

# International Economic Law



# International Economic Law:

## *The Asia-Pacific Perspectives*

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International Economic Law: The Asia-Pacific Perspectives

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## PREFACE

The year 2014 marks the last year of 20 years' experience of working towards the implementation of the WTO. This book assesses the past 20 years of the WTO in time for its 20<sup>th</sup> Anniversary, and forecasts the future of the WTO system in the context of development of international economic law. This book is an edited work in which experts, from a range of backgrounds, provide perspectives on many issues that arise from the international economic law experience, focusing on its legal significance and likely impact on multilateralism. Although each author's work is independent, the broad theme of the book is to overview 20 years of the WTO governance and implementation; to discuss the reasons for the current impasse of multilateral negotiations at Geneva; to examine the recent progress made via the "Bali package", and to identify any cross-cutting challenges and problems within the WTO mechanism.

The past two decades have seen a significant proliferation of regional trade agreements and a lack of multilateral governance of finance around the world. How to respond to these challenges and how to reform the WTO jurisprudence and process to co-ordinate global and regional mechanisms have become compelling questions for whole-scale discussions and systemic analysis. This book provides vital insights into just how to improve multilateral trading governance and to recalibrate international economic law in the twenty-first century.

Most of the papers collected in this single volume were presented at the Asian International Economic Law Network (AIELN) III Conference (General Theme: The WTO at 20 and the Future of the International Law on Trade, Investment and Finance) held at Seoul on 18-19 July 2013. Co-hosts and sponsors of this event included the WTO Law Center and Legal Research Center of Ewha Womans University; Korea Society of International Economic Law; Kim and Chang; Ministry of Trade, Industry and Energy of the Korean Government; Law Research Institute of University of Seoul; and Korea Economic Research Institute.

The speech that I made in the opening ceremony of the conference expresses what I would like to include in the preface of this book. So, I restate it here as follows:

“Ladies and gentlemen,

As I see this assembly of friends, colleagues, teachers, and even bureaucrats, only one thing comes to my mind - the value of unity.

A unity offered by the multilateral rules of trade. I believe the WTO system was born for, raised to, fought for and destined to be the center of all trading systems. For these reasons, we must be responsible for keeping it as such.

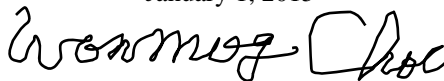
Although bilateralism and regionalism are everywhere these days and they were announced to complement multilateralism on the long term path - in this era of proliferating and uncoordinated regional trading blocs and fragmented rules of trade - we cannot lose our sight of a sense of urgency. I mean an urgency to recover the central value of multilateralism and I believe the academic responsibility for this rests on our shoulders.

Like Grandma’s favourite story needs to be told again and again, in the end multilateralism is Pareto Optimum. Therefore, multilateralism holds lessons that need to be revisited again and again.

I believe that this is the reason why we are gathered here, feeling the value of academic unity. Hopefully, we may find excellent solutions to recover this value after the conference.”

Happy New Year,

January 1, 2015

A handwritten signature in black ink, appearing to read 'Wonmog Choi', with a stylized flourish at the end.

Won-mog Choi







**CHAPTER I:**

**WTO FUNCTION AND THE FUTURE  
OF MULTILATERALISM**

# THE ROLE OF LEGAL CULTURE IN AN INCREASINGLY HETEROGENEOUS WTO

COLIN PICKER AND LISA TOOHEY

As the WTO approaches two decades of operation, both its successes and its challenges will be analysed by the organisation's supporters and critics. The most-cited successes of the WTO include its dispute settlement system, and the rapidly expanding list of countries that have completed the accession process and have become members. However, the WTO has also faced major challenges that have drawn strong criticism, most notably the failure to conclude the Doha Round, and the expansion of regional trade agreements in lieu of global consensus.

It is tempting to attribute the difficulties of the Doha Round to the complexity of the legal issues being negotiated, or to the large number of negotiating parties. While it is true that some issues in the Doha Round, such as competition law, represent new territory for the WTO as an organisation, the issues are not inherently more difficult than the then novel issues of previous rounds. For example, when the negotiations for the GATS took place, the very concept of a 'service' had only recently been created from a group of previously disparate industries such as construction, finance and transportation.<sup>1</sup> Furthermore, as Martin and Messerlin have shown, there is no causative effect between the number of WTO members and the length of the Doha Round negotiations.<sup>2</sup>

In this chapter, we advocate a different approach to conceptualising the challenges facing the WTO, arguing that it is legal cultural diversity that is the overlooked dimension of the WTO. Applying a legal cultural lens to the WTO it becomes clear that the Doha Round difficulties can be

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<sup>1</sup> William Drake and Kalypso Nicolaidis, 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46(1) *International Organization* 36 at 38.

<sup>2</sup> Will Martin and Patrick Messerlin, 'Why is it so difficult? Trade liberalization under the Doha Agenda' (2007) 23(3) *Oxford Review of Economic Policy* 347 at 348.

attributed, at least in part, to the need to adjust to the different demands and expectations of the increasingly diverse group of contracting parties.

Legal culture, while not easy to precisely define, points to differences in how law regulates or impacts behaviour.<sup>3</sup> Legal culture, a concept increasingly familiar to legal scholars<sup>4</sup>, is in its most essential form the generalized and collective attitude and reactions of individuals, whether legal professionals or not, to activities and scenarios of a legal nature. In other words, a legal cultural analysis is actor-centric, focusing on aspects of law as it is lived and the cultural values that animate a legal system, recognising that law is a complex, socially-constructed phenomenon. As Picker has previously observed, legal culture is a reflection of tradition, history, outlook and approach, and the way that these areas are manifested in behavioural choices and the content of the law. However, it has been only comparatively recently that academics have turned their attention to the existence of legal culture within international organisations and within ‘fields’, such as international economic law.<sup>5</sup>

The first part of this chapter explores the greatly increasing heterogeneity from the early days of the GATT, and the further diversification over the two decades of the WTO’s existence. The second part of this chapter then explores the way in which legal cultural differences present both opportunities and challenges to the WTO in its current state, impacting not just on substantive content of the WTO Agreements, but behavioural choices by actors in the WTO system. Given the present state of the WTO, it is clear that the role of legal culture cannot continue to be ignored.<sup>6</sup> Rather, we argue that among the many other things the WTO must do (many of which are discussed in this book) it must also carefully consider and engage with the impact of legal culture. Accordingly, in the third part of this chapter we outline how the question of legal culture can be given

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<sup>3</sup> For a detailed list of definitions of legal culture, see C.B. Picker, *Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach*, 1 *Chinese J. Comp. L.* 21-48 (2013).

<sup>4</sup> See, for example, the list contained in C.B. Picker, *Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach*, 1 *Chinese J. Comp. L.* 21-48 (2013).

<sup>5</sup> See C.B. Picker, *China, Global Governance & Legal Culture: The Example of China & the WTO*, Part 1 of 4 in *China and Global Economic Governance: Ideas and Concepts* (Publ. of Univ. Tokyo Instit. Soc. Sci.) (Junji Nakagaw, ed.) (2011), pp 69-88 at 72-73 (citations omitted).

greater prominence and consideration – a tripartite approach in which positive legal cultural differences, once identified, can be harnessed, and legal cultural challenges either controlled or minimised. In that section we first present a framework that would be the first step of methodology to begin the process of legal cultural analysis as part of the WTO's regular functions.

## **I. The Emergence of Today's WTO from the GATT of Yesterday: A Legal Cultural Consideration**

Historical analysis reveals interesting patterns of cultural diversity from the beginning of the GATT through to the WTO of today. While the size of the GATT, and then the WTO, increased over time - more critically for this analysis - they also became more culturally diverse. This has led to an increasingly heterogeneous membership as far as domestic political, legal, and economic structures of the members are concerned. At the same time, the political contexts of these organisations changed substantially. Since the end of the Cold War, the global political context in which the GATT and then the WTO have operated has become very different, resulting in legal cultural differences of a type and extent previously not experienced.

The GATT was brought into existence in 1947 with 23 original signatories (hereinafter called "members") – in alphabetical order, these were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States. These states/countries were geographically dispersed and showed substantial variation in their stages of development. However, from the perspective of their legal culture, and their mode of engagement with international law, they were largely homogenous - even the recently decolonized areas, which still bore the vestige of their colonial past. The nature of colonialism and decolonization meant that contests of legal pluralism, playing out on a daily basis at a domestic level within formerly colonized states/countries, were not yet taking place with respect to international law, much less so in the field of international trade law. Newly independent former British colonies such as Burma, Ceylon, Pakistan and India, as well as the former French colonies of Syria and Lebanon, retained the strong legal cultural influences of their former colonisers, as even did states that had been freed from colonialism years before, such as Australia, New Zealand, and South Africa, while others then remained under strong neo-colonial influence, such as Cuba

and Brazil. The legal systems of most members were dominated by Anglo-American and Civilian conceptions of governance and regulation, thereby generating a fairly small amount of dissonance on the international plane from a legal cultural perspective. Secondly, it is important to note that, at first, law was not the primary influence in the GATT, and in fact lawyers had a fairly marginal role in the early GATT era. Rather, at that time, both the rules negotiations and the early dispute settlement system were dominated by economists, diplomats and politicians, and the dispute settlement system developed in an ad hoc fashion rather than by design.<sup>7</sup>

Throughout the Cold War, the battle for ideological supremacy impacted on the trade environment quite significantly. Trade became a key instrument of soft power for both superpowers. One of the ways in which destinies were swayed was by the bolstering of trade blocs—COMECON for the Eastern Bloc and the GATT for those outside its orbit, primarily in the West or non-aligned states. Indeed, the United States soon recognised that the GATT could serve to counteract Soviet influence, and “promote the independence of such countries, or areas. ...from domination or control by international communism.”<sup>8</sup> Thus, the GATT became one additional means for the United States and Western Europe to bind the ‘free world’ to market-based liberalism.<sup>9</sup> Coates describes the GATT and the IMF as being “to Western capitalism what the Berlin Wall was for the Eastern bloc – a critical mechanism for holding your side together and keeping the other out”.<sup>10</sup>

The political impetus to draw an ambivalent non-aligned state towards the Western sphere of influence meant that the major GATT powers quite actively sought new members, resulting in near-automatic acceptance of

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<sup>7</sup> Hudec, R E. (1998) ‘The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure’, in Bhagwati, Jagdish and Mathias Hirsch, (eds.) *Round and Beyond: Essays in Honour of Arthur Dunkel*, Ann Arbor, Michigan: University of Michigan Press, 101-120 at 117.

<sup>8</sup> Foreign Assistance Act of 1963, 5 402(b), 77 Stat. 390, 19 U.S.C. 5 1861(b) (Supp. V, 1964), amending the Trade Expansion Act of 1962, ch. 4, 5 231, 76 Stat. 876.

<sup>9</sup> See William Anthony Lovett et al, *U.S. Trade Policy: History, Theory, and the WTO* (Armonk: M.E. Sharpe, 1999) at 76 – 78.

<sup>10</sup> David Coates, *The Context of British Politics* (London: Taylor & Francis, 1984) at 29.

decolonised states such as Indonesia in 1950<sup>11</sup> and generous accession conditions for states such as Japan in 1955.<sup>12</sup> As a consequence, “fit” and potential differences went largely unexamined at the point of accession (in stark contrast to recent WTO accessions), and there was no requirement that new states “be a paragon of liberal trade virtue.”<sup>13</sup> By contrast, as Ruggie has argued, there was explicitly no intention at the time to create an ‘orthodox liberal’ trade order, but rather to promote ‘embedded liberalism’, a balancing of the state, and the market, based on Keynesian economics – liberal in the sense of removing obstacles to free trade, but reserved to domestic governments fairly extensive powers of intervention to ensure domestic stability.<sup>14</sup> As a result, the GATT fairly quickly came to include participants with radically different legal cultures and legal cultural characteristics.

As a consequence, members with very diverse domestic legal systems, often quite incapable of fully implementing the GATT obligations, were accepted into the GATT. Increasing freedom and autonomy from the 1960s onwards, amongst the Eastern Bloc, presented one of the first challenges for the GATT in integrating culturally diverse new members that were easily seen to have radically and relevantly different legal cultures. One such example was Poland, which sought accession to the GATT despite still being essentially a centrally-planned economy with a Soviet socialist legal system. The GATT members were fully aware that Polish tariff concessions would not lead to reciprocity due to the state-centred system of trade, knowing that even after the de-Stalinization of the Polish leadership there would be no deviation from a centrally-planned economy with the key features of the Soviet socialist legal system

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<sup>11</sup> See Copelovitch, Mark S., and David Ohls. 2012. “Trade, institutions, and the timing of GATT/WTO accession in post-colonial states.” *The Review of International Organizations* 7 (1): 81–107.

<sup>12</sup> Aaron Forsberg, “The Politics of GATT Expansion: Japanese Accession and the Domestic Political Context in Japan and the United States, 1948–1955” (1998) 27(1) *Business and Economic History* 185.

<sup>13</sup> Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd edn (Oxford: Oxford University Press, 2001) at 66.

<sup>14</sup> John Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 *International Organization* 379 at 388.



remaining in place.<sup>15</sup> The accession agreement of Poland, like the later agreement for Romania, offset the obvious disconnection by including an obligation to raise imports, in the case of Poland by a specified amount,<sup>16</sup> and in the case of Romania the commitment was couched in terms of rates comparable to imports from other sources (in other words, to ensure comparable imports into those countries from both the GATT and COMECON Members). This stands in stark comparison to the structural changes required of post-Soviet applicants seeking to join the WTO decades later. In other words, very culturally diverse legal systems became incorporated into the GATT from the time of its inception and throughout the Cold War, but the political and economic climate of the time counteracted, distracted or suppressed arguments amongst members that would have raised legal cultural differences to the fore.

The 1970s saw the further diversification of the trading order, due in large part to the increased share of trade from Asia, and the increased involvement of the Asian region in the GATT - such as the GATT membership of the Republic of Korea in 1967, Singapore in 1973, the Philippines in 1979, Thailand in 1982, and Hong Kong in 1986. This coincided with the “New International Economic Order” promoted by developing countries that had not previously been particularly active in the GATT, invoking development rights as the basis for more equitable treatment.<sup>17</sup> While this period of history has been examined for its impact on the GATT, Generalised System of Preferences and its role in defining obligations of Special and Differential Treatment<sup>18</sup>, it should also be understood as a critical turning point in the legal cultural diversity of the GATT, with developing country members for the first time presenting a concerted challenge to the orthodoxy of Western legal cultures and the

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<sup>15</sup> Leah Haus, *Globalizing GATT: The Soviet Union's Successor States, Eastern Europe and the International Trading System* (Washington, D.C.: The Brookings Institution, 1992) at 25 – 29.

<sup>16</sup> See Andrew Ian Douglass, 'East–West Trade: The Accession of Poland to the GATT' (1972) 24(4) *Stanford Law Review* 748.

<sup>17</sup> Declaration on the Establishment of a New International Economic Order, Declaration of the United Nations General Assembly A/Res/S-6/3201 dated 1 May 1974. On the New International Economic Order and the creation of UNCTAD, see Robert L. Rothstein (1979) *Global Bargaining: UNCTAD and the Quest for a New International Economic Order* Princeton: Princeton University Press.

<sup>18</sup> See, for example, Bernard Hoekman and Çağlar Özden, *Trade Preferences and Differential Treatment of Developing Countries A Selective Survey*, (2005) World Bank Policy Research Working Paper 3566

prevailing neoliberal paradigms of the GATT rules. The final years of the GATT saw an extensive expansion of the developing country membership, with dozens of developing, and the least developed countries, joining the GATT in its last years.<sup>19</sup> The ongoing difficulties faced by developing countries within the WTO, including from a legal cultural perspective, is in itself evidence of the entrenched advantage of Western developed states as the architects of the international economic order. The tensions between developed, and developing countries, continues to be one of the major themes in the WTO's continuing quest for legitimacy, and closely parallels cultural contests in international law more generally.

The next critical legal cultural juncture coincided with the transition from the GATT to the WTO. This exuberance of purpose is captured in the evocative (but ultimately inaccurate) proclamation of Francis Fukuyama that the world was witnessing "the end of history", and "the universalization of Western liberal democracy as the final form of human government."<sup>20</sup> Within a short period from the collapse of the Soviet Union in 1991, the membership of the GATT expanded dramatically – growing by 28% between 1991 and 1994. Two factors affecting legal cultural interactions in the WTO were then at play. The first was the notion of the 'triumph of capitalism', and the absence of the perceived Communist challenge. This meant that very quickly, members were no longer willing to sacrifice trade concessions for foreign policy ends, and the 'suppressing effect' of the Cold War environment on legal culture came to an end. Existing members realised that the WTO was a club whose membership was desirable and that compliance with a liberal trade architecture could be demanded as the entry fee, thus marking a new highpoint of engagement with questions of legal culture in accession negotiations in particular.<sup>21</sup> There was thus a very discernible increase

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<sup>19</sup> These were Bolivia, Costa Rica, Tunisia and Venezuela in 1990; El Salvador, Guatemala and Macau in 1991; , Mozambique and Namibia in 1992, Bahrain, Brunei Darussalam, Czech Republic, Dominica, Fiji, Mali, Slovak Republic, Saint Lucia, Saint Vincent & the Grenadines and Swaziland in 1993, and Angola, Djibouti, Grenada, Guinea, Guinea Bissau, Honduras, Papua New Guinea, Paraguay, Qatar, Slovenia, Solomon Islands, Saint Kitts & Nevis, and the United Arab Emirates in 1994.

<sup>20</sup> Francis Fukuyama, "The End of History" (1989)(Summer) *The National Interest*(unpaginated).

<sup>21</sup> See further Lisa Toohey, "Accession as Dialogue: Epistemic Communities and the World Trade Organization" (2014) 27(2) *Leiden Journal of International Law* (in press).

towards the turn of the millennium in the complexity of accession negotiations for new members joining, such as Latvia and Estonia (joined in 1999), Jordan, Georgia, Albania, Oman, and Croatia (joined in 2000), Lithuania, and Moldova (joined in 2001), and of course the most culturally complex and time-consuming accession of China (also in 2001).

The second reason for culture coming to the fore at this time was the nature of the WTO's expanded regulatory agenda. For example, new provisions concerned, amongst other things, judicial functions, legislative mechanisms, and publication of legal instruments. The introduction of members, with very different means of regulating state relations, required a more detailed examination of laws and policies, such as a stipulation in Annex B of the Sanitary and Phytosanitary Agreement that certain measures be published for a reasonable time before entering into force, which reflects a very particular legal tradition of a parliamentary democracy.<sup>22</sup> Similarly, many provisions of the TRIPS Agreement mirror particularly specific legal cultural approaches, such as the Article 41 requirement for judicial review of administrative actions. Part III of TRIPS further sets out a catalogue of domestic measures that states must implement in order to allow the enforcement of intellectual property rights. Those include interlocutory measures - orders akin to equitable injunctions - and highly prescriptive requirements relating to procedural fairness, such as the obligation in Article 42 to provide detailed and timely written notice to defendants of enforcement proceedings; the right to be represented by independent legal counsel and a right to tender evidence. The cultural provenance of these provisions are quite distinctly Western, if not specifically more Anglo-American, with compliance representing a challenge both philosophically and practically for many states with different legal cultural approaches to those issues.

The final chapter in the legal cultural history is the second decade of the WTO's existence, by which time China had become not just a member of the WTO, but an active participant in dispute settlements in particular.<sup>23</sup> The subsequent record of admitting new members was 'patchy' at best from 2002 until 2012, with only ten acceding in that decade<sup>24</sup>. Though,

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<sup>22</sup> See also Article 3(1) of the General Agreement on Trade in Services,

<sup>23</sup> See Lisa Toohey, "China And The World Trade Organization: The First Decade" (2011) 60(3) *International and Comparative Law Quarterly* 788 – 798.

<sup>24</sup> During that period, the following states completed accession: Chinese Taipei (2002), Armenia and Macedonia (2003); Nepal, and Cambodia (2004); Saudi Arabia (2005); Vietnam (2007); Tonga (2007); and Ukraine and Cape Verde (2008);.

many of the accessions, completed in the last couple of years of the second decade of the WTO, are of both practical and symbolic importance, such as the accession of the Russian Federation in 2012. The accession of Russia importantly completes the WTO's membership of the BRICS group of countries' (Brazil, Russia, India, China and South Africa), powerful, and rapidly-developing states that have very substantial differences in legal culture to the existing dominant WTO members, and yet which are predicted to be future key economic powers.<sup>25</sup> The potential critical role of the BRICS group in the most recent attempt to close the Doha Round of negotiations, at the 2013 Bali Ministerial Meeting, are a clear sign of the impact that these states are having on WTO negotiations.<sup>26</sup>

The above historical view of legal cultural diversity clearly shows that the WTO is an organisation containing tremendous diversity, with a concomitant diversity of legal culture, and with the prospect that its new members will further enhance that diversity.<sup>27</sup> But, unless that diversity of legal culture is addressed, it is likely that all future multilateral broad-based negotiations will face continuing legal cultural obstacles. The following parts of this chapter consider this issue, first providing a few issues and questions that should be considered when identifying whether and which legal cultural issues are likely to be an issue, and then providing three approaches to the management of legal cultural interactions within the WTO.

## II. Engaging with Legal Culture in the WTO

As Part 1 has explained, legal culture has acquired increasing significance in the WTO, by virtue not just of its diverse and sizeable membership, but also due to the opportunities and challenges presented by a post-Cold War multipolar world. How then does legal culture play out in the modern

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<sup>25</sup> The term BRICS is generally considered to have been coined by Goldman Sachs Head of Global Economic Research Jim O'Neill in 2001 -see Jim O'Neill, 'The World Needs Better Economic BRICs', (Global Economics Paper No. 66, Goldman Sachs New York, NY, 2001) online at <http://www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/build-better-brics.pdf>.

<sup>26</sup> Shawn Donnan, "Bali talks set to showcase WTO's changing dynamics" *Financial Times* (London Edition Online) 28 November 2013.

<sup>27</sup> Lisa Toohey, "Barriers to Universal Membership of the World Trade Organisation"(2012)19 *Australian International Law Journal* 97.

WTO? In this part, we first provide a checklist for identifying legal cultural issues and then set out three ways to manage the issues associated with the identified diverse legal cultures within and surrounding the WTO - whether by embracing (harnessing) the difference as an agent of change, by lessening the impact of adverse legal cultural conflicts (ameliorating), or by seeking to create changes in legal culture (controlling).

“Harnessing” applies to those legal cultural characteristics that exist within the WTO that are positive for the operation and development of the WTO. In other words, legal cultural characteristics that can have a constructive impact on the WTO should be harnessed for the benefit of the WTO and its members. In contrast, “controlling” refers to the effort to manipulate those legal cultural characteristics that are problematic within the WTO so that they may no longer be a problem. Finally, while “ameliorate” also concerns those legal cultural characteristics that are harmful to the WTO, in contrast to controlling the legal cultural characteristics, policies of amelioration merely seek to minimize the harm to the WTO through changes within the WTO, leaving the underlying legal cultural characteristics unchanged.

### **A. Identification of Legal Cultural Issues Within and Surrounding the WTO**

Of course, with all of these approaches the first step is always to identify or simply to “know” the legal cultural characteristics that are relevant. As noted in the conclusion to this chapter, WTO participants increasing interactions with others will slowly permit understandings and knowledge of how each other works, leading to less conflict between their different legal cultures. But, it is perhaps too informal, slow and may miss vital constituents, such as home-based trade officials who may rarely work with their opposite numbers in Geneva or elsewhere. The more formal approaches suggested below need additionally to be applied for legal cultural issues to be more precisely and widely identified and then handled.

Identification requires that the issue of legal culture’s relationship to international trade law, at the WTO and member state level, be taken seriously and be the subject of inquiry. But, given the diversity of WTO membership, the paucity of work on legal culture in international trade law, and the fact that there are a myriad number of different legal cultures, often hidden until suddenly relevant, the reality is that legal culture will

increasingly rear its head into an environment not prepared for it. Clearly, without awareness of legal culture - a “legal cultural sensitivity” - the issue will remain hidden, often obstructing the effective operation of the WTO and its Agreements.

One tangible method to deal with this issue is to employ a legal cultural analysis or audit during the development and/or implementation of WTO policies. This should apply to all new legal or policy initiatives, as well as be applied when undertaking a review of existing WTO practices (whether during negotiations, dispute resolution or as part of general examinations of WTO operations – by the WTO Secretariat, member country WTO missions, private practitioners or by scholars).

A series of questions can be used to tease out potential legal cultural issues. The questions below are clearly not exhaustive of the issues that should be probed. Given the limitations of a chapter in an edited book, the questions below are illustrative only, and will be confined to two broad categories. The questions will focus on (i) the legal culture associated with a specific WTO current or proposed policy and (ii) the relevant legal cultural issues of the policy’s participants (states, regions, communities, etc.)

### **Questions to help identify legal cultural issues of a current or proposed WTO policy**

- Has it been proposed or dominated by policy-makers or participants from one particular state party?
- Is the current policy or proposal one that is universally accepted, or contentious?
- Is it from, or related to, an isolated field developed without close interaction with principles of public international law?
- Is it sourced primarily from hard or soft law?
- What are the sources of substantive legal obligation?
- From which domestic systems have they been, or will be, transplanted?
- Who are the scholars dominating the proposal or current policy, and what impact might their own legal cultural backgrounds have in terms of the structure and approach of the proposal or policy?
- How have previous disputes, or case law, contributed to the development of the proposal or current policy?

- Who were the decision makers involved with this policy, and what were their legal cultural backgrounds?
- Have IGOs, NGOs or other organized non-WTO participants been critical to the development and operation of the policy?
- To what extent does the proposal or policy involve the regulation of domestic legal institutions or processes – to what extent is it a ‘behind the border’ issue and how might it be transplanted into a variety of diverse implementation contexts?

The answers to all of these may help to identify specific legal cultural issues. For example, if the answer to the first question is the United States then one can consider whether the policy is imbued with American legal cultural characteristics and if so what then might be the consequences for the policy within the WTO and with its various participants.<sup>28</sup> Similarly, if the policy is contentious that also may have legal cultural consequences.<sup>29</sup>

### **Questions to help identify the legal cultural issues associated with the relevant participants and communities**

With respect to the relevant communities, participants, regions and other discrete groups, the following issues should be considered:

- Are there legal literacy issues?
- What is the role of the elites?
- Are there differences in urban and rural approaches to the issue?
- Are there ethnic or indigenous communities involved?
- Are there demographic considerations?
- Are there industrial or agricultural issues, or divides?
- Are there rule of law or corruption issues?
- Are there strong religious influences?
- What are the developmental or related-economic issues, such as endemic poverty?

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<sup>28</sup> See e.g., CB Picker, *Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach*, 1 *Chinese J. Comp. L.* 21, 36 (2013).

<sup>29</sup> See, e.g. CB Picker, ‘International Investment Law: Some Legal Cultural Insights’ in *Regionalism in International Investment Law* (Leon E. Trakman & Nicola W. Ranieri, eds.) (Oxford Univ. Press) (2013) at 51 (noting legal cultural consequences arising from the controversial nature of international investment law).

- Are there linguistic issues?
- Are NGOs involved?

For example, the presence of legal illiteracy could imply the existence of legal cultural characteristics associated with informal law, or the mistrust of legal professionals. Similarly, linguistic issues may relate to numerous legal cultural issues. For example, the dominance of English amongst participants may suggest the influence of the Anglo-American legal culture, whereas participants employing French may suggest more civil law or even EU legal cultural influences.

An audit, or a legal cultural impact analysis of the sort suggested by the questions above, should provide a sound basis on which to identify when there might be legal cultural issues; what might be the content or character of those legal cultural issues and from where or what they originate. With that information it might then be possible to better manage any legal cultural concerns through employment of the approaches discussed below.

## **B. Harnessing Legal Culture Differences**

Many of the different legal cultural traits currently “swirling around the WTO vortex” may indeed contribute to the smooth and efficient and successful development and operation of the WTO. For example, while the US has behaved as though the many zeroing cases did not bind them,<sup>30</sup> the American legal cultural approach to precedent and the rule of law, despite its formal absence within international law, likely made the US position untenable in the long run. Similarly, a legal cultural aversion to formal litigation, reflected in a reluctance to take another country to the WTO’s formal Dispute Settlement Body (DSB) may be viewed as a positive legal cultural trait by those who believe that the DSB may often be too quickly employed. Other examples of positive legal cultural traits would be those legal cultural characteristics within a legal system that, amongst others, reflect the following: transparency; legal pluralism; non-formalism; rule of law; a role for civil society; and pragmatism.

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<sup>30</sup> Over many years the US continued to lose one zeroing case after another, until finally giving in and changing their dumping methodology. See Sunjoon Cho, ‘No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO’, (2012) 16(8) ASIL Insights, <http://www.asil.org/insights/volume/16/issue/8/no-more-zeroing-united-states-changes-its-antidumping-policy-comply-WTO>



Of course, this is not to say that those legal cultural characteristics that have negative consequences for the WTO do not serve vital and positive roles within their home legal system. The characterization that they are negative may be entirely WTO-specific. Further adding to the complexity is that in some cases determination that a legal cultural characterization is positive, neutral or negative may itself reflect a normative position or a specific understanding of the WTO not shared by others within the WTO world. For example, the reluctance to take another state to the DSB, while viewed positively by some, may be viewed negatively by others as it then may permit some states the ability to avoid much needed control by the DSB or lead to non-transparent behind the scenes settlements. This is in contrast to those negative characteristics for the WTO, which may garner more widespread acknowledgment of their negative role. For example, the legal cultural “exceptionalism” that exists within the US legal culture is, in the trade law context, not viewed as overly helpful (as opposed to within other areas of international law where it may find some support)<sup>31</sup>. But, for the most part, legal cultural characteristics are not examined systematically enough for these sorts of questions to be raised, let alone answered. The questions provided above should help to correct that failing.

Once positive legal cultural characteristics are identified, the next step is to encourage their role within the WTO (“harnessing them”). This can be achieved by both making the WTO more open to them, as well as by identifying those legal cultural characteristics, or reasonably close variants among other WTO participants, which can then also be encouraged. More specifically, the following mechanisms could be applied:

- “Celebration” or positive acknowledgement of those characteristics;
- Inclusion of them in capacity building training;
- Identification of comparable ones amongst the wider group of WTO participants; and
- Application, or encouragement of, those positive characteristics as a formal matter at negotiations and within disputes, perhaps especially so at the conciliation stage.

The celebration of those characteristics could focus on legal cultural characteristics that are positive for the WTO and its members – either in isolation, or as opposed to the negative or opposite version, of that legal

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<sup>31</sup> See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003).

cultural characteristic. These characteristics can also be encouraged by their inclusion within capacity building programs, and in trade law education more generally. The identification of comparable ones amongst other WTO participants is important for it can create a groundswell that can lead to that characteristic being more formally reflected in new agreements and understandings, and perhaps even leading to their application in the jurisprudence that emerges from the DSB. Consensus on which legal cultural characteristics are positive for the WTO may result in them being considered hierarchically more significant and relevant when confronted with opposing or competing legal cultural characteristics.

Another possible avenue would be a more explicit consideration of legal culture within the jurisprudence of the WTO. Just as the European Court of Human Rights explicitly employs its margin of appreciation, so too there could be a greater acknowledgement of legal cultural differences. While this issue has arguably been raised in the context of like product analysis<sup>32</sup> and in other parts, such as in Article XX,<sup>33</sup> there is room for greater and more explicit consideration of the role of legal culture and its impact on obligations within the WTO. Similarly, while as an institution, the WTO Secretariat has a modest role to play in the development of the WTO because it is a membership run organization, the ability of the WTO Secretariat to influence the development of the WTO can still take place significantly at the margins. With the issue of legal culture itself in some ways an issue at the edges of WTO law, this may be an ideal arena in which the Secretariat can take the lead. But, it would require them to take on board the role of legal culture and then to impart that to the membership at all stages.

### **C. Controlling Legal Culture**

Both controlling and ameliorating legal culture reflect the fact that many of the legal cultural characteristics within legal systems often do not fit well with those found in other legal systems. This is particularly problematic when those legal systems come together within an international organization such as the WTO, which itself will have its own legal cultural characteristics – some of which may also not fit with those

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<sup>32</sup> See, e.g., Chi Carmody, When “Cultural Identity was not at Issue”: Thinking About Canada—Certain Measures Concerning Periodicals, 30 *Law & Pol’y Int’l Bus.* 231, 295-96 (1999)

<sup>33</sup> See, e.g., Panel Report, United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R (Nov. 10, 2004)

of other cultures. The growing heterogeneity of the WTO membership has significantly exacerbated this issue. Examples of such negative legal cultural characteristics may include: legal chauvinism; being excessively litigious; viewing law purely instrumentally; technical fetishism; legal verbosity; and perhaps being insufficiently pragmatic or being too theoretical. Within the WTO, perhaps the most well-known legal cultural characteristic that today may be thought negative is “decision by consensus” – a legal cultural characteristic of the old GATT system, derived from its diplomatic origins, but then impounded into the WTO agreements, but implemented at levels beyond those that could have been imagined during the GATT period.<sup>34</sup>

Controlling legal cultural characteristics that lead to conflict, or impede beneficial state-to-state or state-to-organization interactions, is clearly important to the development and smooth operation of the WTO. Though, as with the positive characteristics, the relevant negative ones must first be identified. Once identified the problematic legal cultural characteristic can be controlled, varying in degree from its total elimination to some form of transformation.

The most extreme of these options is to force a specific negative legal cultural characteristic from a State’s legal system to be completely absent in the international face of that state. For example, some religious law legal cultural characteristics, present in non-western legal systems, may in some cases simply present too stark a difference for successful interaction with others. Thus, the lack of legal pluralism that may run deep within such religious or ideologically-based legal cultural characteristics may simply not operate well with other legal systems, especially one such as the WTO which requires the smooth interaction of many diverse legal systems. Luckily, such significant obstacles have been as a pragmatic matter not presented in the external relations of those states with religious or ideologically-based law systems. Nonetheless, were they to be present they would need to be removed or else the participation of that system would be severely compromised.

Clearly the problem here is that most legal cultural characteristics will be felt as being integral parts of a state’s legal system, and so external efforts to eliminate them will not be viewed very positively by the impacted state.

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<sup>34</sup> See, e.g., Mary E. Footer, *The Role Of Consensus In GATT/WTO Decision-Making*, 17 Nw. J. Int’l L. & Bus. 653 (1997)

Unless, of course, a state has itself come to the conclusion it needs to abandon a particular legal cultural attribute in its external affairs, as has been the case with those systems involved with the WTO that include legal cultural characteristics at odds with legal pluralism. A further example may help to elucidate this issue. For example, consider those legal systems with legal cultural characteristics that viewed intellectual property less strictly, either substantively or through enforcement, and yet were forced to abandon those attitudes in order to join the WTO. Thus, as with everything, there is often a price in exchange for which states are willing to do that which is otherwise distasteful to them. In order to get membership of the WTO, those countries, very often developing and non-western countries, were forced to alter their outward or visible approach to intellectual property. However, as the continuing debate over intellectual property shows, forcing states to take a position inimical to their legal culture may not in fact result in the effective or successful implementation of the underlying commitment.

At the other end of control is the rather less drastic approach of encouraging the problematic legal cultural characteristic to undergo some sort of transformation when present in the international interactions of the legal system. Transformation thus permits a different face of that legal cultural characteristic to emerge or dominate in international settings such as the WTO legal environment. For example, to the extent China's legal culture includes Confucianism and Chinese Legalist cultural characteristics, they can play either to a better relationship with the WTO Agreements and other WTO members (for example, through promotion of harmony), or they can provide sources of conflict (e.g., elevating virtue to an unrealistic level). Thus, the challenge in that example is to encourage the positive side of the legal cultural influence that promotes an efficient and positive relationship between the WTO, WTO participants and China.

#### **D. Ameliorating Legal Culture**

Unlike controlling legal culture, ameliorating it does not result in its loss or reduction, diminishment or transformation. It accepts its existence, vitality and potential positive role within the WTO's dynamic, even as there is an understanding that within a specific negotiation or conflict that specific legal cultural characteristic is at that time playing a negative role. In order to keep it alive for use in other roles, processes need to be employed that serve to handle the negatives of the legal culture at that specific time, leaving it otherwise untouched. This approach may also be

most acceptable to states and perhaps is most acceptable to the concepts of legal pluralism that should run deep in the international legal environment.

A few examples can show how the process works. One example of a legal cultural characteristic that may be problematic is the legal cultural characteristic of “legal verbosity”. The negative consequences of this trait are: diminished effectiveness in argumentation; lack of transparency; loss of efficiency by other participants forced to interact with that verbosity; and so on. Amelioration with respect to this problematic legal cultural characteristic could take place through a number of devices including limitations on document length, and so on. While those limitations might leave the state participants frustrated, they could still have many other avenues in which to express their verbosity – through public statements and documents; through face-to-face meetings, and so on. Nonetheless, at a different time, or in a different context, that verbosity may actually be positive. Thus, it may very well have been absolutely necessary for the WTO’s *EC Biotech Case* to run to over a thousand pages (for example, for legitimacy reasons).<sup>35</sup> Thus, amelioration as opposed to eradication of that legal cultural characteristic permits its use in some positive situations while controlling it in other situations.

Another example might be a legal system’s legal cultural approach to the participation of civil society. While an individual state may not have a legal culture of public-private cooperation, or of encouraging or even permitting civil society voices to be heard or even to take part, the WTO – through its approach to such things as amicus participation in disputes – may provide an avenue for civil society, even from participants originating in legal systems with legal cultures inimical to it. But that avenue is a controlled one. Those opposed to it do not have their own view changed, but rather their opposition is offset by the WTO providing an alternative avenue for NGOs, and others, to have a voice in the development of the WTO.

### III. Conclusion

This chapter has argued in favour of a legal cultural analysis as a way of understanding the WTO’s past – its evolution and development – as well as a way to ensuring its future vitality. Given the fact that more than 150

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<sup>35</sup> See EC – Approval and Marketing of Biotech Products, WT/DS291/R / WT/DS292/R / WT/DS293/R (29 Sept. 2006), runs to 1087 pages.

members of the WTO represent a vast range of approaches to the law, consideration of the interactions between their legal cultures is essential. In a similar vein, it is also important not to ignore the reality that an international organisation such as the WTO itself also develops its own legal culture, which then impacts every aspect of the WTO's existence. There is no denying that a single definition of legal culture is a nebulous concept, but it is clear that many aspects of legal culture are easily visible and understood. Legal cultural analysis provides the very foundations of attitudes towards WTO rules; ways of engaging with WTO laws; and even of the determination of what is properly the domain of WTO law. As a consequence, those who work with WTO law should be aware of it. Indeed, as noted above, recent scholarship has pointed to that need and encouraged the beginning of serious studies aimed at the issue, for many of the reasons noted in this paper.

Nonetheless, there may still be hesitancy by many to more actively engage with legal cultural issues. One concern about legal culture, for example, may be related to the incorrect conflation between legal cultural sensitivity and legal cultural relativism. The existence of diverse legal cultures does not mean all must be accommodated, or that all have a valid place within the WTO or within other international or transnational systems or organizations. All states make concessions when they join multilateral organizations and agreements. It is, in part, what makes multilateralism so much more difficult than bilateralism or regionalism. Though, it may also be a source of its strength for when many are involved, one state cannot usually dominate or impose its legal culture on everyone else, which may be the case in asymmetric regional or bilateral relationships. In addition, the WTO's clear goals, of liberalized trade relationships, sustainable development, and improvements in people's welfare, are all apparent from its preamble.<sup>36</sup> And to the extent a legal cultural characteristic cannot fit at a fundamental level with these goals, then it simply cannot be accommodated.

Finally, as a recent example - that should help to allay the concerns of those who hesitate to consider the utility of unconventional or informal forces impacting the development of the WTO - it has been suggested that the success of the 2013 Bali Ministerial was due, in part, to the fact the WTO members have begun to change their mindset; their legal cultural

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<sup>36</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).