonstrably not very good at “discovering” the rule in a situation (e.g. bananas or hormones) where the parties have not found the rule in negotiations. The Law serves to guide their relations with each other, to make it possible for them to interpret behavior. (it is no accident that the Soviet Union and its allies could not be members. Contracts, Fuller observes, are not helpful between hostile parties. The hostility was not merely in the security realm, but at the level of economic systems. The task of accession is one of ensuring that the new Member is comprehensible to the old.)

Legal pluralists direct our attention away from the most formal aspects of conflict resolution, away from mechanical adjudication by experts and towards the sources of order by which people, or entities within the trading system, live. They stress not normative competition so much as a recognition that pluralism in law is pervasive. Legislation and adjudication are not the only or even the most important sources of social order. In the WTO, negotiation, discussion in committees, and surveillance in the TPRM are all part of how Members discover and interpret the rules. The elements of the WTO do not stand in hierarchical relationship to each other.

The WTO like any treaty can only establish a framework since we lack an
international authority capable of command. World trade is US$6.5 trillion a year and growing. A secretariat of 500 staff could not dream of “enforcing” something called “international trade law” even if they were directed to try. The WTO operates at the margins, helping states recognize their own interests, and to recognize their obligations to each other. It aims to avoid disputes, not to structure massive conflicts. How important in the end is dispute settlement? It is always significant for the individual actors caught up in a case, but it is not so significant for the system. Dispute settlement contributes to the rule of law in international trade, as Trebilcock and Howse suggest in the quote from their magisterial survey of the topic that begins this paper, but the sources, interpretation, and evolution of WTO “law” cannot be reduced to dispute settlement.

4. Conclusion

If the WTO is thought to represent the Rule of Law in the trading system, how should we understand the meaning of “law” in this context? What is the source of such law? How can it be seen as democratic? The scope and domain of the WTO is now so vast, and so intrusive at the local level, that it must inevitably put democracy in question. The 1999 protests in Seattle may have been bigger than the 2000 protests in Washington, Windsor, Prague and Montreal because the WTO’s focus is not the diffuse macroeconomic policies of the IMF or the far-away policies of the World Bank but the microeconomic framework policies whose effects are felt at home. These problems of democratic legitimacy are acute if the WTO is understood in a positivist or centralist mode as the authoritative source and interpreter of administrative or commercial law, for how then can the multitudinous sites of democratic participation be accommodated? I have tried to show that the apparent antimony between the two quotes at the head of the paper miscasts the problem. The real antimony is between them and an alternative conception of law.

The problem lies in defining WTO law in terms of disputes, for that is to define the thing by breaches not by adherence to its normative order. If WTO law is instead understood as the rules by which we shall live together in the trading system, a focus on disputes truly gets at the wrong end of the stick. And when we do look at disputes, we should be more interested in solving the problem than in setting a precedent. Too often (Hutchinson and Monahan, 1987a, p. 122) economists think that the dispute settlement system exists to impose Free Trade on recalcitrant governments. A Rule of Law that exists to ensure that a polity finds the right answers impedes democracy. All the rule of law can do is safeguard democratic debate.

One meaning of rule of law could be acceptance that law applies to the actions of the state and its officials. Does this mean that the existence of courts is the indicator that the or a rule of law exists? But actors can be governed by law without needing courts. Adjudication is a particular form of law and not the measure of it. The formal rules of the WTO as interpreted by judge of the Appellate Body are not the only source of WTO law. All the other WTO processes, the business of social interaction structured by the institution, are forms of learning and sources of law that are central to how obligations are interpreted (compare Macdonald, 1990, p. 458). Formal disputes are the tip of the iceberg.

To call the trading system rule-based is not to say much at all. Any system of social
interaction is rule-based. Law—legal rules—does not have to be produced by the state, or even be explicit. It emerges from human interaction. Two things then are significant about the trading system: a) the continual effort to recognize the rules and to write them down, making what was tacit, explicit; and, b) the attempt to make the process one of multilateral surveillance and negotiation rather than great-power dictate. The rule of law means only that decisions are made according to legal principle not political whim. It does not mean that decisions must be made by adjudicators rather than the parties themselves. The challenge for the WTO is always to understand and reconcile differences, ensuring that the players can get on with things with some degree of predictability. They do not need the same law, or a harmonized law, they just need to have a recognizable rule that structures activity in a fair way. Most important, they need transparency, including the ability to be informed about proposed rules, the right to state views, information on the results of any monitoring exercise, and a forum for settling disputes. All of these elements of transparency are central functions performed by international regimes in their efforts to provide global governance, reconciling the actions of welfare states. Analysis of bargaining within institutions has its place, but like Fuller I am more interested in situations where it is only through interaction with each other that the parties discover their interests or identities.

The WTO does not and cannot rule the world economy. As new forms of “global law” emerge, they need not be assimilated into the WTO texts. To think otherwise is the positivist belief that we must have a single form of law dependent on the state, a belief that now takes the form of a new attempt to create a single body of law for at least some sorts of entities and transactions. Centralists who desire such a codified global rule of law do not understand that a global rule of law divorced from political authority, which remains local, would be tyranny. Legal pluralism suggests that the WTO can be valuable for enhancing the rule of law without moving formal state-made law to the international level, or centralizing it in one place. Legal pluralism can value rule of law rather than the hierarchical power to announce law (Macdonald, 1998, pp. 89, 78).

Unless we deny the historical evolution of incommensurable legal and political systems, we have to admit the impossibility of establishing an agreed understanding of fairness, and the greater impossibility of international judicial review of administrative decisions leading to outcomes that are ‘better’ (as opposed to simply different). Only governments can know if another government has regulated in accordance with its obligations. I would agree with Mitrany (1943) on the need to minimize the role of ‘politics’ (meaning what later came to be called ‘High Politics’) in settling technical matters. The role of Administrative Law is to keep officials honest while recognizing that some things—many things—are decided neither by legislators nor by judges. That is, I am arguing not for ‘political interference’ in WTO disputes, only for ensuring that lawyers do not drive what should be a process of accommodation. Since there is no single “rule” to determine how to accommodate those conflicting values, much of the WTO agreement concerns the mechanisms—ministerial conferences, ambassadorial councils, committees of officials, the TPRM, the dispute settlement system—through which states will talk to each other about how to reconcile their competing objectives. There is no court established.
Only the signatories, at ministerial level if need be, can decide on which “rule” should be invoked.

How can this WTO rule of law be democratic? Let me suggest five reasons.

First, democracy is not served by seeing the WTO as a set of formal rules that can be used to constrain domestic decision processes. The WTO is best understood as constructing relationships, not as creating “rights” which are absolute and stand apart. Moreover, states are not the fount of WTO law. The rule of law matters, but Fuller’s eight principles of legal excellence are a property we hope to create in our institutions not something to be enforced by courts. Law should be understood as emerging from and establishing a framework for social interaction. The WTO is part of the rule of law, therefore, but it is not in itself the Rule of Law in the trading system. The goal is neither hierarchical control nor mechanical “legalization” but creating a system of trade “law” that is part of “an enterprise of subjecting human conduct to the governance of rules.”

Second, democracy is not served by civil society groups who appear to claim that un-elected officials have too much discretion in the WTO, that their actions are not transparent, and that the new trade rules undermine the sovereign authority of national legislatures. It is a curiosity that demands from civil society to fetter negotiators are in effect Dicey rule of law type arguments. A centralist understanding of the Rule of Law serves to sustain an elitist conception of politics (Hutchinson and Monahan, 1987a, pp. 111, 117). Such elitism only makes the WTO democracy problem worse. First, because it means to deny popular engagement, and second because NGOs capable of real dispute settlement system participation have to be seen as part of the elite. The issue is not creating new groups to participate in a closed elite process, but creating a new (or supplementary) process that is more open and participatory. Moreover, seeing formal adjudication as a means to Rule of Law understood as democratic is bizarre, for it displaces more democratic fora and requires use of an arcane logic and language that citizens cannot deploy.

Third, many of the more informal aspects of the WTO work best by allowing states to talk to each other privately in order to resolve disputes at an early stage. But democracy is served by making aspects of the WTO more transparent. Transparency in this context means providing both information and a window on the process. It follows that the more we stress the formal dispute settlement system, the harder real transparency becomes. It is easier to allow the public to see what is going on, and to involve non-state actors in open discussions, in the less formal parts of the process. (Developing countries who find WTO internal transparency inadequate are skeptical of calls for more external transparency.) Transparency rules, or regulation by revelation (Florini, 1998) can make formal rule of law moot—which leads to the Global Compact approach.

Fourth, people tend to focus on how consequential decisions get made. If topics now covered by formal national legislation move to WTO, then democratic deliberation must too. Deference to normative orders that may be local and particular allows us to avoid this problem. Rather than being the place to discipline Administrative Law by limiting the abuse of national administrative discretion, WTO is the place to reconcile Administrative Law, as in the telecoms Reference Paper, and as in Article XX of the Government Procurement Agreement.
Finally, if law emerges from our interactions, then democracy is only served, and we are only ruled by law, if we keep talking, and if we keep expanding participation in the conversation. In the folk wisdom of experienced trade negotiators, it has long been thought essential to have a new round of negotiations always in prospect. This "bicycle" theory means that WTO can only grow or adapt through negotiations, and because of the Single Undertaking that keeps everybody's interests harnessed together—a truly multilateral system—negotiations require a round, which places a heavy democratic burden on the next WTO ministerial in Qatar. But negotiations are parasitical on the rest of collective life in the system, the variety of sites of normativity where rules emerge in human interaction—are discovered—before they are recognized in negotiations. The system is plural, not unitary. Perhaps the real meaning of the bicycle theory is that we always have to keep talking, despite protestors on the bridges of Prague or the ramparts of Quebec City. The WTO would be in trouble if people ever thought that the agreements were now good enough to leave to the lawyers. "See you in Geneva" should not be our first response to an impasse. Such a rule of law in the WTO would not be democratic.

Notes


2Although the argument is not developed in this paper, the UN Global Compact is a similar attempt to diffuse significant normative debate away from the WTO. See http://www.un.org/partners/business/globcomp.htm

3Does a democratic rule of law require that government should do what the people decide, or that individuals should be protected by an international judiciary? Should governments even of large states be constrained by law, or should democratic determinations of a (large) state trump the decisions of another (small) state?


5It follows that the WTO is an appropriate locus for discussion about services and competition policy, both being the domain of administrative agencies and tribunals in most countries.

6Article X Publication and Administration of Trade Regulations [excerpt]
1. Laws, regulations, judicial decisions and administrative rulings of general application [..] shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. [...] 3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph I of this Article. (b) Each contracting party shall maintain, or institute as soon as practicable, [independent] judicial, arbitral or administrative tribunals or procedures [...].

7The claim is made by Lawrence Herman, "Are WTO panels weakening national sovereignty?" Globe and Mail (December 27, 2000), B9.
“Transatlantic trade tensions,” Financial Times (May 15, 2000, 16.) emphasis added.

This formulation was suggested by Astrid Link.

Fuller was an influential mid-twentieth century American legal scholar. For a contemporary assessment of his importance, see (Witteveen and Burg, 1999). For his erudite and compelling critiques of legal positivism, undistorted by the famous debate with Hart (which Fuller was thought to have lost), see (Fuller, 1940; Fuller, 1969b). On the debate, see (Hart, 1958; Fuller, 1958). The authors in the Summer 2000 issue of International Organization on “Legalization and World Politics” take their common theory of law from Hart, not Fuller. Implicitly they have the legal positivist’s view that law is what the sovereign (government) wills and thus legalization is something that governments can choose. The value of using Fuller is not to make a claim that he was a constructivist ahead of his time, but constructivist attention to rules and norms demands some attention to legal theory, and Fuller’s approach is helpful. For a detailed discussion of Fuller’s ideas in this context, see (Brunnée and Toope, 2000). They argue that “non-positivist conceptions of law would actually clarify the way that norms help to shape identity and influence behaviour, buttress constructivist claims, and help to found a more fruitful linkage between constructivism and international law.”

Law also depends on social context: it cannot be projected into alien contexts—which is what happens when an Anglo-American conception of the Rule of Law becomes part of the globalization bundle associated with being a ward of the IMF and the World Bank (See Chapter 5 in the 1996 World Development Report, or Chapter 3 in the 1997 Report). Participation in the proposed Free Trade Area of the Americas is also seen as a way to promote the rule of law. In the International Country Risk Guide, “Rule of Law” is a quantifiable variable (Knack and Keefer, 1995, p. 226) that “reflects the degree to which the citizens of a country are willing to accept the established institutions to make and implement laws and adjudicate disputes.” Santos observes (2000, p. 254) that the rule of law has become a new mantra for the so-called “Washington Consensus” view of policy: Only if the rule of law is widely accepted “are certainty and predictability guaranteed, transaction costs lowered, property rights clarified and protected, contractual obligations enforced, and regulations applied. To achieve all this is the crucial role of the judicial system...” This stress on courts as the central instrument of good governance in developing countries assumes that only courts can create the legal framework necessary for the transition, for example in the states of the former Soviet Union, from a command to a market economy. This movement assumes that the rule of law is some entity independent of time and place, and it overlooks the nature and importance of administrative law.

In this light we have a better grasp of the WTO concept of non-violation “nullification or impairment,” which depends, Jackson explains (1997, p. 115), not on an actual breach of the rules, but a breach of a party’s “reasonable expectations” of benefits under the agreement.

In this sense language is both constitutive and regulative, because: “language sets us free by imposing limits on how we express what we intend to say (Fuller, 1975, p. 89).”

On the so-called new lex mercatoria—law that is not dependent on states, coming instead from law firms, the internal rules of
MNEs, or trade unions—see (Teubner, 1997).

15On order as discovered not imposed, see (Fuller, 1946).

16"The merit of trading quietly," The Economist (12 August 2000, 18)

17For a sophisticated analysis of how disputes escalate through these stages, see (Busch, 2000). Hoekman and Mavroidis (2000, p. 529) highlight four key features of the system that affect the participation of both developing countries and civil society: only governments have standing, compensation for damages is customarily not requested and awarded, the ability to enforce rulings is very asymmetric, and the costs of the process are significant.

18"Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures," (World Trade Organization, Committee on Sanitary and Phytosanitary Measures, G/SPS/12, 11 March 1999.) To that date, the Committee also noted, over 1100 notifications had been submitted by 59 Members.

19Busch and Reinhardt (2000) offer an elegant discussion of the selection bias problem in choosing what counts as a dispute for analysis. Not all disputes begin and end in the WTO—some are handled in regional deals, national courts, or private arbitration. Moreover, not all conflicts become disputes, and not all interaction under the law becomes conflictual.

20Ambassador Charlene Barshefsky, "U.S. Interests and Experience in the WTO Dispute Settlement System" (Testimony to the Trade Subcommittee of the Senate Committee on Finance, Washington, D.C. June 20, 2000. Source: Inside US Trade. Canada is also interested in greater transparency for the dispute settlement process, and in a May 1999 public discussion paper wondered about whether non-state actors should have greater access to the system. See http://www.dfait-maeci.gc.ca/tna-nac/discussion/dsu-e.asp

21For a more hard-nosed, and positivist, expression of this point, see (Davey, 1996).

22This line of argument is relevant to paragraph 30 of the Millennium Declaration, where Members resolve “To ensure greater policy coherence and better cooperation between the United Nations, its agencies, the Bretton Woods Institutions and the World Trade Organization, as well as other multilateral bodies, with a view to achieving a fully coordinated approach to the problems of peace and development.”

23WTO Appellate Body reports must formally be accepted by Member states—the Appellate Body has no autonomy at all from states, unlike the ICJ and the ECJ. The Appellate Body itself interprets Article 3:2 of the Dispute Settlement Understanding to mean that it has no mandate to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. (Petersmann, 1998b, p. 40)

24Access to courts never equals access to justice. Efforts to address the problem through technical assistance move slowly (Van der Borght, 1999).

25The “ neoliberal institutionalist” approach to dispute settlement exemplified in “Legalization and World Politics” sees it as a way for governments to constrain the protectionism of other governments (cheating on deals) while increasing private sector confidence in the policy framework (predictability). One of the touchstones of the volume is the supposed legalization of
the WTO, yet there is almost no evidence presented that would buttress the claim, and some of what is presented is wrong, notably their equation of the TPRM with third party delegation. Indeed I think in the WTO third party delegation is not the proof of compliance but the proof of its absence. (When the parties to a transaction see no dispute, there is no dispute; when the parties to a dispute decide that it is resolved, at any stage of the proceeding.) On p. 396, the notion that legalization precludes interpretation in capitals seems to me to make no sense at all. On p. 397 the idea that compliance can only be measured after legalization is wrong-headed, since only the parties can judge compliance.

26Subjects of international law are not individuals but entities with standing in world politics. The range and nature of these entities is expanding. Most notions of the rule of law involve protecting the weak from the strong—that is, rule of law means protection from [arbitrary] [ab]use of power. So, seen in this light, the [in]famous “tuna-dolphin” and “shrimp-turtle” cases are triumphs of the rule of law, if states are its subjects, though not necessarily if dolphins and turtles are its subjects. That is, the WTO rule of law prevented the US Congress from imposing its power on smaller democracies.

27NAFTA Chapter 19 may be the exception that proves this rule, since its success depends on both a degree of harmonization of trade remedy law, and close similarity of institutions and understandings of procedural fairness between the partners. The extension to Mexico has required adjustment, however, and it is not clear that the model could be multilateralized. See (Winham, 1998a).

References


Fuller, Lon L., (1940) The law in quest of itself (Chicago: The Foundation Press Inc.).


