Groping Toward Grotius:

The WTO and the International Rule of Law

Address

by

James Bacchus

Chairman

Appellate Body

World Trade Organization

Geneva, Switzerland

at

Harvard Law School

Cambridge, Massachusetts

October 1, 2002

The tale is familiar to all those who seek a world that truly values international law.

The time is the early seventeenth century, at the dawn of what historians — despite considerable evidence to the contrary — often call "The Age of Reason." The place is the Netherlands, in revolt against Spain, on the verge of a civil war, and in the grip of a divisive religious discord.

The hero is Huig de Groot — better known to us by his Latin name, Hugo Grotius. The heroine is Maria — his loyal and long-suffering wife, and the mother of his five children.

The tale is a tale of escape. It is a tale of an escape *to freedom.*

In 1619, at the beginning of our tale, our hero, Grotius, was imprisoned in a gloomy and forbidding fortress in the Netherlands. Grotius was no ordinary prisoner. In his youth, he had been described by no less than the King of France as "the miracle of Holland."[1] He was a poet, a playwright, a theologian, a diplomat, and, not least, a renowned lawyer and jurist. He was, all in all, one of the most learned men in all of Europe.

Grotius was also a Christian humanist. He not only believed in Christianity. He believed also in what he saw as a necessary corollary to Christianity. He believed in human freedom. In this, Grotius was at least a few centuries ahead of his time. Thus, in the fallout from a Dutch political power struggle, he was condemned as a religious heretic and sentenced to life imprisonment. As one historian put it, Grotius was now "cut off in the flower of his age and doomed to a living grave."

Enter our heroine, Maria, a resourceful woman devoted to her husband. She proved it when she agreed to be locked up with him every night in the fortress. She proved it all the more when she engineered his escape.

For two years, Grotius continued his scholarly studies while in prison. To further his studies, his friends outside the prison sent him stacks of heavy books. The books were taken to and from the fortress in a large, locked chest. After awhile, the prison guards grew accustomed to the steady flow of books to and from their studious prisoner and "gradually ceased to inspect the chest."

The sharp-eyed Maria noticed this, and told her husband. Together, they developed a plan for his escape. Grotius would take the place of the books inside the chest. The chest was just large enough to hold the imprisoned scholar. A single keyhole allowed just enough air for breathing. In preparation, Grotius lay "in the chest with the lid fastened, and with his wife sitting upon the top of it, two hours at a time by the hour-glass."

Finally, on a rainy and windy morning in March, 1621, when the gale "beat with unabated violence in the turrets," and when the prison commandant was conveniently away, Grotius fell on his knees and prayed for an hour, and then had his wife lock him in the chest. Curled up inside, he used a copy of the New Testament as a pillow.

Maria kissed the lock, gave the key to the chest to their maidservant, and then summoned the guards. The guards joked about the weight of the heavy chest, but they carried it away. They carried it through thirteen "barred and locked doors," until, finally, they were outside the fortress. Then they placed it on a boat that waited on the bank of a nearby river.

The maidservant sat on the chest while the boat crossed the river. Then she had the chest taken to the home of one of the scholar's supporters. There she unlocked the chest, and Grotius emerged, gasping for air. Later, disguised as a journeyman bricklayer, he made his escape from the country. Soon his wife and children joined him, in freedom.

As dramatic as this tale of the daring escape of Grotius may be, even more dramatic is the sequel. For the sequel to the escape of Grotius is a tale, too, of an escape to freedom. It is the unfinished tale of our own escape to freedom — through the embrace and the establishment of the international rule of law.

It was *after* his dramatic escape from his imprisonment in the Netherlands that Grotius wrote the masterpiece for which he is most remembered by students and scholars of international law. It was *after* his escape, while living in exile in Paris, and while surviving on a small pension from the French king, that he wrote his classic treatise On the Law of War and Peace.[2]

It was in this treatise — written after his escape — that Grotius made his claim to be remembered today. For it was in this work that he had the most to say about freedom, about how freedom depends on the rule of law, and about how the hopes we have for the rule of law in an unruly world depend on having something that can truly be called "international law."

There are others, besides Grotius, who helped lay the intellectual foundation for international law. Vitoria. Gentili. Suarez. And more. Yet it is Grotius who is generally proclaimed as "the father of international law." In part, this is because of his insight and his foresight relating to the need for the international rule of law in On the Law of War and Peace.[3]

In his treatise, Grotius set forth the first modern formulation of international law. His treatise, as its subtitle indicates, is not only about the law of war and peace. More broadly, it is about "the law of nature and of nations." More precisely, it is about how what Grotius saw as the law of nature should affect what he foresaw as the law of nations. It is about how international law must serve as the foundation for universal human freedom.

As a Christian and as a humanist, Grotius taught that human law, like God's law, must be just. He believed that we humans are God's creatures, endowed with the capacity of reason and blessed with the opportunity of sharing the gift of life. Therefore, he believed that we humans are — in our nature — both rational and social. From this, he concluded that what is *just* for humanity must be what is *natural* to our society of rational creatures trying our best to live together in the world God gave us.

Thus, Grotius stressed the significance of "natural law." In his view, natural law is "the dictate of right reason." It is what is necessary to our rational and social nature. It is that system of rights and duties that flows necessarily from our essential nature as rational creatures living together in society. It is *natural* law that is *just* law.

The implications of this insight are considerable and far-reaching. For it follows that whatever is necessary for our rational existence — whatever is necessary for our productive participation in society — is necessarily *ours* under natural law. It is ours by natural *right*. And, thus, a just society is a society that both respects and realizes our natural rights.

More, it follows as well that those who would govern our rational efforts to make a just human society — those we call today "nation-states" — must both respect and realize our natural rights. Further — and crucially — it follows likewise that our natural rights — call them our "human rights" — must be both respected and realized in spite of, and irrespective of, the individual inclinations of individual "nation-states."

For Grotius, "the dictate of right reason" is a demanding dictate that applies at all times to everyone everywhere. For him, we each have — by our very nature — as individual humans — an equal claim to individual human rights. And, for him, these equal human rights are exactly the same for each and every one of us.

This is an idea that assumes a *shared* humanity. This is a notion that assumes a *single* humanity, a *common* humanity that transcends the artificial and ever-changing limits of national borders, and that binds us together above and beyond all the boundaries of nationality, race, religion, or any other superficial distinction that might somehow obscure our basic oneness. This, to say the least, is a potentially revolutionary thought.

From Grotius, this was a Christian thought, founded on the universal teachings of his own faith. Yet even Grotius argued that what he characterized as the universal law of nature would be valid even if there were no God. *Then* — as Grotius himself acknowledged at the time — such a suggestion was blasphemous in the context of a Christian Europe.[4] *Now* — as we all might acknowledge today — the revolutionary thought that universal laws should apply to a humanity that is universally one and the same is by far the most compelling argument in favor of universal human rights in the context of our much more diverse modern world.

Reasoning from this decidedly revolutionary proposition, Grotius saw the substance of natural law — in part — in the operation of human reason in human experience. He saw it in custom. He saw it in what we would describe today as "rule-making." He saw customs and rules as transcending national borders, and as constituting some of the most significant elements of "international law." He implied that sovereign states can be fully and truly legitimate only if they acknowledge the duties they owe to each other — and to a common humanity — by acting in accordance with the customary rules of "international law."[5]

Reasoning further, Grotius argued that sovereign states must not only act in accordance with "international law." They must also act together to make "international law." Grotius wrote of what he described as "the law of nations."[6] He saw "the law of nations" as law that is developed by the collective will of all or many nations, and that draws its obligatory force from the combined will of all or many nations. Thus, he emphasized the potential of cooperative *international* efforts as a means of making *international* law.

Grotius saw sovereign states as sharing a common interest in making international law, and also in enforcing international law through strict adherence to the international rule of law. Implicit in his revolutionary thought that there are universal human rights is the equally revolutionary thought that human rights can prevail universally only if the rule of law prevails universally.

It is this implicit corollary to his thinking on international law that is perhaps most telling for us today. Not only nationally, but internationally, freedom only exists under the law. Not only nationally, but internationally, it is the certainty of the rule of law that, alone, can enable us to escape from all the confining fortresses that imprison us. Not only nationally, but internationally, it is the certainty of the rule of law that, alone, can set us free.

Following his daring escape, Grotius never returned to the Netherlands. In France, in Sweden, and elsewhere he continued his humanistic scholarship. He continued to work for peace, and he continued to work for freedom. Yet, despite all his work, despite all his treatises, and despite all his scholarly and other accomplishments, at his death he thought his life a failure.

Grotius died in exile. He died of exhaustion and exposure following a shipwreck a few years before the conclusion of the Peace of Westphalia that ended the senseless religious fratricide of the Thirty Years' War in Europe in 1648. Thus, he did not live to see the first faint glimpse of the future he foresaw through international cooperation and through the international rule of law. He did not live to see the ascendance of "nation-states" in the advent of what the theorists of international affairs commonly call the "Westphalia System."

The "Westphalia System" is a system in which the principal actors in the world are all "nation-states." It is a system that depends for its success on the constructive cooperation of "nation-states." The "Westphalia System" has lasted now for the better part of four centuries. It has provided the fundamental framework for the conduct of world affairs ever since 1648. The "Westphalia System" has created the possibility for cooperative action through international law. Yet the "nation-states" of the "Westphalia System" are only now starting to see some of the most profound of the implications of what Grotius really meant by "international law," only now starting to realize some of the vast potential of international law, and only now starting to make some of the connections that Grotius made between the need for the international rule of law and the hope for human freedom.

In all the years since the creation of the "Westphalia System," we have been trying to make these connections. In all the years since he wrote his famous treatise on international law, we have been groping toward Grotius. In all the centuries since he made his escape, we have been trying to make our own escape to the full measure of human freedom that he believed could be found through the international rule of law. But we have yet to escape. We have yet to find that freedom. We have yet to free ourselves from the confines of our own imprisonment. And, thus, ours remains a world locked in a confining fortress of our own fierce making. Ours remains a world gasping for air.

For all our concerted efforts, for all our centuries of allegiance to the lofty ideal of international cooperation, the hard reality is that we have yet to find the full flourishing of human freedom that can only be found through the international rule of law. Indeed, in reality, we have yet even to agree that there can, in reality, truly be such a thing as "international law."

From the very beginning, there have been skeptics. In his Leviathan, published in 1651, just a few years after the death of Grotius, and just a few years after the birth of the "Westphalia System," the English political theorist Thomas Hobbes stated what many have long thought to be obvious about the fond hopes of internationalists and other idealists for the international rule of law. "Where there is no common power," Hobbes said, "there is no law."[7] In the minds of such skeptics, as there is "no common power" in the world — as there is no single global sovereign power — there can be no international custom, or rule, or standard of any kind, worthy of being called a "law."

Typical of the Hobbesian line of thinking on this issue was the nineteenth century English thinker on jurisprudence, John Austin. Austin defined a "law" as a rule laid down by a sovereign power for which obedience can be enforced — because there is some penalty for failing to obey it. Thus, as he saw it, for a "law" to be regarded as a "law," there must be some legal sanction for *not* obeying it.[8]

By this reasoning, much that is often described as "international law" is not really law at all. Although it is nominally binding, although it has been agreed and signed and ratified, although the "nation-states" may have convened a colorful ceremony to celebrate it, there is, in reality, no penalty for *not* obeying it, and thus there is no assurance that it will be enforced. It is, in the familiar jargon of today's successors to Grotius, not "hard law," but "soft law." Consequently, what we call "international law" is, as Austin put it, actually "a law in name only."[9] It is a form only of what he called "positive morality," because whether it is enforced or not depends entirely on whether "nation-states" are willing to obey it.[10]

Thus, in this view, it is not law, but power, that really matters in the world. And a world in which it is power that really matters is the very opposite of the world that Grotius sought through the international rule of law. It is the cold world of the ancient Greek sophist, Thrasymachus, who told Socrates, in the first book of Plato's Republic, that " 'right' is always the same, the interest of the stronger party."[11] It is the harsh world of the Melian Dialogue of Thucydides, where "the strong do what they can and the weak suffer what they must."[12] It is the sorrowful world of an endless series of endless variations on the Thirty Years' War that Grotius tried so hard to end — a world in which *might* always and ever makes *right*.

Because of the decisive role of power in the world, Raymond Aron, the French political thinker, concluded that international society is "an anarchical order of power in which might makes right."[13] In the absence of real international law, and in the absence of the real international rule of law, international society is destined always to remain "anarchical."[14] We have been reminded all too vividly of this lately. We have been reminded by recent events how very far we have still to go to escape from the international anarchy that characterizes our continuing imprisonment, and to secure the international rule of law through "the dictate of right reason." As my friend and colleague on the Appellate Body, that great and eloquent champion of international law, Judge Georges Abi-Saab of Egypt, reminded me on September 12, 2001, "Ours is not yet an Age of Reason."

Our only escape from anarchy into freedom is through "the dictate of right reason." Our only chance to achieve all that might be achieved through our common humanity is through the enduring vision of Grotius. And yet, in far too may ways, in far too many places, and in far too many instances, the international rule of law is only a fiction and a fantasy. Seemingly at every turn — on pressing international issues ranging from crimes against humanity to crimes against the environment, and on urgent global security issues ranging from defense against the continuing threat of nuclear missiles to defense against the new, nightmarish threat of unprecedented acts of terror — the desire for the international rule of law is subordinated to the demands of the international rule of power. Seemingly at every turn, *might* still seems to make *right*.

The centrality — the sheer indispensability — of the international rule of law to all our brightest hopes for the future can hardly be exaggerated. On this, the civilized nations of the world seem to agree. To cite only one example: the third clause in the Preamble to the Universal Declaration on Human Rights states emphatically that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the rule of law."[15] In her wonderful book on the drafting of this Universal Declaration, A World Made New, Harvard Law Professor Mary Ann Glendon highlights the way in which this clause "gives prominence to a key concept: the importance and the fragility of the rule of law."[16]

And yet, all too often, in our "anarchical" world, the international rule of law for the sake of a common humanity seems only to be an afterthought to the exercise of power. It seems only to be a soothing, reassuring, rhetorical footnote to the continued rule of *realpolitick*. International law still leads what the American jurist, Justice Benjamin Cardozo, once described as a "twilight existence."[17]

But, much like Grotius, Justice Cardozo also held out the hope that international law might emerge from the twilight. It can do so, he said, when "at length the *imprimatur* of a court attests to its jural quality."[18] Something akin to this is happening now. At long last, there is evidence for the hope that international law can, indeed, emerge from its "twilight existence." At long last, there is evidence that Grotius, and all those who have followed Grotius in all the long years since his escape to freedom, have been right: there can be the international rule of law.

This evidence comes from what some would consider an unlikely source. It comes from the dispute settlement system of the World Trade Organization.

Few who have ever served in public office have ever had any illusions about the primacy of economics in the life of the world. Few who have ever faced the judgment of voters have ever doubted the significance of commerce and trade. It is true that the British statesman, William Gladstone, complained when, during his political apprenticeship, he was assigned to the Board of Trade. He complained that, wanting to govern men, he had been sent to "govern packages."[19] However, Gladstone, like many others, quickly learned that, in governing men, it helps to know how to govern packages. In my own case, great opportunities for governance came my way early in my tenure in the Congress of the United States because, as the Chairman of the House Ways and Means Committee told me at the time, "I understand that you have actually read the GATT."

Many others, however, have *not* read the GATT — the General Agreement on Tariffs and Trade. And — ironically — many of those who have *not* done so, are among the most ardent and articulate advocates of the international rule of law. For more than half a century now, the GATT-based trading system has been establishing the international rule of law in international trade — rule by rule, and case by case. For many years now, there has been an ever-expanding treasure of international jurisprudence arising, first, from the experience of the GATT, and, now, from the experience of the dispute settlement system of the new WTO. But, for some reason, all of this has been largely ignored by many of the most dedicated followers of Grotius.

Through the years, most of the leading luminaries on public international law have had little to say about international trade law.[20] There are exceptions.[21] But, generally, international trade law has been an afterthought in the academic and other realms of international law, even as the very notion of "international law" has often been an afterthought in much of the ongoing work of the world. Few have read it. Few have taught it. Few have seemed to think much of it or much about it.

Until now. Now this is changing.

Why is this so? Why is international trade law, all of a sudden, in the forefront of all the "cutting edge" thinking on international law worldwide — like the poor relation in some Jane Austen novel who is finally invited to sit at the main table in the manor house? Why, suddenly, is the WTO "trendy"?

One reason is that what has long been clear to the politicians and to their constituents worldwide has gradually also become clear to others. Trade is vital to the world. And, further, the work of trade and the law of trade increasingly intersect with much else that is also vital to the world. Health, environment, labor rights, human rights, and much, much more are *all* related to trade. They all affect trade, and are all affected by trade. And, thus, increasingly, we have *all* come to understand the sweeping implications of "governing packages."

Another reason is that it is increasingly clear to all that international trade law is, in fact, a part of the broader overall realm of "international law." Through the years, some have seen the law of the GATT, and now the law of the WTO, as somehow self-contained in the world of "widgets" that was for so long the seemingly separate province of those who dealt with GATT law and GATT lore. Yet our brief experience with the WTO has clearly shown that the work of the WTO cannot be seen as separate and apart from all that is not directly related to trade in "widgets." And it follows, likewise, that WTO law cannot be considered as separate and apart from other international law. As we said in the very first ruling of the WTO Appellate Body, WTO rules cannot be viewed in "clinical isolation" from the broader corpus and the broader concerns of the rest of international law.[22]

Still another reason why the WTO is "trendy" is because the WTO is busy. In only the few years since the creation of the WTO in 1995, the WTO dispute settlement system has rapidly become the busiest international system for resolving international disputes in the history of the world. Hundreds of international trade disputes have been settled because of the very existence of the WTO dispute settlement system, hundreds of other disputes have been resolved through formal cases in the WTO dispute settlement system, and thousands of pages of new international jurisprudence — by one recent count, *more than eleven thousand pages* — have emerged from the ongoing work of the WTO dispute settlement system.[23] The Appellate Body alone has issued more than fifty appellate reports. Still more are forthcoming. And all of this, of course, is in addition to the *twenty-seven thousand pages* of international agreements, concessions, and other rules that comprise the "covered agreements" of the WTO treaty. All in all, the ever-increasing workload of the WTO dispute settlement system affects the lives of five billion people in the 95 percent of all world commerce that is conducted by the 144 countries and other customs territories that are — currently — Members of the WTO.

All of this is difficult to ignore. But none of this fully explains why international trade law is no longer an afterthought. By far the most important reason why the WTO has drawn the increasing attention of the world is because the WTO is offering persuasive evidence to the world for the very first time that there truly can be something deserving of being called "international law," and, thus, also, there truly can be the international rule of law.

The British barrister and law professor Dennis Lloyd observed some time ago that, "A distinctive feature of a developed, as compared with a more primitive, form of law is the existence of tribunals charged with the task of deciding matters in dispute, whose jurisdiction is compulsory, and which have at their disposal sufficient organized force to ensure that their decisions are, at least generally speaking, obeyed."[24] He concluded that "international law … has not yet attained, if it ever will, the stage of regular adjudication and enforcement of disputes," and he noted that "[e]ven the International Court of Justice has no compulsory jurisdiction and if it had, has no means of enforcing its decisions."[25]

The seven of us who are privileged to serve by appointment of the Members of the WTO as Members of the Appellate Body of the WTO do not call our international trade tribunal a court. We do not wear robes. We do not wear wigs. We do not wear bibs. We do not have all the institutional accoutrements that have accrued to other tribunals with the passage of time and with the accretion of tradition. Nor do we seek them.

We see ours as an important — but also as a mundane and straightforward — task. In the words of the treaty that guides and governs our work, we seek, through our work, to assist the Members of the WTO in their efforts "to secure a positive solution" to every international trade dispute that comes before us, and we seek, through our work, to help the Members of the WTO provide "security and predictability to the multilateral trading system," and also "to preserve the rights and obligations of Members" of the WTO "under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[26] In this way, we hope to help the Members of the WTO establish a useful, workable, practical, enduring institution that will contribute to the continuing success of the WTO and the WTO dispute settlement system, and that will, in time, serve all the people of the world.

Yet we are ever mindful in our work that the WTO dispute settlement system is as busy as it is because the WTO dispute settlement system is *unique*. We have much to do around our table in Geneva because, among all the international tribunals in the world, and, indeed, among all the international tribunals in the *history* of the world, ours is unique in two important ways. We have compulsory jurisdiction, and we make judgments that are enforced.

We have compulsory jurisdiction because all WTO Members have agreed in the WTO treaty to resolve all their treaty-related disputes with other WTO Members in the WTO dispute settlement system. The WTO cannot be ignored by WTO Members when a claim is made under the WTO treaty.

We make judgments that are enforced because the WTO treaty empowers the WTO Members to enforce the decisions made in WTO dispute settlement through the "last resort"[27] of a "suspension of concessions"[28] that has the effect of economic sanctions. The WTO dispute settlement system inspires WTO Members to comply with WTO judgments through the considerable incentive of economic suasion.

Thus, the WTO offers an example to the world for the first time of what even the skeptics are bound to acknowledge by their own terms is real "international law." The WTO has moved beyond the anarchy, beyond the primitivism, and beyond the skepticism to construct a system in which international rules and international rulings are both made *and enforced*. This is the essence of our uniqueness. This is also the source of what makes the WTO so controversial to so many in the world. It is easy to ignore a tribunal whose judgments are ignored. It is impossible to ignore a tribunal whose judgments are enforced.

Because of our uniqueness, and because of the commitment of the Members of the WTO to the success of the WTO dispute settlement system, we are helping the world get just a little closer toward Grotius. Through the WTO, we are approaching the international rule of law, as we often say on the Appellate Body, on a "case-by-case basis." And our progress in Geneva on matters relating to trade and commerce can and must be seen as evidence to all the world that, at long last, after long centuries of futile hoping and wishful thinking, the international rule of law can become real.

For WTO rules are not the only rules the world needs. There are many other international agreements, in addition to the WTO treaty, that have legitimacy, and that are also deserving of enforcement through the international rule of law. There are hundreds of multilateral international agreements dealing with human rights, women's rights, children's rights, workers' rights, the environment, health, intellectual property, investment, crime, corruption, genocide, and numerous other areas of compelling international concern that deserve due credence and due consideration by both national and international tribunals. And there is need for more.

There is need for more international law, not less. Certainly we could begin — as Judge Abi-Saab has recently suggested — with the negotiation of a comprehensive international convention against terrorism.[29] Surely we should also negotiate additional international agreements to help achieve the essential global goals of the recently completed World Summit on Sustainable Development in Johannesburg, South Africa. In these and other ways, we should find more and better means of making and enforcing international law in order to meet all the many challenges of "globalization," and in order to confront and overcome all the many threats to the peace and prosperity of our world.

The success, thus far, of the WTO dispute settlement system is an example of the success that can result from pursuing the insight of Grotius that making and enforcing international law can be an act of international cooperation. There is still "no common power" in the world. Thus, it falls to all the nations of the world to cooperate to shape and share a "common power" through an international rule of law that will be sufficient to address the needs of global trade in a global economy, and will be sufficient also to address the many other compelling needs of our common humanity. Although still new, and although still very much in the making, the WTO is proof that such a "common power" can be created, and can serve the common cause of human freedom through the international rule of law. What we have done for the "widgets" of the WTO we can do also for all the many other shared purposes of humanity. We can move ever closer to Grotius. As explained, for example, by Michael Mandelbaum, a leading theorist on international security, "The world that we want to see evolve today is not a world of one, two, or three contending powers, but rather a world governed by rules. That is already increasingly true in economics, and … security affairs will eventually mirror that."[30]

We do not, in other words, want a world in which might makes right. Rather, we want a world in which *right* makes *might*. And we can have such a world only when the world has agreed on rules for international cooperation, and only when those rules are enforced through the international rule of law. As with the WTO, the aim in other areas of common human concern must be to resolve international disputes by relying on international rules on which the nations of the world have agreed, and by enforcing those rules uniformly and consistently. The aim must be to beat our "swords into ploughshares" through the international rule of law.[31]

Our success — thus far — in WTO dispute settlement is encouraging evidence that we can accomplish much more — in trade and in many other areas of our shared concern — for the international rule of law. It is the best evidence the world has ever seen that "international law" can be real law in the real world. Ours, though, is a fragile achievement. Our success, thus far, in the WTO is no guarantee of our continued success. We have emerged from the twilight of our imprisonment. But we have not yet escaped into the bright sunlight of freedom.

One of the many insights of Grotius was that "international law" is the product of historical experience. For Grotius, "natural law" can be reflected in experience. It can be revealed in the experience of applying human reason to rule-making.[32] Or, as Professor Oscar Schacter has written, in a contemporary echo of Grotius, law "is in essence a system based on a set of rules and obligations."[33]

This is certainly how many of us who serve and support the WTO see what Professor Schacter has called "the reality of international law" as it is reflected and revealed in the WTO dispute settlement system.[34] The WTO is the product of more than half a century of multilateral experience in rule-making for an ever-growing and ever-evolving multilateral trading system. The WTO treaty is a set of rules on which all those who have signed the treaty have agreed. By its terms, the treaty is binding — and enforceable — on all the Members of the WTO. By its terms, WTO rules *are* international law.

Long before there was a WTO, Professor Robert Hudec famously characterized the system of dispute settlement in the WTO's predecessor, the GATT, as a form of "diplomatic jurisprudence" — as a mix of law and politics, a mix of law and diplomacy.[35] Since its beginning, for more than half a century, the dispute settlement system has been evolving from politics and diplomacy to law and jurisprudence. What began as informal "working parties" of diplomats, has gradually evolved through the decades into formal deliberations by legally-minded jurists.

Today, in WTO dispute settlement, in the work of the *ad hoc* panels, and in the work of the standing Appellate Body, we have a system in which politics and diplomacy have yielded to the rule of law. In particular, this is so of the Appellate Body. We seven Members of the Appellate Body are limited by the WTO treaty to addressing *legal* issues that are raised on appeal from panel decisions.[36] And we have always fulfilled our responsibilities to the Members of the WTO in a way that one observer for the *New York Times* has described as "impartial and unflinching."[37] We have upheld the international rule of law. We always will.

But some would have it otherwise. Some would turn back the clock. Some would return to the "good old days" when politics and diplomacy prevailed over law in dispute settlement — to the days when the GATT was often derided as the "General Agreement to Talk and Talk." Some even maintain — despite all the accumulating evidence to the contrary — that the WTO dispute settlement system still is, not law, but diplomacy. Thus, the debate over whether there can or should be such a thing as the international rule of law continues — even within the WTO. And, thus, our achievements in recent years in establishing the rule of law in world trade through the WTO dispute settlement system cannot — and must not — be taken for granted.

What must we do? What must we do to secure and sustain our recent achievements for the international rule of law in the WTO? What must we do so that we will be able to build on those achievements for the future of the world trading system, and also for the future of the international rule of law as a liberating force for freedom in the world? What must we do to make our escape to freedom?

Much of what we must do is evident. We must continue to be "impartial and unflinching" in enforcing the rule of law in WTO dispute settlement. We must continue also to improve the WTO dispute settlement system so that it will better serve the rule of law. And we must continue — and succeed — in the mutual efforts of the Members of the WTO to agree on additional trade liberalization and other needed trade reforms in the new "Development Round" of multilateral trade negotiations. Burdened by a weak world economy, the world surely and sorely needs the additional growth that can result from the successful conclusion of the new round. And a *successful* conclusion of the new round will be one that clearly benefits *all* WTO Members. The more that *all* the Members of the WTO see that they *all share* in the benefits of growth, and the more that *all* see that they *all* share in the benefits of the WTO trading system, the more willing *all* the Members of the WTO will be to continue to insist on the rule of law in WTO dispute settlement.

But to succeed in all this, we must do something more. Beyond all this, we must understand something more. We must understand what the "rule of law" really is, and we must understand also why we really need the "rule of law" internationally. We must understand what the stakes really are for all of us in realizing "the dictate of right reason" through the international rule of law.

The "rule of law" is, above all, *not* politics. The "rule of law" is definitely *not* politics. As Professor Schacter has warned us, we cannot reduce law to politics "without eliminating it as law."[38] Politics is arbitrary. Law is not. With the "rule of law," the law is certain, not arbitrary. With the "rule of law," the law is written beforehand, and the rules are defined and known in advance. With the "rule of law," the law is written to apply to all equally, and all — in practice — in reality — are equal before the law. With the "rule of law," no one — no one — is beneath the concern of the law, and no one — no one — is above the law. Only this can rightly be called the "rule of law."

Further, what all too many in the centuries since Grotius — what all too many in the bloody history of all the efforts to set men free — have all too often forgotten about the "rule of law", and what we must understand — above all — about why we really need "the rule of law", is this. It is the law that sets us free. We can be free only *under the law*. We can be free only *with the "rule of law*."

Grotius was not alone in teaching this. Voltaire taught us that we are free only when we are bound to obey nothing but the law.[39] Hayek explained that, when we obey laws under the rule of law, "we are not subject to another man's will and are therefore free."[40] Locke wrote, "The end of the law is … to preserve and enlarge freedom. … Where there is no law there is no freedom."[41] It is the law alone, he wrote, that prevents us from being "subject to the inconstant, uncertain, unknown, arbitrary will of another man."[42] All of these historic defenders of the "rule of law" were elaborating on Grotius, whether consciously or not. And all of them were right.

Freedom and law are linked. They are inextricably connected. What we may call freedom truly *is* freedom only where there *is* the rule of law. Grotius understood this, and all of us who are still groping toward Grotius all these hundreds of years later must understand this as well if we hope to escape to freedom. In particular, this must continue to be understood by all those who serve the "nation-states" that are Members of the WTO as — together — they strive to serve the cause of human freedom through the exercise of their "common power" as the WTO.

The demise of the "nation-state" has been much exaggerated.[43] The Peace of Westphalia, which first gave precedence to the "nation-state," still has meaning for the modern world. For the most part, the "Westphalia System" still prevails. The WTO is not by any means alone among international institutions in being "Member-driven" by "nation-states." Rightly, and unquestionably, the future of the WTO will be shaped by the shared will of the countries and other customs territories that are the Members of the WTO. Their shared will — their cooperative will — their combined will as manifested in the continuing idealistic aim of the WTO of achieving a multilateral consensus — is the key to the future of the WTO as both an engine for the trading system and an exemplar for the international rule of law. Their will is the key to opening the lock to freedom.

Like *all* law, all *international* law ultimately depends on a willingness on the part of those who are supposedly bound by the law to comply with the law. This is true *regardless* of whether there are sanctions for *not* complying with the law. This is true of a traffic ticket. This is true of WTO law. In this respect, the "law" of WTO rules and rulings differs from other "international law" only in degree, and not in kind. Ultimately, there must be a willingness to obey it.

Given this, the WTO will, ultimately, be able to achieve all that it is capable of achieving for the international rule of law only if all the many "nation-states" that are Members of the WTO remain willing to uphold the international rule of law in all they do — individually — as Members of the WTO, and in all they do — together — as the WTO. And this willingness will exist and persist only if each and every Member of the WTO fully understands — and fully communicates at all times to all their citizens and to all their many and varied domestic constituencies — the full extent of all that is at stake for the future of the world in the future of the World Trade Organization.

Without the rule of law, the *developed* countries that are Members of the WTO can never obtain the security and the predictability they seek as a needed framework for world trade and as a firm foundation for the continued growth of the world economy. Without such a framework, without such a foundation, there can be no assurance of continued growth. Without it, the ability of developed countries to continue their historic trade expansion would be impaired, and their future would, thus, be greatly at risk. A world without the rule of law is *not* a world in which there can truly be a *world* economy.

Likewise, without the rule of law, the *developing* countries that are Members of the WTO cannot remain the equals of the developed countries within the WTO. One of the greatest achievements of the WTO is that developed countries and developing countries are equals in WTO dispute settlement. However, without the rule of law, developing countries would be at the mercy of a WTO dispute settlement system in which might *would* make right. Those who do not agree may wish to re-read Plato or Thucydides, or, better yet, recall the sad history of much of the twentieth century. If might ever made right in the WTO dispute settlement system, the developing countries would be destined forever to remain *developing* countries. They would never attain their full measure of freedom through sustainable economic development.

Moreover, without the rule of law, we cannot do everything else that we all hope to do for the cause of freedom throughout the world through the WTO. We would not be able to preserve the rights and obligations of the WTO Members under the existing rules of trade, and we would not be able to implement the new rules for trade that the world needs. And, further, we would not be able to remain an example to the world of all else that might be done for freedom in the world through the international rule of law.

Trade is a means to an end. The end is freedom. Much that can be done for the end of freedom through the means of trade simply will not be done unless politics yields to law, and unless diplomacy yields to jurisprudence, in the important work of WTO dispute settlement. The arts of politics and diplomacy are altogether appropriate when making law, but not when enforcing law. They are entirely appropriate when negotiating WTO rules, but not when clarifying WTO rules in dispute settlement for the purpose of preserving the rights and obligations of WTO Members under the WTO treaty. Only if WTO rules are viewed impartially and objectively in the light of a critical judgment that is totally independent of competing political considerations can compliance with those rules by all WTO Members — for the mutual benefit of all WTO Members — be justified. And only if all WTO Members remain willing to exercise their sovereign rights as "nation-states" by choosing to comply with WTO rules and WTO rulings can the continued success of the WTO be assured.

Nowhere is there a greater need for such willingness than in the leading trading nation in the world — the United States of America. Nowhere is there a greater need for an understanding of what the stakes really are for the world in seeking the international rule of law. Nowhere is there a greater need for an enlightened exercise of the sovereign will in the service of a broad and visionary understanding of the true national self-interest. From time to time, in the WTO, we speak of a "systemic" interest. And no Member of the WTO at any time has a greater "systemic" interest in the continued success of the WTO dispute settlement system in serving and furthering the international rule of law than my own, my beloved country.

Contrary to what some have suggested lately — in the context of the WTO and also in other international contexts — the idea of an international rule of law is not alien to America or to Americans. Americans have always been among the followers of Grotius. Early in our history, Charles Sumner — a Harvard man — suggested the need for both a world court and a league of nations.[44] From the conclusion of the Jay treaty, to the settlement of the Alabama Claims, to the establishment of the Hague court, to the conference at Bretton Woods, to the convening of the United Nations, to the agreement on the GATT, and to the creation at long last of the WTO, Americans have always been in the forefront of cooperative international efforts to achieve peace and prosperity in a better world through the international rule of law.

Together with others of like mind around the world, we Americans must always be in the forefront of those who seek and serve the international rule of law. This must *remain so* in all that we do as it relates to the WTO. This must *be so* in everything that America does in the world.

In the mundane world of trade, there will always be the temptation to want to pick and choose the rules we will obey, and to pick and choose the occasions when we will obey them. But we must remain mindful that we cannot have one set of rules for the United States, and another for the rest of the world. And we must remain mindful also that we cannot comply with only the rulings we like while not complying with those we may not like. That is *not* the rule of law, and that is definitely *not* in our broader and more visionary self-interest as seekers and servants of the international rule of law.

In the murderous world of terror, this is also true. The "war" we are waging *against* terror in the world must be a war *for* the international rule of law. The "war against terror" is a war *for freedom*. And this "war" can only be won if, in waging it, we seek and serve the international rule of law. Freedom under law is the only freedom worthy of the name. Freedom under law is the only lasting antidote to terror. Freedom under law is the only hope we have ever had, or ever will have, for an "Age of Reason."

In furthering trade, in fighting terror, in all that we do in the world, we Americans must always stand for the international rule of law. We must continue to summon the will and the wisdom to see that our true national interest is the international rule of what the Constitution of the United States of America — like Grotius —calls "the law of nations."[45]

In remembering all it means to be Americans, we must remember also all we have always believed America can mean for *all* the world. In recalling all we share as Americans, we must recall also all we share with the rest of a common humanity. We will always be our best as citizens of America if we always see ourselves also as citizens of the world.

Nearly four hundred years after Grotius made his daring escape from his prison fortress, we have not yet secured the birthright of our common humanity. We have not yet made our own escape from the fortress of our own imprisonment. We are still groping toward Grotius. We are still seeking the full measure of human freedom that he foresaw. We remain in the twilight.

The revolutionary thought of Grotius remains but a thought. Yet, as someone who values international law, I believe that one day it will be much more than a thought. It has been the work of centuries. It will be the work of many centuries to come. But, I believe that, if we resolve to seek and serve the international rule of law, our tale will have a happy ending. One day we will find our way out of the twilight, and all the world will live in the bright sunlight of freedom.

# # #

James Bacchus is the Chairman of the Appellate Body of the World Trade Organization in Geneva, Switzerland. He is the youngest Member, the longest serving Member, the only North American Member, and the only remaining original Member of the global tribunal, which hears final appeals in international trade disputes involving the 95 percent of world commerce conducted by the 144 countries and other customs territories that are Members of the WTO. Bacchus is a former Special Assistant to the United States Trade Representative in the Executive Office of the President. He is also a former member of the Congress of the United States, from Florida. He served two terms in the U.S. House of Representatives before choosing not to seek re-election in 1994. In 1995, he was appointed by the Members of the WTO to the Appellate Body. Bacchus received a Bachelor of Arts degree from Vanderbilt University, Magna Cum Laude and Phi Beta Kappa, with High Honors in History. He received a Master of Arts degree from Yale University, where he was a Woodrow Wilson Fellow in History. He was graduated with High Honors from the Florida State University College of Law, where he was Editor-in-Chief of the FSU Law Review. These are his personal views, and are not the views of his colleagues on the Appellate Body or the official views of the WTO.

Notes

[1] Much of this account of the escape of Grotius — including the quotations — is taken from the lively telling in chapters 21 and 22 of The Life of John of Barneveld by John Lothrop Motley, published in 1874. Now largely forgotten, Motley was — along with Parkman, Prescott, and Bancroft — one of the great American narrative historians of the nineteenth century. He was a novelist, a diplomat, an historian, and a quintessential "man of letters" whose most famous work was his multi-volume history of the rise of the Dutch Republic. Motley was also a Harvard graduate. He entered Harvard College at the age of thirteen, and studied law, but never practiced. On Motley, *see* Van Wyck Brooks, The Flowering of New England, 1815 – 1865 (New York: E.P. Dutton, 1936), 334 –342.

[2] Or, in the Latin, De Jure Belli ac Pacis (1625).

[3] For a more detailed discussion of this treatise, *see* "Hugo Grotius," in Leo Strauss and Joseph Cropsey, ed., History of Political Philosophy, 3rd Ed. (Chicago and London: University of Chicago Press, 1987), 386 –395 [1963].

[4] Id. at 388.

[5] For a thoughtful and thorough discussion of this point, and of several others relating to this treatise by Grotius, *see* Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History (New York: Alfred A. Knopf, 2002), 513 – 518.

[6] Or, in the Latin, *jus gentium.*

[7] Thomas Hobbes, Leviathan (New York: Penguin Books, 1985), 188 [1651].

[8] Dennis Lloyd, The Idea of Law (London: Penguin Books, 1991), 183 [1964].

[9] Quoted in Bobbitt, The Shield of Achilles, at 565.

[10] Lloyd, The Idea of Law, at 179, 187.

[11] Plato, The Republic (New York: Penguin Books, 1987), 77 – 78.

[12] Robert B. Strassler, ed., The Landmark Thucydides (New York: The Free Press, 1996), 352.

[13] Raymond Aron, "The Anarchical Order of Power," in Stanley Hoffmann, ed., Conditions of World Order (1968), 25 – 48.

[14] *See* Hedley Bull, The Anarchical Society: A Study of Order in World Politics (New York: Columbia University Press, 1977).

[15] Preamble, Universal Declaration of Human Rights.

[16] Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (New York: Random House, 2001), 176.

[17] Justice Benjamin Cardozo, New Jersey v. Delaware, 292 U.S. 361 (1934).

[18] Id.

[19] Richard Shannon, Gladstone, Volume One, 1809 – 1865 (London: Methuen, 1984), 110 [1982]; Roy Jenkins, Gladstone (London: Papermac, 1995), 66 – 67.

[20] Brownlie does not mention the GATT or the GATT-based trading system. Ian Brownlie, 4th ed., Principles of Public International Law (Oxford: Clarendon Press, 1996). Neither does Shaw. M.N. Shaw, 3rd ed., International Law (Cambridge: Cambridge University Press, 1995). Nor do a number of other standard treatises on public international law.

[21] Robert Hudec and John Jackson, of course, come most readily to mind. They have each devoted their lives and their long and illustrious careers to demonstrating the potential of international trade law as an example of the potential of the international rule of law.

[22] United States — Standards for Reformulated Gasoline, WTO Doc. WT/DS2/AB/R, at 17 (March 20, 1996).

[23] John H. Jackson, "Perceptions about the WTO trade institutions." World Trade Review, Volume 1, Number 1 (March, 2002) 101, 109.

[24] Dennis Lloyd, The Idea of Law, at 335.

[25] Id. at 189.

[26] Article 3.7 and Article 3.2, WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding").

[27] Article 3.7, Dispute Settlement Understanding.

[28] Article 22.1, Dispute Settlement Understanding.

[29] Georges Abi-Saab, "The Proper Role of International Law in Combatting Terrorism," (unpublished paper in the author's possession). As he points out, "All international efforts for decades, starting with the League of Nations and continuing with the United Nations, to draw a comprehensive convention against terrorism (but not specific acts of terrorism) have hitherto failed, absent a generally accepted and shared definition of what is terrorism, a terrorist act or a terrorist group."

[30] Michael Mandelbaum, Interview with Thomas Friedman, International Herald Tribune (April 11, 2000).

[31] Isaiah 2 : 4.

[32] Bobbitt, The Shield of Achilles, at 529.

[33] Oscar Schacter, International Law in Theory and Practice (Norwell, Mass.: Martinus Nijhoff, 1991), 4.

[34] Id. at 5.

[35] *See* Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System (Salem, New Hampshire: Butterworth, 1993).

[36] Article 17.6, Dispute Settlement Understanding.

[37] Michael M. Weinstein, "Economic Scene: Should Clinton embrace the China trade deal? Some say yes," New York Times (September 9, 1999).

[38] Schacter, International Law in Theory and Practice, at 4.

[39] Voltaire, Philosophical Dictionary (New York: Penguin Books, 1972), 194 [1764].

[40] Friedrich von Hayek, The Constitution of Liberty (Chicago: University of Chicago Press, 1978), 153 [1960].

[41] John Locke, Section 57, "The Second Treatise of Government," Two Treatises of Government (London: Everyman's Library, 1993), 142 [1689].

[42] Id., Section 22, at 126.

[43] *See* Robert Gilpin, Global Political Economy: Understanding the International Economic Order (Princeton: Princeton University Press, 2001), 362 – 363.

[44] Van Wyck Brooks, The Flowering of New England, 1815 – 1865, at 395.

[45] Article I, Section 8, Constitution of the United States of America.