

THE GROWING ROLE OF LAWYERS IN SETTING THE
RULES OF GLOBAL TRADE

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Today, I want to talk to you about the growing importance of the rule of law, and hence the growing importance of lawyers, in international trade.

Of course lawyers have always been important in international business transactions, whether that involved shaping import and export decisions, drafting international contracts, or advising on international investments and cross-border mergers.

But I think there are two phenomena acting to deepen and expand the role of lawyers. First, the sheer increase in international transactions means that more and more legal work involves international components – questions of foreign law for example. This should be no surprise: international trade has been increasing at twice the rate of domestic GDP for the past 20 years, which means that a greater and greater percentage of business transactions in the world today are international transactions.

Now one might say, "this just means that the mix of legal work has changed, and that lawyers today simply do more international work, but this doesn't change their relative importance in shaping trade policy or trade rules"

But this brings me to the second phenomenon – the growth of rules-based models for conducting trade and investment relations between states, and therefore between private actors. The proliferation of trade and investment agreements, many with juridical features that look like domestic legal regimes, means that lawyers are doing more and more to shape the rules. And many of these agreements have dispute settlement systems that are very detailed and legalistic in nature, thus resulting in rulings that shape business behaviour and significantly alter the world of commerce.

Let me start with the example of the WTO. Now I do not want this speech to be a technical one about WTO rules or to be filled with a lot of WTO legal jargon. I would save that for the lawyers in your midst who actually handle WTO work – such as those who deal with antidumping cases or customs matters.

But I would like to explain why I think the WTO means that lawyers play a greater role in shaping international trade than they used to.

The WTO came into force a little over 15 years ago. It evolved out of the old GATT system, and it had two overarching characteristics which distinguished it from the old GATT:

- First, it was much broader and deeper in the rules it established for governing trade relations between countries. It went beyond trade in goods, for example, to cover both trade in services and intellectual property rights. It also broadened the disciplines so that all the rules applied to some extent to all 153 Member countries, rather than only applying to certain large players.
- Second, it had a much more binding and definitive dispute settlement system – one which bore many of the features of a domestic legal system, with binding rulings, a structure of lower courts and an appellate court (we call the lower courts panels and the upper court the Appellate Body, but it amounts to the same thing) and with real rulings that had to be implemented if governments wanted to avoid adverse consequences.

I would argue that both of these changes caused the role of lawyers to expand. The old GATT had a dispute settlement system, but it was much less effective and binding, and the basic culture of GATT was one dominated by trade negotiators, politicians and economists. The economists argued for pure free trade, the politicians argued for protection, and the trade negotiators conducted the arbitrage between the two. There was a great deal of trade liberalization, but there were also lots of exceptions. As a former GATT Director General put it, "the GATT was a series of loopholes tied together with waivers".

Today, with broader and deeper commitments, much fewer loopholes, and a much more complete juridical structure, the WTO is miles away from GATT. And today, the WTO dispute system is arguably the most prolific of all international dispute settlement systems. In just 15 years it has had over 400 disputes appear on its docket (compare this to the International Court of Justice, which has had only 150 disputes in over 65 years; or the International Tribunal for Law of the Sea, which has heard only 15 cases since it was established in one year after the WTO in 1996).

Not all of these cases go to final rulings, but we have had over 200 disputes go to the panel stage, and the Appellate Body has issued over 100 reports. And the record of governments in implementing and complying with these numerous reports is actually very good. (By the way, one reason people like our system as complainants is that the time deadlines are short and are enforced. The average Panel proceeding takes 10 months – compared to 4 years at the ICJ, 2 years at the ECJ and 3 to 5 years under NAFTA. The average Appellate Body proceeding takes 90 days, as our rules provide).

This all means that lawyers are at the heart of our system. Not just the lawyers who become members of the Appellate Body, or the WTO Secretariat lawyers who advise them, but the lawyers in national trade ministries who argue the cases, and the private lawyers who bring the cases to their governments and increasingly then are actually deputized by the governments to argue them before the WTO. In fact, more and more we have private lawyers, who are retained by governments, appearing in our panel and AB proceedings.

Keep in mind that WTO agreements touch on all kinds of matters that reach beyond the simple border transaction and delve into domestic law. So these aren't merely rulings that relate to import tariffs or customs measures. We have cases relating to national treatment in taxation or regulatory practices, such as product standards. We have huge cases relating to subsidy practices, such as the recent disputes between the U.S. and the EU on billions of dollars in subsidies to large-scale civil aircraft, otherwise known as the Airbus and Boeing cases. We've had major cases on intellectual property rights and on IP enforcement commitments. And of course we have had cases on traditional trade remedies – such as antidumping measures or safeguards. And the cases being filed today are relevant to all kinds of major sectors of the economy – autos, steel, pharmaceuticals, electronics and all types of agriculture, as well as some cases on services trade. Just recently we have seen cases filed on such cutting edge sectors as renewable energy and wind power equipment. Some cases are small, but others involve billions of dollars in trade, and the decisions have often required governments to make big changes in their domestic laws, regulations and subsidy programs.

But my point is not to give you a full recital of all the cases. Rather, it is to point out what this phenomenon means. Just as the evolution of domestic court systems – with clear legal standards and a solid rule of law – have been transformational events in many societies, so

too has the growth of such a system at the international level been a transformational process. And it means that the kind of influence lawyers have always had inside a country in shaping precedents and defining how rules are applied is now being felt in international fora. So lawyers are shaping the rules – most people would probably say that is good news and bad news. We all know what high esteem our profession is held in by a lot of our fellow citizens. But I would argue that on balance the influence of lawyers is good. The old way of doing things, with economists and politicians calling the shots, resulted in many good agreements, but also weak enforcement and weak credibility. Today the rules are more credible. Of course, I would argue that the best system is one that blends the integrity of good economics – comparative advantage, economies of scale and wealth creation – with the certitudes of a good legal system. Economists aren't infallible, but on balance we can't have a smooth functioning multilateral trading system unless it is based on sound economics.

But by the way, it isn't just the WTO that I would say is driving this increased role for the rule of law. Remember, there are now more than 300 bilateral and regional free trade agreements, and while I would prefer they be consolidated back into the WTO system in order to avoid complexity and contradictions, most of them are based on legal commitments and many have disputes mechanisms that involve a lot of work for lawyers. NAFTA is a good example, but there are many others. There are also other international tribunals, like the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) which are spreading the rule of law in international transactions. But there are few big multilateral systems with as many intricate rules, combined with a fully mature dispute settlement system, as the WTO. And that makes us something of a test case as to whether governments and publics around the world will end up thinking this is a good model. I hope they do.

But we have some challenges. While the dispute settlement arm of the WTO is working well, the negotiating arm is not. The recent deadlocks over the latest round of negotiations to expand and deepen the WTO system – known as the Doha Round – means that we are, for the moment, unable to take our system of rules forward into new disciplines, fairer rules and better multilateral commitments. No legal system can remain viable long-term if the legislative function that feeds it is disabled, and this is the dilemma we face. Short-term, it is not fatal, but long-term, it is unsustainable. Our rules have to adapt to changing realities.

But I am confident we will eventually get our legislative branch moving again, once the governments of the world realize what is at stake. And no matter what the evolution of our system, I would argue that the dye is already cast, and that the legalistic nature of our system is here to stay – we already have numerous agreements in place—on everything from tariffs to subsidies to product standards to trade remedies to customs procedures. Our MFN and National Treatment rules, which are overarching rules in both goods and services, are extremely important to the way trade is conducted today. They will stay important.

So my two conclusions today are simple. First, world trade is more and more in the hands of the lawyers. Second, this means the legal profession bears a heavy responsibility to see that global trade continues to evolve on a rule of law model and do not regress. With all its challenges, this is a better world of trade than what came before. We must see that it continues to improve and to reflect the values that can only flow from a rule of law.