

# **Behind the Multilateral Trading System**

## **Legal Indigenization and the WTO in Comparative Perspective**

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Lijuan Xing

Submitted to the graduate degree program in Law and the Graduate Faculty of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

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Professor John W. Head (Chairperson)

---

Professor Raj Bhala

---

Professor Virginia Harper Ho

---

Professor Tailan Chi

Date Defended: March 9, 2012

The Dissertation Committee for Lijuan Xing

certifies that this is the approved version of the following dissertation:

**Behind the Multilateral Trading System**

Legal Indigenization and the WTO in Comparative Perspective

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Professor John W. Head (Chairperson)

Date approved: May 7, 2012

## ABSTRACT AND OVERVIEW

This dissertation offers a new perspective from which to view and understand the WTO regime and its participants. The central feature of that new perspective is the concept of legal indigenization. This term generally refers to the process or ideology in which domestic authorities make and implement international or domestic rules in a way appealing to their native features (especially legal traditions), as responses to globalization led by a defective global legal system. The dissertation's core thesis is that the key elements of the legal tradition and culture of a society or political system inevitably and fundamentally influence the ways in which WTO members propose multilateral trading rules and implement their WTO obligations – in ways that have not, until now, been adequately explored and explained in the extensive literature relating to international trade law.

In developing and elaborating on that core thesis, this dissertation has six chapters, following an *Introduction* that summarizes the significance, structure and approach, and terminology of the dissertation.

Chapter 1, *Review of Literature*, comprises two parts. The first part surveys the key academic, professional, and official literature regarding a range of issues that are pertinent to this dissertation. These include such topics as the general character and structure of the WTO regime, specific trade mechanisms, the relationship between WTO law and domestic law, the relationship between WTO law and general international law, principles and interpretation of WTO agreements, the position of developing countries in the multilateral trading system, strategies pursued in international trade negotiations, domestic trade legislation, Free Trade Agreements (FTAs), dispute settlement mechanism, and domestic adjudication of trade issues. The second part of this chapter offers the main findings of the relevant literature. It is those findings, of course, that serve as the foundation as well as starting point for further research as reflected in this dissertation. The findings of the literature have helped formulate two hypotheses of the dissertation. One is that the insufficiencies of the WTO legal regime provide the possibility and necessity for the WTO Members to indigenize WTO law by resorting to their own legal

traditions and cultures. The other hypothesis is that the WTO Members' practices in dealing with the WTO have demonstrated their willingness and efforts to indigenize WTO law.

Chapter 2, *Concept of Legal Indigenization*, develops the fundamental concept of this dissertation – legal indigenization. This chapter starts in Section I by reviewing legal fragmentation in international trade before World War II. The disaster of world war brought about by legal fragmentation called for international responses thereto, which resulted in (legal) globalization. Then, the section proceeds into the exploration of the problems of (legal) globalization – both inherent and acquired – which explain the need to rely on legal indigenization. Section II of this chapter defines the concept of legal indigenization, based on the various concepts of indigenization that exist in various other disciplines such as anthropology and culture, and dissects the concept of legal indigenization further for clarification. In that same vein, the latter part of this section compares this term with other two relevant terms – that is, globalization and localization.

Based on the concept of legal indigenization defined in Chapter 2, the succeeding three chapters proceed to apply this concept to the specific actions adopted by China, the United States, and the EU regarding their interaction with the WTO. Chapter 3, *Legal Indigenization of WTO Law in China*, examines four aspects of legal indigenization. Section I focuses on China's participation in international trade rule-making. It explains how China emphasizes Special and Differential (S&D) treatment as well as substantive and procedural issues in the Chinese proposals submitted to the WTO. The sources of pertinent features of the Chinese proposals submitted to the WTO are located, partially, in the Chinese legal tradition and culture. Section II of this chapter finds that China's participation in the settlement of international trade disputes reflects certain Chinese ideologies that have been challenged by its trading partners. Those ideologies bear on such issues as whether legal protection is to be provided for subjects involving some illegality, the relationship between publications and public morality, state control of trading rights, and the necessity of criminal thresholds regarding protection of intellectual property rights. This section examines how these features have taken shape, based on Chinese legal tradition and culture. Section III examines key characteristics of the overall Chinese

domestic trade legislation, such as the degree of specification of laws at different levels, the use of “temporary” legislation, and a focus on “management.” This section explains these features from the perspective of the Chinese legal tradition, focusing specifically on various forms of law in dynastic China and China’s contemporary legal system. Section IV examines domestic adjudication of trade disputes arising within China. It reviews administrative and judicial regimes relating to trade issues. Although China has complied with its WTO obligation to provide judicial review of administrative determinations, it still treats adjudication of trade issues as having unique characteristics that other WTO members might find odd or objectionable but that reflect deeply rooted elements of Chinese legal tradition and culture.

Chapter 4, *Legal Indigenization of WTO Law in the United States*, examines the process of legal indigenization (again, relating to trade law) taking place within the United States. Section I explores several aspects of U.S. proposals submitted to the WTO on both substantive and procedural issues, as well as S&D treatment. It also gives some attention to U.S. Free Trade Agreement (FTA) negotiations. This section characterizes U.S. proposals to the WTO from several perspectives – the tendency to submit a series of proposals, to exhibit cautiousness toward S&D treatment, to address institutional reform, to emphasize international rule of law, to pursue procedural justice, etc. This section traces these practices to roots in U.S. legal tradition and culture and specifically in the emphasis on procedural fairness in the common law tradition, the U.S. leadership in the WTO, U.S. reliance on reciprocity, its belief in rule of law, and segmentation of power in its political regime. Section II examines international trade disputes involving the United States as respondent and reveals certain U.S. ideologies challenged by its trading partners, such as the relationship between sovereignty and unilateralism and extra-territorial application of U.S. domestic law. This section also attributes these features to U.S. legal tradition and culture, especially to vestiges of unilateralism. Section III explores domestic legislation on trade within the United States and highlights some of its key characteristics, such as the urge for comprehensive content and codification as well as a subordination of international trade agreements. The origins of these characteristics in U.S. legal tradition and culture mainly involve a mixture of the civil law and common law traditions, the fluctuation of trade policies in the U.S. legal history, and dualism with respect to the relationship

between international law and domestic law. Section IV examines domestic adjudication of trade issues arising within the United States. After reviewing pertinent administrative agencies and judicial bodies relating to trade adjudication, the discussion emphasizes certain characteristics of domestic adjudication of trade issues within the United States, such as the use of administrative segmentation and specialized courts. The U.S. legal tradition and culture can help explain these characteristics – for example, in the U.S. deference to “expertise.”

Chapter 5, *Legal Indigenization of WTO Law in the European Union*, analyses the process of legal indigenization of WTO law within the EU. Section I examines how the EU has participated in international trade rule-making and explains the EU’s emphasis on certain topics, such as the constituents of the Dispute Settlement Body, the style of proposals, the importance of sustainable development and S&D treatment, the establishment of principles guiding negotiations of specific rules, and the role of independent experts in the multilateral dispute settlement mechanism. The origins of the special attention accorded to these topics can be found in the legal tradition and culture of the EU, and particularly in the role of judges in the civil law tradition, the center stage given to general principles, a high status given to jurists, and the heavy importance of sustainable development in the EU. Section II examines international trade disputes involving the EU as respondent. On the grounds of a review of pertinent cases, this section identifies some EU ideologies that seem conflicting with those of its trading partners, such as its broad methods of interpreting WTO agreements, its attitude towards the relationship between trade preferences in the FTAs and multilateral principles, and its application of general principles of law in its arguments. Some of the factors that contribute to the formulation of these features appear also in continental European legal tradition and culture, especially in the civil law’s approach to interpretation of international agreements. Section III of this chapter explores the “domestic” trade legislation within the EU. Based on an overview of EU “domestic” trade legislation, this section points out some EU-specific approaches to trade legislation. These features find their roots in continental European legal tradition and culture, especially in the concept of the legal rule as adopted by the civil law tradition and in theories about the relationship between EU law and domestic laws of its member states. Section IV, after reviewing pertinent administrative agencies and courts involved in adjudication of trade issues within the

EU, characterizes such “domestic” adjudication of trade issues as giving special emphasis to the judicial protection of individual rights, to the application of general principles of law, to procedural justice, and to the direct application of WTO agreements. Once again, the shared corpus of legal tradition and culture that predominates in the EU can partially account for these features, as explained at the end of Chapter 5.

Chapter 6, *Legal Indigenization and the WTO*, explores these issues from a more integrated perspective. Its aim is to explain how, at a more multilateral level, the WTO provisions have been indigenized by each of these three individual members’ legal tradition and culture. Section I reviews how existing WTO provisions or practices were influenced by the legal tradition and culture of certain members. It does this by studying three examples: the United States and the multilateral antidumping mechanism, rules developed by the Dispute Settlement Body (DSB) for applying the principle of “legitimate expectations,” and the admissibility of amicus curiae submissions in the DSB. Section II focuses on legal indigenization in the context of further negotiations. This section examines competing (indigenized) views from three members – China, the United States, and the EU – on S&D treatment, environmental issues, fisheries subsidies, and reform of the DSB. Section III addresses on the general implications of legal indigenization for the WTO both in the short term and in the long run.

The text of the dissertation closes with a *Conclusion* that summarizes the main findings of all the above chapters.

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## MAIN ABBREVIATIONS

<b>ADA</b>	Anti-dumping Agreement
<b>APL</b>	Administrative Procedural Law
<b>ASCM</b>	Agreement on Subsidy and Countervailing Measures
<b>CAFC</b>	Court of Appeals for the Federal Circuit
<b>CAP</b>	Common Agricultural Policy
<b>CBP</b>	Customs and Border Protection
<b>CCL</b>	Commerce Control List
<b>CCP</b>	Common Commercial Policy
<b>CIT</b>	Court of International Trade
<b>COP</b>	Conference of the Parties
<b>CTD</b>	Committee on Trade and Development
<b>DDA</b>	Doha Development Agenda
<b>DOA</b>	Department of Agriculture
<b>DOC</b>	Department of Commerce
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>EAR</b>	Export Administration Regulations
<b>EC</b>	European Communities
<b>ECB</b>	European Central Bank
<b>ECJ</b>	European Court of Justice
<b>EU</b>	European Union
<b>FTA</b>	Free Trade Agreement
<b>G20</b>	The Group of Twenty Finance Ministers and Central Bank Governors
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GSP</b>	Generalized System of Preference
<b>IPR</b>	Intellectual Property Right
<b>ITC</b>	International Trade Committee
<b>MEA</b>	Multilateral Environmental Agreement
<b>MFN</b>	Most-Favored-Nation
<b>MOC</b>	Ministry of Commerce
<b>NAFTA</b>	North American Free Trade Agreement
<b>NPC</b>	National People's Congress
<b>S&amp;D treatment</b>	Special and Differential Treatment
<b>SDS</b>	Sustainable Development Strategy
<b>SPC</b>	Supreme People's Court
<b>STO</b>	Special Trade Obligation
<b>TEU</b>	Treaty on European Union
<b>TRIPs</b>	Agreement on Trade- Related Aspects of Intellectual Property Rights
<b>URAA</b>	Uruguay Round Agreements Act
<b>USTR</b>	The Office of United States Trade Representative



**WTO**  
**WWII**

World Trade Organization  
World War II

## ACKNOWLEDGEMENT

Professor John W. Head was not only a giant in the field of International and Comparative Law, but also an enduring inspiration in my work. Serving as my supervisor and the Chairperson of my Dissertation Committee, Professor Head has provided constant guidance and support to me in the past three years, in such various forms as reading, editing, discussing, and critiquing my work as well as training and honing my skills in advanced legal research and writing. I am deeply indebted to Professor Head, and therefore, begin my acknowledgements with sincere respect genuine thanks to him.

A big note of appreciation also goes to all other members of my Dissertation Committee for their invaluable comments on the manuscript, including Professor Raj Bhala of the University of Kansas School of Law, Professor Virginia Harper Ho of the University of Kansas School of Law, and Professor Tailan Chi of the University of Kansas School of Business.

I am also grateful for the excellent study and research environment of the University of Kansas School of Law as well as moral support from its whole faculty. All these made every step of my writing an easier and more interesting task.

As will be obvious from footnote references and from the Bibliography, I have relied heavily on many authorities with far broader expertise than I could possibly bring to bear on this subject myself. I offer acknowledgments and expressions of gratitude to them collectively.

A special mention is warranted for Lucia Orth, who has generously given her encouragement and personal assistance to me from the outset. Finally, but distinctly not least, I thank my family for their constant support and inexhaustible love.

# INTRODUCTION

## – *The Aim, Structure, Terminology, and Limitations of This Dissertation*

Now the man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks to enlarge others.

— Confucius, the *Analects* (Yong Ye)

The above proverbs of Confucius, recorded in the *Analects*, points out the attitude and approach that a person who wants success should adopt: if a person wants success and respect, he should be ready to respect others and to help others succeed. In order to do that, of course, it is first essential that he should *know how* to respect others and how to help others succeed. In short, mutual understanding constitutes a prerequisite for success.

It is true that understanding is the source of trust and catholicity. Considering that trust and catholicity have become more and more difficult to establish in this rapidly changing world, the significance of understanding should be highlighted today more than ever. Therefore, this dissertation – instead of purporting to be about “good and bad,” “benevolent and evil,” or “right and wrong” – is about “understanding.”

## Goals

The year 2012 marks the 17<sup>th</sup> anniversary of the establishment of the World Trade Organization and the 11<sup>th</sup> anniversary of the launching of the WTO’s first round of multilateral trade negotiations – the Doha Development Agenda. The frustrations this Round has encountered so far have resulted in mountainous literature,<sup>1</sup> most of which focuses on exploring

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<sup>1</sup> For example, see generally Terence P. Stewart, AFTER DOHA: THE CHANGING ATTITUDE AND IDEAS OF THE NEW WTO ROUND (2002); Ross P. Buckley ed., WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE (2003); Ross P. Buckley ed., WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE (2003); Brian Hindley, TRADE LIBERALIZATION IN AVIATION SERVICES: CAN THE DOHA ROUND FREE FLIGHT? (2004); Alex F. McCalla & John Nash (ed.), REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES: KEY ISSUES FOR A PRO-DEVELOPMENT OUTCOME OF THE DOHA ROUND (2007); Alex F. McCalla & John Nash (ed.), REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES: KEY ISSUES FOR A PRO-DEVELOPMENT OUTCOME OF THE DOHA ROUND (2007); Harald Hohmann, AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO (2008); and Gary C. Hutbauer, Jeffrey J. Schott & Woan Foong Wong, FIGURING OUT THE DOHA ROUND (2010).

the causes of and solutions to the problems that have plagued these negotiations. Furthermore, it seems apparent that some WTO members, especially those that are eager to conclude the Round as soon as possible, have lost much of their patience, as evidenced by more and more criticisms emerging from the negotiations.<sup>2</sup> It seems that the necessity still exists to explore the real causes and realistic resolutions to the troublesome impediments.

The general purpose of this dissertation is to provide a new angle to understand the WTO regime and its participants – that is, an analysis revolving around the concept of legal indigenization on the grounds of legal tradition and culture. Briefly, it refers to the process, ideology, or outcome in which domestic authorities make and implement international or domestic rules in a way appealing to their native features (especially legal tradition), as responses to globalization led by a defective global legal system. One of the reasons that we should not ignore the influence of legal tradition and culture on the multilateral trading system is that it is inevitable that the WTO Members will propose multilateral rules and implement their WTO obligations on the grounds of their own legal traditions and cultures. Another reason might be that the legal tradition and culture is relatively stable compared with a member's immediate political and economic interests – interests that are likely to be affected by both domestic and international developments of a rather transitory nature. Thus, the influences of the legal tradition and culture are more predictable than those of political and economic factors. However, the aim of this dissertation is by no means to make legal aspect weigh over any other factor. A third reason is that, no matter how huge the influences that other factors may exert on the multilateral trading system, these influences usually have to be transformed ultimately into legal form. However, an examination of current literature shows that there still is a great gap between the significance the legal tradition and culture *should* have received and that it *has* received. This dissertation attempts to help fill that gap.

One of the biggest challenges encountered by this dissertation is how to present both (1) an overall picture of legal indigenization of WTO law and (2) detailed explanations of the specific

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<sup>2</sup> For example, see generally *US Slams China, India at WTO Talks*, available at <http://www.voanews.com/english/news/a-13-2008-07-28-voa22.html>, last visited on Feb. 27, 2012.

manifestations of such indigenization. It would seem to be an almost impossible undertaking to address all the aspects of legal indigenization taking place in all the WTO Members within the covers of this dissertation. Therefore, this dissertation selects three WTO members – China, the United States, and the European Union<sup>3</sup> – as research subjects. On the one hand, considering that each of these entities reflects one of the great legal traditions – that is, the Chinese law, common law, and civil law traditions – a study of legal indigenization within the WTO can show the influences of legal tradition and culture on the multilateral trading system. In addition, a comparison of legal indigenization of the WTO regime might contribute to recognition of the generality and diversity of the “indigenization” process in other contexts as well.

Naturally, the emphasis attached in this dissertation to legal tradition and culture does not mean to deny the significance of other factors – such as economic and political interests – that also have great influence on an individual member’s participation in WTO activities.

## **Structure and Approach**

The text of this dissertation comprises six chapters, in addition to the Introduction and the Conclusion. Chapter 1 reviews the literature pertinent to various aspects of this dissertation. Chapter 2 develops the concept of legal indigenization. Using this concept, Chapters 3, 4, and 5 explore legal indigenization of WTO law in China, the United States, and the European Union.

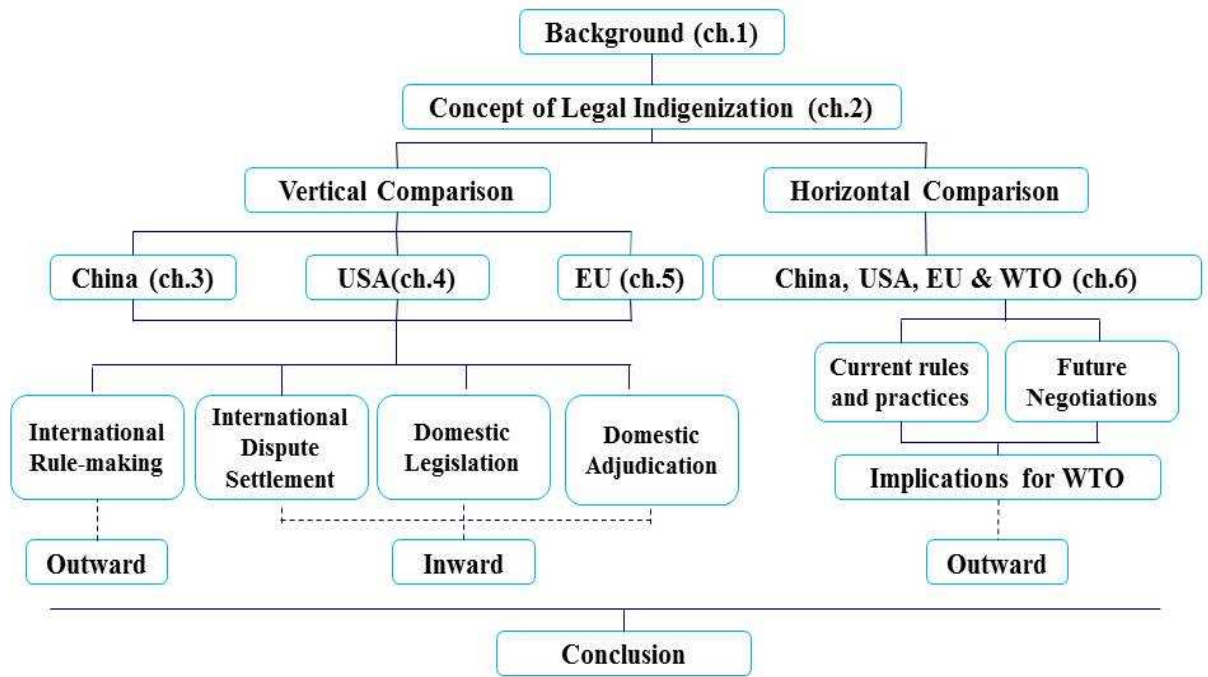
All of these offer a “vertical” (or “temporal”) comparison. By “vertical” comparison, I mean a process of studying the contemporary practices of each member from a historical perspective. A second approach is a “horizontal” (or “spacial”) comparison – which means “across legal traditions.” The “spacial” comparison is the main approach adopted in Chapter 6, which explores different influences of the three members on the rule-making and adjudication issues. Chapters 3, 4, and 5 follow a same model of analysis – that is, exploring the process of indigenization in four aspects: international rule making, international trade disputes settlement, domestic legislation on trade, and domestic adjudication of trade issues. Among the four aspects,

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<sup>3</sup> Although the European Union is not an individual member in a strict sense, it adopts the uniform voice within the WTO and is regarded as a unit of its member states.

the analysis on international rule making focuses on the outward direction of the process of indigenization – that is, how the members make efforts to influence international trade negotiations by their legal tradition and culture. The analysis on the other three aspects concentrates on the inward direction of the process of indigenization – how the members indigenize the WTO obligation domestically on the ground of legal tradition and culture. Chapter 6, which also discusses the outward direction of the process, concentrates on different indigenized WTO rules and practices, as well as some general implications of legal indigenization for the organization. The structure of this dissertation is also exhibited in Chart 1.1.

**Chart 1.1 Structure of the dissertation**



In addition to the two types of comparison mentioned above – vertical (or temporal) and horizontal (or spacial) comparison – I would offer a couple of comments regarding the “approach” of this work. Overall, this dissertation adopts a 1-2-3-4 model in its analysis – that is, it covers one theme (*i.e.*, legal indigenization), two directions (*i.e.*, outwards and inwards), three legal traditions (*i.e.*, the Chinese legal tradition, the common law tradition, and the civil law tradition), and four aspects (*i.e.*, international trade rule-making, international dispute settlement, domestic legislation on trade, and domestic adjudication of trade issues.)

There are definitely various approaches of developing the topic of this dissertation. One of them is to wrap together the presentation of cases or facts with analyses. However, I opt for a different approach. For example, in the following chapters, in order to make it clear for presentation, characteristics of one member’s behavior would be separated from its pertinent legal tradition. One of the considerations is to make it more logical for the reader to understand or to gradually construct the contour before he gets into the deeper analysis of these characteristics. The other consideration is that the identified characteristics themselves can also be regarded as a part of the preliminary findings of this dissertation, which serves, in turn, as the foundations of further conclusions. They deserve an independent part for identification and explanation also. Therefore, this dissertation adopts the current structure and organization of argument.

Likewise, there would also be various ways to characterize pertinent practices of each member. Consequently, there would be more “characteristics” of those practices than the ones identified in this work. For the purpose of this dissertation, the approach I have adopted is to underscore the aspects that could distinguish one member’s behavior from those of the others on the ground of its own legal tradition and culture. In other words, in this dissertation, these listed characteristics warrant special attention and further analysis.

## **Conceptual Terminology**

In this dissertation, I adopt the following understandings of some fundamental concepts that might be unfamiliar to some readers. The most fundamental of all, of course, is that of legal



indigenization; as noted above, all of chapter 2 is devoted to explaining that concept. Other key concepts include the following:

- **Legal tradition.** A legal tradition, as the term is used in the following pages, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather, as posited by John Henry Merryman of Stanford, it is “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.”<sup>4</sup> The legal tradition is, as Merryman goes on to explain, a partial expression of the overall culture in which a legal system has developed. A society’s legal tradition puts the legal system into cultural perspective.
- **Legal culture.** In this dissertation, I adopt the definition of legal culture proposed by Friedman. According to him, legal culture is a mix of “ideas, attitudes, expectations and opinions about law, held by people in some given society. It is the network of values and attitudes ... which determines when and why and where people turn to law or government or turn away. It is thus the immediate source of legal change, whatever the ultimate source may be. The term covers those thoughts and ideas which act as motives or incentives for ‘legal behavior’ – behavior oriented toward or away from legal rules, legal institutions, or the uses or nonuses of law.”<sup>5</sup> Consequently, the term “legal tradition and culture” incorporates both historical and contemporary elements – that is, both legal tradition and various attitudes that have been reflected by a broad array of legal behaviors of a given society in fairly recent era. The concept of legal culture is complex, some specific definitions and description of methods that I have used in studying “legal culture” are discussed in this Introduction and elsewhere throughout the dissertation. Legal culture is such a central concept to this dissertation because it is a kind of “filter” throughout the legal indigenization. I have drawn from a variety of sources to define and work with the concept of “legal culture.” These sources include not only those already cited, but also numerous others.<sup>6</sup> However, this dissertation is not intended to be an exhaustive analysis of that term. I have tried to draw a wide enough range of sources to inspire some confidence.
- **Legal system.** A legal system can be understood as comprising “a relatively effective

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<sup>4</sup> John Henry Merryman, *THE CIVIL LAW TRADITION* ii (2d ed., 1985).

<sup>5</sup> Lawrence M. Friedman, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 213 (1990).

<sup>6</sup> For example, Friedman, *supra* note 5; John W. Jackson, *AMERICAN LEGAL CULTURE* (1981) [hereinafter Jackson-Culture]; H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* (4th ed., 2010); Merryman, *supra* note 4; Sara McLaughlin Mitchell & Emilia Justyna Powell, *DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS* (2011); Jinfan Zhang, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* (2009) [hereinafter Zhang-Transition]; Herbert J. Liebesny, *FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS* (1981); Max Rheinstein & Bea Verschaegen, *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (vol. XVII, 1981); and B. Aguilera, *Law as a Limit to Power – the Origins of the Rule of Law in the European Legal Tradition*, in *JUDICIAL REVIEW: A COMPARATIVE ANALYSIS INSIDE THE EUROPEAN LEGAL SYSTEM* (Susana Galera ed.) 1 (2010).

mixture of rules and institutions that govern relations among individuals and groups in a society – typically the population of a nation-state or some other substantially autonomous political entity – and that also regulate the role and powers of the government of that entity.”<sup>7</sup>

- ***The civil law tradition.*** The civil law tradition, in brief, is what has developed over the course of about 2,450 years in Western Europe, originating with the famous Twelve Tables<sup>8</sup> issued in 450 BCE. Indeed, the civil law tradition could also be referred to as “the Romanist” or the “Romano-Germanic” legal tradition. These names draw attention to the fact that this legal tradition originated with Roman law and later interacted with Germanic laws and influences.<sup>9</sup> In contemporary world, the components of the civil law tradition still find home in the European continent. They are shared by all the EU countries (except the United Kingdom).
- ***The common law tradition.*** The common law tradition is much younger than the civil law tradition and finds its origin in 11<sup>th</sup> century England. English common law – that is, the law that was gradually seen to be (or made to be) “common” to all of England – displaced the local customary rules of behavior because of the unprecedented strength of William the Conqueror and others who followed him as monarch in England. English common law developed in a peculiar way because of internal political developments and conflicts between the centralized monarchy and provincial political leaders as well as between the monarchy and the parliamentary (legislative) authorities. None of those peculiar and internal developments would be of lasting significance if England had not extended its political, economic, and cultural influence around the world. But it did exactly that, quickly challenging (and often out-maneuvering) those states of continental Europe in the great frenzy of conquest and colonization that occurred in the 1600s through the 1800s. Hence the common law, with its peculiar preference for judge-made rules, its penchant for “equity” (as made manifest by an entirely separate set of courts arising in about the 16<sup>th</sup> century), and its high degree of comfort with legal disorganization, clearly qualifies as one of the “great legal traditions.”<sup>10</sup> “The influence of the common law throughout the world results from the campaign of colonization and conquest that England engaged in the beginning in the 16<sup>th</sup> century.”<sup>11</sup> The United States is of course a most typical representative of the legal family of the civil law tradition in the world.<sup>12</sup>

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<sup>7</sup> John W. Head, GREAT LEGAL TRADITIONS 6 (2011).

<sup>8</sup> The Twelve Tables was the legal code that sits at the very foundation of Roman law and therefore of the civil law tradition. For elaborations, see *id.* at 51-53.

<sup>9</sup> *Id.* at 19.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 371.

<sup>12</sup> For more elaborations on the “transplantation” of the common law tradition in the United States, see Head, *supra note 6*, at 378-382.

- ***The Chinese legal tradition.*** Chinese law, unlike the civil law and common law traditions, did not leave its birthplace and spread widely around the world. Instead, reflecting the inward-looking nature of Chinese culture, Chinese law extended in application only over the central portion of what is today the People’s Republic of China, only gradually moving northward and westward to encompass the Mongolian highlands, western deserts, and Tibetan plateau. Nevertheless, Chinese law qualifies as a “great legal tradition” for at least two reasons: (i) the size of the population subject to Chinese law has been huge for many centuries and now constitutes about one-fifth of the world’s population; (ii) the level of continuity in its development, and especially in its characteristic legal codes, is unmatched by any other legal tradition. Chinese law is remarkable also for its highly sophisticated but (from a Western viewpoint) highly unusual internal conflict between Confucianism and Legalism – two seemingly incompatible concepts of law and governance.<sup>13</sup> “China’s legal identity ... features a remarkably long legal history that is largely unbroken, at least from the days of the Qin dynasty (in the third century BCE) through the end of the Qing dynasty in 1911 CE....China’s law is in a league of its own when judged in terms of age, stability, and effectiveness.... [U]nlike the other two great legal traditions, which encountered tumultuous political changes and numerous episodes of splintering, reunification, colonization, and independence, Chinese law remained in place, with little fundamental change, in a country that (despite some periods of disunity) was from at least the sixth century CE onward always assumed to consist of a single state. This special character of Chinese law makes it unique, and uniquely fascinating.... [A]n understanding of modern Chinese law (or indeed a meaningful grasp of any aspect of modern China) is impossible without some familiarity with the rich tapestry of dynastic Chinese history.... [D]ynastic Chinese law [is] not only an engaging story worthy of study in its own right but also ... a key that can help us unlock the door to understanding the essence of contemporary Chinese law.”<sup>14</sup>
- ***FTA.*** Free Trade Agreement. An agreement among two or more countries (more specifically, customs territories) to drop all international trade barriers as among the countries.<sup>15</sup> In this dissertation, accordingly, FTAs comprises both bilateral and regional trade agreements.

## Limitations

This dissertation attempts to address a very broad set of topics. It could, of course, have been broader still. In the course of my research, countless related topics and intriguing

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<sup>13</sup> *Id.* at 19-20.

<sup>14</sup> John W. Head, *CHINA’S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT* xiii-xv (2009) [hereinafter Head-Soul].

<sup>15</sup> Raj Bhala, *DICTIONARY OF INTERNATIONAL TRADE* 194 (2008) [hereinafter Bhala-Dictionary].

perspectives have presented themselves. I have not been able, given constraints of time and capacity, to explore and develop them for inclusion in this dissertation. The dissertation would be richer for them, but it could not have been finished within a reasonable time or number of pages.

Having said that, I wish to offer a brief description of several of the most interesting “related topics and perspectives” that certainly warrant study. Indeed, an exploration of the following points provides helpful insight into some of the findings and conclusions I have made in these pages – or might indeed alter and improve some of those findings and conclusions. I identify them here with that acknowledgement.

- *A perspective of institutional economics:* The discipline of institutional economics focuses on understanding the role of the evolutionary process and the role of institutions in shaping economic behavior. From an institutional economics perspective (including transaction cost economics and information economics), an important factor influencing rule making is how the rules being considered affect the costs of organizing the economic, political and social activities that the entity is set up to perform. Pertinent theories in this field can prompt research on indigenization to explore how it can make the newly adopted rules more compatible with existing economic, legal and socio-political institutions and thus amenable to implementation with greater effectiveness or at a lower cost.

- *A perspective of negotiation behavior:* It is certainly natural that a country will attempt to gain an advantageous position in globalization when it negotiates new international rules or adopts existing rules as it enters a new international organization such as the WTO. Both economists and psychologists have studied negotiation behaviors. More recently, behavioral economics combines game theoretic models and experiments with insights from cognitive and social psychology to show that the sense of justice affects a party’s negotiation positions and tactics. What a party’s own tradition and culture considers to be normal, right or just could “color” the lens that the party uses in assessing both its own negotiation position and those of its opponents. Such “colored” lenses can sometimes bias one’s view (due to genuine belief) and sometimes motivate the party to use local tradition and culture merely as a bargaining chip (due

to a perceived bargaining advantage). Consequently, research on indigenization can also proceed to examine whether the domestic tradition and culture have influenced person's genuine belief about right and wrong or their awareness of using such beliefs as bargaining tools.

- *A perspective of sociology:* Some sociologists (such as the new institutionalists) regard the behaviors of social agents (including governmental organizations) as dependent on the perception of legitimacy due to what they call *embeddedness* and *isomorphism*. Further research on indigenization may continue to explore whether the government officials of a country feel constrained by the existing traditions and social norms of the country when they try to negotiate new international rules or the adoption of the rules of an existing international organization that the country is joining.

- *A perspective of social welfare:* It will be also significant to study the process and outcome of indigenization from a perspective of social welfare, by examining whether in general it will promote the welfare of the international community or primarily help individual countries gain at the expense of others as well as pertinent issues.

## **Acknowledgments**

In writing this dissertation I have benefitted greatly from the guidance, inspiration, and patience shown me by many people.

## CHAPTER 1. REVIEW OF LITERATURE

The exploration of “legal indigenization” of WTO law is not an easy process. Fortunately, some literature on the WTO has covered certain aspects of the process of legal indigenization, even if the main works in that literature do not adopt the term “indigenization.” The topics concentrated on in the relevant literature, as well as the conclusions drawn by numerous observers, have provided guidance and inspiration in the development of this dissertation.

In this chapter, major contributory works relating to the concept or process of legal indigenization are enumerated and examined in two sections – the *Survey of the Key Sources* and the *Analysis of the Key Sources*. The *Survey of the Key Sources* focuses on the main literature that gives some attention to the topics relating to “legal indigenization” and explains the reasons why it matters. This first section is short; its key aim is simply to acquaint the reader with the main contributions to the literature (mainly books) that bear on the subject of this dissertation. For an extended explanation of these contributions, the readers may refer to Appendix 1.1 (directly following this chapter), where some further details appear. Based on the brief introduction in that first section, the second section – the *Analysis of the Key Sources* – actually explains the relevant substantive findings and conclusions reported in these works. These have provided the foundation for this dissertation and have illustrated the need for further research.

### I. Survey of the Key Sources

Many of the key pertinent sources examine (a) the WTO mechanisms and (b) the interaction between the WTO and its Members. These sources provide, in aggregate, a picture of both the possibilities and the willingness for the Members to indigenize WTO law.

#### A. WTO Mechanisms

The literature giving attention to the WTO mechanisms provides us with the background of why WTO law could be legally indigenized. To be specific, the literature focused on a cluster of topics: (1) an overall assessment of the world trading system, (2) certain WTO mechanisms, (3)

the relationship between WTO law and the Members' domestic law, (4) multilateral trade negotiations, (5) the relationship between WTO law and general international law, (6) the principles and approaches of the Members in interpreting WTO agreements, and (7) the status of developing countries in the WTO. Taken together, these all help explain the background of legal indigenization at the multilateral level.

## 1. Overall assessment

The first group of sources in the extensive literature on the WTO institutions deals with nearly all aspects of the WTO regime in order to give readers an overall impression and assessment. Many of the works in this category – all of which are cited and briefly summarized in Appendix 1.1 – are descriptive in character. While some aspects of the descriptions have no direct relevance to the issue of indigenization, they have considerable indirect relevance because they explain the incompleteness of the WTO regime and the overall international legal system into which it fits. This incompleteness leads not only to some serious problems with the WTO – which are explored more below in the *Analysis of the Key Sources* – but also to both the need and the opportunity for WTO member countries to engage in indigenization.

The sources in this category are:

- John H. Jackson, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000).
- William Davey & John H. Jackson ed., *THE FUTURE OF INTERNATIONAL ECONOMIC LAW* (2008).
- Peter-Tobias Stoll & Frank Schorkopf, *WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW* (2006).
- WTO Secretariat, *FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (2000).
- Peter Gallagher, *FIRST TEN YEARS OF THE WTO 1995-2005* (2005).
- T.K. Bhaumik, *WTO: A DISCORDANT ORCHESTRA* (2006).
- Rorden Wilkinson, *WTO: CRISIS AND THE GOVERNANCE OF GLOBAL TRADE* (2006).
- Bernard Hoekman & Petros Mavroidis, *WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* (2007).

- Kym Anderson & Bernard Hoekman ed., WTO'S CORE RULES AND DISCIPLINES (2006).
- Bernard Hoekman & Michel Kosteki, POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM (2009).
- Debra Steger ed., REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE 21<sup>ST</sup> CENTURY (2009).
- Kent Jones, DOHA BLUES (2010).

## 2. On certain mechanisms

Some contributions to the literature narrow their focus on certain mechanisms of the multilateral trading system such as the dispute settlement mechanism, the mechanism of regional trade agreements (RTAs), the antidumping and countervailing systems, and the S&D treatment principles. All of these specific mechanisms have attracted intense attention and scrutiny, especially insofar as they raise issues of sovereignty. For instance, the dispute settlement mechanism is criticized for its alleged violation of state sovereignty and its procedural shortcomings. Likewise, the mechanism of regional trade agreements has promoted criticism, particularly in three respects: its controversial roles in multilateral trading system, the tensions it causes among different levels of governance, and inadequate surveillance from the WTO – have been examined carefully. The literature focusing on these and other specific WTO mechanisms is cited and briefly summarized in Appendix 1.1, and the particular ways in which that literature bears directly on the subject of this dissertation are explored below in the *Analysis of the Key Sources*.

The sources themselves are:

- Matthias Oesch, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003).
- Federico Ortino & Ernst-Ulrich Petersmann ed., WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 (2004).
- Petros Mavroidis & Alan Sykes ed., WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT (2005).
- WTO, HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2004).
- Tomer Brode, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION (2004).
- Rufus Yerxa & Bruce Wilson ed., KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE



FIRST TEN YEARS (2005).

- Yang Guohua, Bryan Mercurio & Li Yongjie, *WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION* (2005).
- Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes ed., *WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* (2006).
- Dan Horovits, Daniel Moulis & Debra Steger ed., *TEN YEARS OF WTO DISPUTE SETTLEMENT* (2007).
- Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes ed., *WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS AND REGIONALISM IN ASIA* (2007).
- Andrew Mitchell, *LEGAL PRINCIPLES IN WTO DISPUTES* (2008).
- Isabelle Van Damme, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (2009).
- Robert Lawrence, *UNITED STATES AND THE WTO DISPUTE SETTLEMENT SYSTEM* (2007).
- James Mathis, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* (2002).
- Lorand Bartels & Federico Ortino ed., *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* (2006).
- Richard Baldwin & Patrick Law ed., *MULTILATERALIZING REGIONALISM* (2009).
- Rafael Leal-Arcas, *INTERNATIONAL TRADE AND INVESTMENT LAW* (2010).

### **3. The WTO and domestic law**

A third group of contributions to the literature examines the vague relationship between the WTO and domestic legal frameworks – by discussing, for example, how WTO agreements and DSB reports function within domestic legal systems. The following two works represent this group of literature:

- Gaetan Verhoosel, *NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY* (2002).
- Sharif Bhuiyan, *NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM* (2007).

### **4. The WTO and international law**

A fourth group of pertinent literature tries to figure out the relationship between WTO law and general international law. Various works cover such issues as the extent to which general

international law should function in justifying or interpreting the WTO agreements, the amount of sovereignty the WTO could “infringe” upon, and the conflicts and coordination between the WTO and other international rules.

A significant focus of this group of works is on the relationship and consistency between international trade law and general international law, international environmental law, and human rights law. In addition, the literature also gives some attention to the sovereign issue in the context of such interaction. Both the interaction between international trade law and other fields of international law and pertinent sovereignty issues provide a further understanding of the process of indigenization.

The works falling into this category include:

- Joost Pauwelyn, *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).
- Bradley Condon, *ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW* (2006).
- Stefan Grillier ed., *AT THE CROSSROADS: THE WORLD TRADING SYSTEM AND THE DOHA ROUND* (2008).
- Petros Mavroidis, *GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY* (2005).
- John Jackson, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006).

## **5. Principles and interpretation of WTO agreements**

A fifth group of contributions to the literature pays attention to legal principles and interpretation of the WTO agreements. The understanding of legal principles established by the organization and the methods of interpreting pertinent agreements constitute an important clue to understanding of legal indigenization. Current literature mainly focuses on how to understand them at the multilateral level, which further prompts us to explore application or understanding at the domestic level.

The following two publications represent this kind of literature:

- Marion Panizzon, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION*

OF LEGITIMATE EXPECTATIONS (2006).

- Markus Gehring & Marie-Claire Segger ed., SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW (2005).

## **6. Design of WTO agreements**

This group of literature gives attention to the design of WTO agreements. Its main purpose is to identify the shortcomings of existing agreements, to find out the gaps between the reality and the future relating to certain trade issues, to explain the rationale behind the agreements, to analyze how these agreements are expected to be implemented, and to elaborate how the agreements should function efficiently. The flaws of existing agreements as well as the gaps between expectations and reality further justify the significance of the topic of this dissertation.

This group of literature includes:

- Melaku Geboye Desta, LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE (2002).
- Jayashree Watal, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES (2001).
- Marc Benitah, LAWS OF SUBSIDIES UNDER THE GATT/WTO SYSTEM (2001).
- Won-Mog Choi, 'LIKE PRODUCTS' IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE (2003).
- WTO Trade in Services Division, HANDBOOK ON THE GATS AGREEMENT (2005).
- Joseph McMahon, WTO AGREEMENT ON AGRICULTURE: A COMMENTARY (2006).
- Alan Sykes, WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY (2006).
- Kyle Bagwell, George Berman & Petros Mavroidis ed., LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE (2010).
- Tania Voon, CULTURAL PRODUCTS AND THE WTO TRADE ORGANIZATION (2007).
- Tracey Epps, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT (2008).
- Simon Schropp, TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION (2009).

## **7. The position of developing countries in the WTO**

A seventh group of contributions to the literature analyzes the position of developing

countries in the WTO legal system. Theoretically, on the one hand, the developing Members have acquired at least special and differential treatment which aims to guarantee them better positions in multilateral trade negotiations and implementation. Practically, on the other hand, they usually complain about the insufficiency of the mechanism with regard to protecting their benefits. The aim of this group of literature is mainly to help the developing countries to find a more advantageous position by taking advantage of existing system. For example, some scholars address how developing countries can benefit from specific WTO articles. The corresponding actions of developing countries reflect their experiences of legal indigenization.

The two works below represent this group of literature:

- Peter Gallagher, *GUIDE TO THE WTO AND DEVELOPING COUNTRIES* (2000).
- Chantal Thomas & Joel Trachtman ed., *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (2009).

## **8. Domestic context**

Foreign relations, cultural divergence, and domestic politics also constitute some influential factors in forming the WTO Members' attitude toward the relationship between domestic enforcement and international trade law. This group of literature provides a broad context of indigenization of WTO law, which is not limited to legal factors only.

This type of literature includes:

- Fiona Smith, *AGRICULTURE AND THE WTO* (2009).
- Walter Mattli & Ngaire Woods ed., *POLITICS OF GLOBAL REGULATION* (2009).
- Rafael Leal-Arcas, *INTERNATIONAL TRADE AND INVESTMENT LAW* (2010).

## **B. International Negotiation and Rule Making**

The process of international trade negotiation and rule making provides the WTO Members with a stage on which some of them can impose their own preferences on others while some have yet to develop their strategies and priorities in international trade.

## **1. Current multilateral negotiations**

This group of works looks into current round of multilateral trade negotiations – the Doha Development Agenda (DDA). The reasons that the DDA is scarcely expected to be concluded in the near future have been explored attentively by the academy. These reasons vary from powerful politics and changing circumstances to declining U.S. leadership and non-trade social values. The works describe the changing context of the world trading system, the expected direction of reforms or improvements of the WTO by availing of the Doha Round, and the strategies as well as the techniques to concluding current trade negotiations. This kind of literature examines the current platform of legal indigenization at the multilateral level.

This category of literature includes:

- Terence P. Stewart, *AFTER DOHA: THE CHANGING ATTITUDE AND IDEAS OF THE NEW WTO ROUND* (2002).
- Ross Buckley ed., *WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE* (2003).
- Sam Laird, David Vanzetti & Santiago Fernandez de Cordoba, *SMOKE AND MIRRORS: MAKING SENSE OF THE WTO INDUSTRIAL TARIFF NEGOTIATIONS* (2006).

## **2. Power of rule-making**

It is not surprising that some leading members, typically the United States and the EU, have played a determinant role in international trade rule-making. Actually, the attention given to the power of rule-making originates from the desire to differentiate the different influence of individual members. This imbalance of power determines that the effect of legal indigenization (especially, the outward direction) will be different among members.

This category of literature includes:

- Ronald Wolf, *TRADE, AID, AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW* (2004).
- Charan Deveraux, Robert Lawrence & Michael Watkins, *CASE STUDIES IN US TRADE NEGOTIATION* (vol. 1, 2006).
- Douglas Irwin, Petros Mavroidis & Alan Sykes, *GENESIS OF THE GATT* (2008).
- Soo Yeon Kim, *POWER AND THE GOVERNANCE OF GLOBAL TRADE* (2010).

### **3. Strategies or priorities**

Because they appear to lack adequate power in trade negotiations or dispute settlement, developing countries turn to addressing appropriate strategies and priorities in international trade negotiation and dispute resolution. This helps account for the surge of literature on developing countries' experience and participation in the WTO. This type of literature aims to guide certain types of countries to develop their strategies and priorities in WTO negotiations and implementation. Although not using the term indigenization, these works have addressed a similar process of indigenization.

This kind of literature includes:

- Giovanni Anania ed., *AGRICULTURAL POLICY REFORM AND THE WTO: WHERE ARE WE HEADING?* (2004).
- Peter Gallagher, Patrick Low & Andrew Stole ed., *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASES STUDIES* (2005).
- Ernst-Ulrich Petersmann ed., *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DOMESTIC GOVERNANCE* (2005).
- Roman Grynberg ed., *WTO AT THE MARGINS: SMALL STATES AND THE MULTILATERAL TRADING SYSTEM* (2006).
- George Bermann & Petros Mavroidis ed., *WTO LAW AND DEVELOPING COUNTRIES* (2007).
- Dominique Njinkeu & Philip English ed., *AFRICAN COUNTRIES IN THE NEW TRADE NEGOTIATIONS* (2008).
- John Odell ed., *NEGOTIATION TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* (2006).
- Donna Lee & Rorden Wilkinson ed., *WTO AFTER HONG KONG* (2007).

#### **C. Domestic Legislation and Policy Making**

In domestic legislation and regional trade agreements, WTO Members can incorporate their own approaches and understanding into the way in which they implement their WTO obligations. Several books examine this phenomenon. Some focus mainly on legislation, some mainly on FTAs, and some on other issues.

## 1. Legislation

This type of literature examines several issues such as the interaction between domestic law and WTO rules, theoretical and practical aspects of an individual member's handling of pertinent WTO rules, comparative analysis of domestic laws in the context of the multilateral system and the ways the members avail of domestic trade legislation to implement their particular trade policies. These works actually have touched on the issue of indigenization in terms of how legislation has been crafted to appeal to their interests, but in most cases the works end without further explorations of supporting forces and factors.

This type of literature includes:

- Carlos Correa, *INTELLECTUAL PROPERTY RIGHTS, THE WTO, AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* (2000).
- Michael Cardwell, Margaret Grossman & Christopher Rodgers ed., *AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO* (2003).
- Federico Ortino, *BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW* (2004).
- Konstantinos Adamantopoulos & Maria Pereyra, *EU ANTISUBSIDY LAW AND PRACTICE* (2007).
- Luca Rubini, *DEFINITION OF SUBSIDY AND STATE AID* (2009).
- Wolfgang Muller, Nicholas Khan & Tibor Scharf, *EC AND WTO ANTI-DUMPING LAW* (2009).
- Jan Hoogmartens, *EC TRADE LAW FOLLOWING CHINA'S ACCESSION TO THE WTO* (2004).
- Edwin Vermulst, *WTO ANTI-DUMPING AGREEMENT: A COMMENTARY* (2005).
- George Bermann & Petros Mavroidis ed., *TRADE AND HUMAN HEALTH AND SAFETY* (2006).
- Koen Byttebier & Kim Van der Bourght ed., *WTO OBLIGATIONS AND OPPORTUNITIES: CHALLENGES OF IMPLEMENTATION* (2007).
- Edward Luck & Michael Doyle ed., *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* (2004).
- Anwarul Hoda & Ashok Gulati, *WTO NEGOTIATIONS ON AGRICULTURE AND DEVELOPING COUNTRIES* (2007).
- Marc Froese, *CANADA AT THE WTO* (2010).

## 2. FTAs

Three areas of the world – namely, Europe, North America, and East Asia – have accumulated experience in regional integration, but in different ways. Several books examine that experience. These works examine, for instance, how the WTO rules are applied to regional trade agreements, the different use of RTA mechanisms within certain WTO members and the contents of certain RTAs, especially those go beyond the WTO rules.

This type of literature includes:

- Yoshi Kodama, *ASIA PACIFIC ECONOMIC INTEGRATION AND THE GATT-WTO REGIME* (2000).
- Mitsuo Matsushita & Dukgeun Ahn ed., *WTO AND EAST ASIA: NEW PERSPECTIVES* (2004).
- J.H.H. Weiler ed., *EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* (2000).
- David Gantz, *REGIONAL TRADE AGREEMENTS* (2009).
- Francis Snyder, *REGIONAL AND GLOBAL REGULATION OF INTERNATIONAL TRADE* (2002).
- Lorand Bartels & Federico Ortino ed., *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* (2006).
- Gary Horlick, *WTO AND NAFTA RULES AND DISPUTE RESOLUTION: SELECTED ESSAYS ON ANTI-DUMPING, SUBSIDIES AND OTHER MEASURES* (2003).

## 3. Domestic (and regional) influence on the international regime

Some new and important literature concentrates on the *attitudes* of individual countries (or a region) that will influence the focuses of or approaches adopted by the international regime, rather the *power* enjoyed by them to control the process or outcome of international rule-making. In the past few years, a new strand of thought emerged. It revolves around the concept of “Eastphalia,” which is briefly expressed as an Asia-centric international system.

The following essays represent this type of literature:

- Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 *IND. J. GLOBAL LEGAL STUD.* 27 (2010).



- Chang-fa Lo, *Values to be Added to an “Eastphalia Order” by the Emerging China*, 17 IND. J. GLOBAL LEGAL STUD. 13 (2010).
- David P. Fidler, *Eastphalia Emerging?: Asia, International Law, and Global Governance*, 17 IND. J. GLOBAL LEGAL STUD. 1 (2010).

#### **D. Participation of Members in Multilateral Disputes Settlement**

The Members’ participation in the WTO dispute settlement mechanism comprises an important feature of their participation in the multilateral trading system more generally. The United States, the EU, Asian countries, and African members could all provide distinct and valuable opinions on how to use this mechanism based on their own experience. Several contributions to pertinent literature illustrate the experiences of individual members in handling trade dispute settlement, which relate also to certain aspect of legal indigenization.

This type of literature includes:

- Gregory Shaffer, Victor Mosoti & Asif Qureshi, *TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM AT THE WTO* (2003).
- Yasuhei Taniguichi, Alan Yanovich & Jan Bohanes ed., *WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* (2007).
- Nicholas Perdikis & Robert Read, *WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES* (2005).
- Charan Deveraux, Robert Lawrence & Michael Watkins, *CASE STUDIES IN US TRADE NEGOTIATION* (vol.2, 2006).
- Chad Bown & Joost Pauwelyn ed., *LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* (2010).

## **II. Analysis of the Key Sources**

The foregoing enumeration of books and other publications – all of which are more fully cited and identified in Appendix 1.1 – reflects the very extensive WTO-specific bibliographical foundation for this dissertation. The aim of the Survey of the Key Surveys was to provide a snapshot of the range and character of works that have been found relevant to the study of the WTO in this dissertation. (Numerous other sources regarding the laws and cultures of China, the

United States, and the EU will of course be cited in Chapters 3, 4, and 5, below, and a broad literature on “indigenization” will be explored in Chapter 2.)

The remainder of this chapter is devoted to providing an analysis of the actual content of the literature surveyed above insofar as it bears on the subject of this dissertation – that is, indigenization and the WTO.

Generally, the pertinent literature demonstrates that some attention from academia has been given to the *possibility* of indigenization of WTO law – by identifying the contractual gaps, discretion of legislation, or the Members’ authorizations. Indeed, some authorities have hinted at the *reality* of some facets of indigenization of WTO law, as appearing in certain negotiating strategies and approaches to trade dispute settlement. However, what little analysis appears along these lines very seldom adopts the same terms and concepts as are used in this dissertation.

It is worth explaining that in the pages that follow, the comments, critiques, and conclusions that are being summarized in order to explore the general landscape of literature that is relevant to this dissertation are not necessarily *my own* view – and indeed many of them definitely are *not*. The summaries below might therefore be read as if each one were preceded with the phrase “[a]ccording to some views expressed in the relevant literature, ...” In some passages, I have included language of that sort as a reminder of this point.

## **A. WTO Mechanisms**

The literature referred to in Section I above provides a broad foundation for constructing a general framework that explains the current status of the WTO. That framework encompasses WTO mechanisms, international trade negotiations, and trade-related action at the national (domestic) level. Perhaps the most widely-discussed of these is the first one: WTO mechanisms.

### **1. Overall assessment**

Much of the commentary on the WTO regime reflects a grim and pessimistic overall assessment. The following paragraphs highlight some observations regarding the challenges that face that regime.

The rapid developments of the world between 1990 and 2000 – which reflect political, economic, and technological changes – brought the WTO to a turning point. The WTO's agenda now includes such issues as how investment and competition laws affect market access, whether differing labour or environmental standards confer a trade advantage and how this should be dealt with, whether taxation and innovation policies constitute a subsidy, whether governments should be allowed to regulate content on the Internet, and how to advance free trade.<sup>16</sup>

The political conflicts that have played out during various WTO ministerial meetings are the inevitable product of the way the organization was created and has since developed. The specific purposes for which multilateral trade regulation was created built into the organization an asymmetry of economic opportunity that has been extended and amplified through time. This asymmetry has come to shape the interaction of member states in such a way that contests over the shape and direction of the trade agenda – and on occasion the collapse of a ministerial meeting – are inevitable. However, rather than significantly disrupting the development of the multilateral trade regulations, the collapse of ministerial meetings may actually have helped move the system forward.<sup>17</sup>

The WTO faces inevitable institutional problems of an organization buffeted by a growing and changing global economy, and it must change and adapt in order to overcome these problems. The main institutional problems, in the eyes of Jones, include lengthy and burdensome accession process, weakening of the so-called green room process,<sup>18</sup> the weak position of developing countries, and unsuccessful cross-agency coordination. The solution, he says, is to strengthen domestic reform in Members, WTO internal reform and policy coherence among

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<sup>16</sup> See generally WTO, FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM (2000) [hereinafter WTO-Millennium].

<sup>17</sup> See generally Rorden Wilkinson, THE WTO: CRISIS AND THE GOVERNANCE OF GLOBAL TRADE (2006) [hereinafter Wilkinson-Governance].

<sup>18</sup> The Green Room refers to a process, rather than a specific location, in which heads of delegation seek consensus informally under the chairmanship of the Director-General. Green Room meetings serve a useful purpose in that their informal nature allows negotiators to explore new approaches to settling difficult issues. Ministerial Green Room consultations deal with the most sensitive political issues — including tariff or subsidy cuts, or the degree of flexibility regarding those cuts. Green Room meetings often run until the early hours of the morning and can stretch out for days. They can also be tense and dramatic settings in which nerves are taut and tempers evident. See [http://www.wto.org/english/tratop\\_e/dda\\_e/meet08\\_org\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/meet08_org_e.htm), last visited January 27, 2011.

international organizations.<sup>19</sup> (Kent Jones, 2010) Institutional reform of the WTO is called for by Steger, in five critical areas: (1) transparency, (2) decision- and rule-making procedures, (3) internal management structures, (4) participation by nongovernmental organizations and civil society, and (5) relationships with regional trade agreements.<sup>20</sup>

The existence of trade policy flexibility leaves room for the Members' manipulation rooted in their own interests. Trade policy flexibility mechanisms are designed to deal with contractual gaps in the WTO system because the organization amounts to an incomplete contract among sovereign countries. The mechanisms are backed up by enforcement instruments which allow for punishment of illegal extra-contractual conduct. After assessing the interrelation between contractual incompleteness, trade policy flexibility mechanisms, contract enforcement, and the WTO Member's willingness to cooperate and to commit to trade liberalization, a reform should be offered to improve the WTO institutions.<sup>21</sup>

## **2. On certain mechanisms**

Studies of the DSB's operations reveal skepticism from the academy on this mechanism. Some concerns arise relating to the aspects of such operations that involve domestic ideologies, practices, or interests of individual members. Some scholars cast their doubts on the DSU's effectiveness in respect of developing countries' participation in this mechanism.

An examination of the DSB's operation in mediation, decision-making, compliance and reparation, anti-dumping cases, SPS cases, and GATS cases – as well as the developing countries' participation – shows that the DSU's effectiveness is under doubt and needs reforms.<sup>22</sup>

WTO panels and the Appellate Body have been too timid in using principles of good faith, due process, proportionality, and S&D treatment, which should play a crucial role in the WTO

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<sup>19</sup> See generally Kent Jones, DOHA BLUES (2010).

<sup>20</sup> See generally Debra Steger ed., REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE 21<sup>ST</sup> CENTURY (2009).

<sup>21</sup> See generally Simon Schropp, TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION (2009).

<sup>22</sup> See generally Dan Horovits, Daniel Moulis & Debra Steger ed., TEN YEARS OF WTO DISPUTE SETTLEMENT (2007).

dispute settlement.<sup>23</sup> Both the emphasis on legal principles *per se* and the specific attention to the principles of good faith and proportionality reflect the civil law tradition.

Damme challenges the DSB's technique of interpreting WTO law and argues that such interpretation should aim to balance the power between (and the interest of) the WTO Members as well as to preserve the integrity of the DSB (and the WTO).<sup>24</sup>

Some experts find that the attitudes among North America, Europe, and the Asia-Pacific region toward the interrelations among multilateral dispute settlement, multilateral trade negotiations, and regional trade agreements are different.<sup>25</sup>

Some scholars discover that the success of the DSB's operations lies in the WTO Members' serious participation in the system and through their respect for the decisions being rendered by the WTO's adjudicating bodies.<sup>26</sup>

Some authorities express their concerns about the relationship between the DSB and national authorities. Generally, for them, the remedies provided by the dispute settlement mechanism for legal obligations under the WTO cannot stop aggressive unilateralism adopted by the WTO members.<sup>27</sup>

Broude expresses his concerns about the DSB as an inherently and structurally powerful judicial body by design, on the grounds that in practice the membership of the WTO has collectively granted the dispute settlement system far greater normative influence than originally prescribed by the WTO agreements, to the point of a political capitulation of governance in many important instances. This gap, between design and practice, form and function, is a product of the unwillingness of the membership of the WTO to fulfill its normative function and to bear the full burden of political decision-making. This reluctance is in turn explained as the

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<sup>23</sup> See generally Andrew Mitchell, *LEGAL PRINCIPLES IN WTO DISPUTES* (2008).

<sup>24</sup> See generally Isabelle Van Damme, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (2009).

<sup>25</sup> See generally Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes ed., *WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* (2007).

<sup>26</sup> See generally Rufus Yerxa & Bruce Wilson ed., *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS* (2005).

<sup>27</sup> See generally Petros Mavroidis, *GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY* (2005).

aggregate outcome of several cumulative motivations that lead the Membership to prefer and even invite judicial decision-making in lieu of the political process envisioned by the WTO agreements. The defining element of governance in the WTO is not, therefore, the enhanced intrinsic power of the dispute settlement system, as regularly assumed by proponents and critics of the WTO alike, but rather the prescriptive remissness of the membership.<sup>28</sup>

### **3. The WTO and domestic law**

It is a bit ironic that the relationship between GATT/WTO law and national legal systems has not yet been clarified, even though the former one has influenced, guided, even constrained the latter ones for over sixty years. Despite the prevailing opinion that the WTO undertakings should be treated as general international legal obligations, opinion is divided on the issue of how much national law is permitted to differ from WTO law, to what extent WTO law is effective domestically, and which areas of national law are subject to the surveillance of WTO law.

The WTO treaties, which contain a set of far-reaching obligations, establish a systemic and constitutional framework of interaction between WTO law and national law. The WTO dispute settlement system operates as an international layer of judicial review of national laws and administrative, judicial, or quasi-judicial measures. Consequently, many of the WTO dispute settlement decisions and rulings relate in different ways to Members' national laws. The WTO is facing an increasingly complex. Challenge of establishing a correct treatment of national law in international law – one that can ensure effectiveness of international rules and promote good governance within nation-state.<sup>29</sup>

The institutional system, the basic principles and the vast variety of rules of the WTO have defined the world's trade relations and also have exercised an enormous impact on both

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<sup>28</sup> See generally Tomer Broude, *INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION* (2004).

<sup>29</sup> See generally Sharif Bhuiyan, *NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM* (2007).

European and national economic law.<sup>30</sup>

The main WTO parameters defining the interface between the WTO and domestic legal orders have been construed to some extent by the WTO adjudicators (panels and Appellate Body). Flaws and weakness, however, have been found in these quasi-judicial solutions. In an attempt to identify a more proper balance between WTO law and regulatory autonomy, an innovative interpretation of the National Treatment obligations are called for as requiring a necessity test, drawing upon compelling arguments from legal, logic and economic theory.<sup>31</sup>

#### **4. The WTO and international law**

Considering that the WTO Members are the ultimate implementers of WTO law as well as other branches of international law, the competing views as to the relationship between the WTO law and international provide multiple choices for the Members in implementing their WTO obligations. The following paragraphs illustrate such competing views.

The WTO agreements constitute the institution's international. At the same time, they are subject, on certain occasions, to the general principles established by other international covenants. The dual legal status of WTO law accounts in part for the uncertain interaction between it and general international law.

The WTO treaties must be construed and applied in the context of international law, which can overrule WTO norms. WTO law must thus be united with other public international law, through a process of both vertical integration (that is, in its relationship to other sub-systems) and horizontal integration (that is, vis-à-vis general international law). Other law, in particular more specific law, must be recognized as capable of overruling WTO law so as to take account of the diversity between WTO members. There is no need to expand the mandate of the WTO as an international organization for the WTO to take account of other non-trade concerns (including those going beyond the exceptions provided for in, for example, GATT Art. XX). The fact that

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<sup>30</sup> See generally Peter-Tobias Stoll & Frank Schorkopf, *WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW* (2006).

<sup>31</sup> See generally Gaetan Verhoose, *NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY* (2002).

the WTO legal system is a part of international law should suffice. That way, the WTO can continue to produce trade norms; other international organizations and conferences can produce other types of norms. Each should stay within its own field of competence, but once it comes to resolving a particular dispute, all relevant and applicable norms must be resorted to – both WTO norms and other norms – in order to settle the dispute “in accordance with international law.”<sup>32</sup>

WTO law, international environmental law and general international law are generally consistent with each other. No law reforms are currently needed to facilitate further harmonization among them. The current WTO rules are adequate to resolve conflicts between the GATT and MEA provisions and to determine the circumstances in which unilateral measures should be permitted. However, WTO jurisprudence would benefit from a more explicit analysis of the way that panel decisions fit into the general framework of international law. This will require further analysis of how the relevant rules of other branches of international law affect the interpretation of WTO law.<sup>33</sup>

The individual members also face the challenges arising from the rapid development of other branches of international law. Therefore, they have to cope with, by themselves, in some cases, the changing long-held assumptions of international law (such as the consent basis of international law norms, equality of nations, restrictive or text-based treaty interpretations and applications, the monopoly of internal national power, and non-interference).<sup>34</sup>

## **5. General principles and interpretation of WTO agreements**

Emerging social values such as sustainable development might shape into new principles against which the WTO agreements must be read. The DSB functions in a sense as an interpreter of the WTO agreements at the international level, but carries out at responsibility unsatisfactorily. The following opinions illustrate the potential challenges that might arise from the interpretation

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<sup>32</sup> See generally Joost Pauwelyn, *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

<sup>33</sup> See generally Bradley Condon, *ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW* (2006).

<sup>34</sup> See generally John Jackson, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006).



of WTO law. These challenges, of course, will invoke diversity among the individual members with regard to fulfill their WTO obligations.

Oesch points out that, the DSB is less consistent in respect of the interpretation of domestic law.<sup>35</sup> Some scholars present a new perspective to interpret WTO agreements – that is, sustainable development. In their view, the concept of sustainable development has influences many aspects of the multilateral trading system, including (1) the growing interest and involvement of the world health community in trade debates, (2) innovations in investment arbitration procedure, (3) the implications of these new trends for transparency and questions of public policy, and (4) the use of the precautionary principle to justify regulations related to uncertain risks. Moreover, the ongoing international trade negotiations are viewed differently by developed and developing country perspectives based on differing perspectives on the concept of “sustainable development.”<sup>36</sup>

Panizzon challenges the inconsistency within the DSB in respect of the application of general principles of law, such as the principle of good faith. Panels and the Appellate Body reports have made different use of it. The Appellate Body has shown itself prepared to apply the principle to WTO provisions only, while Panels use it more freely and substantively, applying good faith to fill lacunae in any of the WTO covered agreements. Additionally, adjudicators use the principle to strike a balance between the obligation to liberalize trade and the right to invoke an exception from trade liberalization for the protection of the environment, culture, public morals, and human life or health. In this way, good faith safeguards the gains of multilateral trade liberalization against disingenuous interests, such as disguised protectionism.<sup>37</sup>

## **6. The design of WTO agreements**

These observations about the design of the WTO-covered agreements and mechanisms, and perceived defects in them, are directly relevant to the thesis of this dissertation – that WTO

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<sup>35</sup> See generally Matthias Oesch, *STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION* (2003).

<sup>36</sup> See generally Markus Gehring & Marie-Claire Segger ed., *SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* (2005).

<sup>37</sup> See generally Marion Panizzon, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS* (2006).

Members have found it necessary to indigenize WTO law in order to overcome such defects.

Multilateral trade rules and disciplines that presumably lie at the heart of the WTO regime – such as non-discrimination rules, reciprocity rules, the notification and surveillance of trade policy, the modalities for negotiating market access, and the conversion of non-tariff trade measures into tariffs – are in fact not without controversy.<sup>38</sup> (For example, the regulatory framework of contingent protection in the WTO – antidumping, countervailing duties, and safeguards – has caused considerable interpretation and implementation issues.<sup>39</sup>

One author, for instance, focuses on the TRIPs Agreement. By examining (1) how that agreement was negotiated at the Uruguay Round, (2) how various countries have implemented it so far, and (3) how the WTO monitors compliance, that author concludes that the developing countries can interpret TRIPs to their best advantage, relying on the “constructive ambiguity” that characterizes the agreement.<sup>40</sup>

Other observers also highlight ambiguities in WTO agreements. One such observer calls for an effective definition of “like products,” as well as other consistent principles, to be established in trade law through interpretation of the WTO agreements.<sup>41</sup> Even official WTO publications acknowledge that differences of understanding of the GATS from its main users create challenges and opportunities for the ongoing GATS negotiations.<sup>42</sup>

The Agreement on Agriculture has also been characterized as a WTO treaty with difficulties a full legal analysis of the obligations imposed by that agreement on the WTO Members, and of the complex history of the Agreement’s negotiation and revision and the controversy surrounding its effect on international development, reveal problems in the Agreement’s

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<sup>38</sup> See generally Kym Anderson & Bernard Hoekman ed., *WTO’S CORE RULES AND DISCIPLINES* (2006).

<sup>39</sup> See generally Kyle Bagwell, George Berman & Petros Mavroidis ed., *LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE* (2010).

<sup>40</sup> See generally Jayashree Watal, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* (2001).

<sup>41</sup> See generally Won-Mog Choi, ‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE (2003).

<sup>42</sup> See generally WTO Trade in Services Division, *HANDBOOK ON THE GATS AGREEMENT* (2005).

accommodation of and impact on developing countries.<sup>43</sup>

Safeguard measures under WTO law are usually justified, although not without controversy, on the basis of economic and legal concerns. There, too, ambiguity exists. The interpretation of the most important requirements of “causation” and “non-attribution” under Article XIX of the GATT and the Agreement on Safeguards has thus far been plagued, according to one observer, by confusion in WTO case law. It is unclear what questions are being asked, let alone how to answer them. The requirement in safeguards law of a finding of “unforeseen developments,” and of a linkage between those developments and the import surge, also raises daunting conceptual and practical issues. The legal uncertainty associated with safeguard measures presents a substantial hurdle for any WTO Member that wishes to use them without fear of successful legal challenge. Safeguard measures in the WTO system thus operate in something of a legal limbo.<sup>44</sup>

The WTO SPS Agreement has also attracted criticism for not striking an appropriate balance between conflicting domestic health protection and trade liberalization objectives. However, although some aspects of the rationale underlying the SPS Agreement’s science-based framework are considered questionable, this provides countries with considerable flexibility to respond to scientific uncertainties and public sentiment.<sup>45</sup>

In sum, numerous observers highlight flaws and ambiguities in the design of WTO agreements. These features tend to permit and even encourage indigenization of the sort that will be explored in Chapter 2.

## **7. The position of developing countries in the WTO**

A theme emerging from the literature surveyed above in Section I is that the position of developing countries in the WTO legal system is somewhat “awkward.” Developing countries should theoretically benefit from S&D treatment given by the WTO agreements. However, the findings of some authorities tell a different story.

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<sup>43</sup> See generally Joseph McMahon, *WTO AGREEMENT ON AGRICULTURE: A COMMENTARY* (2006).

<sup>44</sup> See generally Alan Sykes, *WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY* (2006).

<sup>45</sup> See generally Tracey Epps, *INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO’S SPS AGREEMENT* (2008).

For example, Mathis establishes this finding on his observations of the United States' and the EU's strategies of FTAs, and concludes that such strategies cannot help realize the purpose of the Enabling Clause<sup>46 47</sup>.

## **8. Domestic context**

The significance of domestic contexts with respect to the implementation of WTO agreements has also been highlighted by the following findings. Some scholars point out that whatever the final framework is to be for international trade, the critical decisions about institutional form and content will be decided in an emerging global political arena. By examining the laws and politics in the EU and Asian countries, some experts try to find the domestic roots of this emerging global political arena.<sup>48</sup>

The challenge faced by the WTO does not lie principally in knowing how to improve the multilateral trading system but in summoning the political will of individual members to do it. The peculiar political challenge is that in all countries small vested interest groups will fight far, far harder to avoid being prejudiced by trade liberalization than the average person will fight to benefit from it. When the vested interests are those of multinational corporations or other developed nation constituencies, and the common interests are of the poorer members of developing countries, the power imbalance leads to many of the problems identified by critics.<sup>49</sup>

Similarly, some scholars find out that success or failure of participating in the WTO is strongly influenced by how governments and private sector stakeholders organize themselves at home. When the system is accessed and employed effectively, it can serve the interests of poor and rich countries alike. However, a failure to communicate among interested parties at home often contributes to negative outcomes on the international front. Above all, case studies demonstrate that the WTO creates a framework within which sovereign decision-making can

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<sup>46</sup> The Enabling Clause refers to special and differential treatment under Part IV of GATT.

<sup>47</sup> See generally James Mathis, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* (2002).

<sup>48</sup> See generally Francis Snyder, *REGIONAL AND GLOBAL REGULATION OF INTERNATIONAL TRADE* (2002).

<sup>49</sup> See generally Ross Buckley ed., *WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE* (2003).

unleash important opportunities or undermine the potential benefits flowing from a rules-based international environment that promotes open trade.<sup>50</sup>

## **B. International Negotiation and Rule Making**

The preceding observations, drawn from the literature surveyed in Section I, focuses on a variety of WTO mechanisms and agreements. Many observers have focused attention more narrowly on negotiations and rulemaking in the international trade law regime.

There is hardly any doubt that the creation and evolution of the WTO regime is attributable to the power and willingness of only some, rather all, members. Now, not surprisingly, more and more members are trying to speak with louder voices in the organization. The following findings address (1) how the multilateral trade negotiations have been influenced by the power of rule-making enjoyed by individual members and (2) how the different strategies or priorities of individual members have contributed to increasing discrepancies among them in trade negotiations.

### **1. Current multilateral negotiations**

Generally, the plight of the DDA stimulates or excuses the use of regional and domestic leverage. The DDA's difficulties stem from a number of problems, especially structural issues, now facing the WTO. Trade negotiations are hampered by concerns over the characteristics of "judicial governance" of the WTO, over S&D treatment, negotiating leverage to force compliance, and over the treatment of trade in services.<sup>51</sup>

### **2. The power of rule-making**

From a historical perspective, the United States and the United Kingdom have most heavily influenced the shaping the GATT /WTO.<sup>52</sup> The United States played an especially strong role in GATT negotiations, though power-based bargaining for tariff reductions and other mechanisms

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<sup>50</sup> See generally Peter Gallagher, Patrick Low & Andrew Stole ed., *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASES STUDIES* (2005).

<sup>51</sup> See generally William Davey & John H. Jackson ed., *FUTURE OF INTERNATIONAL ECONOMIC LAW* (2008).

<sup>52</sup> See generally Douglas Irwin, Petros Mavroidis & Alan Sykes, *GENESIS OF THE GATT* (2008).

that catered largely to U.S. domestic politics and European integration.<sup>53</sup>

The United States still takes advantage of opportunities in multilateral trade negotiations to set rules internationally, such as in the TRIPs, the proposed (but aborted) Multilateral Agreement on Investment, China's WTO Accession, and that U.S.-EU Mutual Recognition Agreement.<sup>54</sup>

Through these influences, the WTO spawns legal globalization and, according to some observers, globalization of *western* law. By some accounts, this globalization hastens legal globalization and abrogates national sovereignty over international trade issues.<sup>55</sup>

### **3. Strategies or priorities**

Some experts find that the agricultural negotiations in the DDA has been complicated taking into the facts that domestic and trade policies in the previous ten years across developed and developing countries have evolved greatly and hence have varied the proposals made in the agricultural negotiation regarding market access, export subsidies and domestic support.<sup>56</sup>

Some scholars perceive the efforts from developing countries to form their own strategies and coalition in trade negotiation as well as to influence other participants' belief. (John Odell ed., 2006) Developing countries aims to influence both the process and substance of negotiations. Some other scholars attribute these perceived efforts to a gap between what was expected by developing countries from the WTO and what the WTO does actually for developing countries.<sup>57</sup>

Some experts call for African countries to be aware of their priorities in WTO negotiations, for example, the agriculture and services sector, to acquire more benefits from S&D treatment, to change their negotiating strategies, to strengthen capacity building, to make initiatives to response the TRIPs.<sup>58</sup>

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<sup>53</sup> See generally Soo Yeon Kim, *POWER AND THE GOVERNANCE OF GLOBAL TRADE* (2010).

<sup>54</sup> See generally Charan Deveraux, Robert Lawrence & Michael Watkins, *CASE STUDIES IN US TRADE NEGOTIATION* (vol.2, 2006).

<sup>55</sup> See generally Ronald Wolf, *TRADE, AID, AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW* (2004).

<sup>56</sup> See generally Giovanni Anania ed., *AGRICULTURAL POLICY REFORM AND THE WTO: WHERE ARE WE HEADING?* (2004).

<sup>57</sup> See generally George Bermann & Petros Mavroidis ed., *WTO LAW AND DEVELOPING COUNTRIES* (2007).

<sup>58</sup> See generally Dominique Njinkeu & Philip English ed., *AFRICAN COUNTRIES IN THE NEW TRADE*

In addition to developing countries, developed countries also have their own priorities in trade negotiations, which are largely different from those of the developing countries. For example, some scholars point out that The U.S. trade deficit makes the conclusion of the DDA more difficult.<sup>59</sup> The United States and the EU also have different negotiation parameters within WTO framework such as negotiations regarding digital products.<sup>60</sup>

### **C. Domestic Legislation and Policy Making**

Domestic legal practices within individual members of the WTO have also drawn much attention from the academy. The findings that follow demonstrate how the members incorporated their own political and economic objectives into pertinent domestic legislation on trade and how they address the same interests in their FTA negotiations.

#### **1. Legislation**

Some scholars discover that the agriculture policy and law in the EU as well as Americas have received fundamental impact of both the Agreement on Agriculture and pertinent domestic law and policy.<sup>61</sup>

Horlick concludes that the GATT regulations on antidumping and countervailing duties and the dispute settlement mechanism have been challenged by the U.S. law.<sup>62</sup> Moreover, Hoogmartens discovers that the EU relied on its own responses, instead of multilateral leverages, towards China's accession to the WTO. These responses include typically its application of special safeguard measures and nonmarket methodologies in antidumping investigations. Such application aims to counterbalance of the insecurity of certain EC industries and to balance its

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NEGOTIATIONS (2008).

<sup>59</sup> See generally Donna Lee & Rorden Wilkinson ed., *WTO AFTER HONG KONG* (2007).

<sup>60</sup> See generally Sacha Wunsch-Vincent, *THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS: EC-US PERSPECTIVES* (2006).

<sup>61</sup> See generally Michael Cardwell, Margaret Grossman & Christopher Rodgers ed., *AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO* (2003).

<sup>62</sup> See generally Gary Horlick, *WTO AND NAFTA RULES AND DISPUTE RESOLUTION: SELECTED ESSAYS ON ANTI-DUMPING, SUBSIDIES AND OTHER MEASURES* (2003).

trade deficit with China.<sup>63</sup>

By examining South Korea's compliance behavior with the WTO, some authorities conclude that: (1) the nature of a domestic enforcement mechanism seems to be more influential in determining compliance behavior than the degree of institutionalization of the relevant international regime; (2) on some issues, cultural underpinnings and the patterns of political socialization can be an important factor in shaping compliance and enforcement behavior of an individual member; (3) compliance behavior cannot be separated from the political calculus of contending actor; and (4) compliance with international regimes should be understood in an iterated fashion rather than by a snapshot approach.

The above observations present, in turn, several policy prescriptions to the WTO, some of which relate to the topic of this dissertation. These pertinent prescriptions include: (1) international organizations need to enhance their enforcement mechanisms with clearly defined incentives and disincentives; (2) international organizations need to pay constant attention to the characteristics of the enforcement gap in individual countries; and (3) international organizations should take into account the social and cultural contexts of compliance efforts.<sup>64</sup>

Some scholars observe the differences between WTO agreements and pertinent domestic laws. For example, although the EU terminologically follows faithfully the SCM Agreement in defining the concepts of "subsidy" and "specificity" and specifying the criteria for calculating countervailing duties, its Basic Regulation still provides some significant differences in EU countervailing law and those of the SCM.<sup>65</sup> Furthermore, in "domestic" legislation, the EU adopts the concept of state aid which is similar to subsidy but easy to cause misunderstanding or disputes. This also led to a problem of the notion of subsidy.<sup>66</sup>

Froeses casts doubt on the WTO's capability to trigger changes of domestic policies within individual members. He argues that the WTO cannot punish countries that do not adhere fully to

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<sup>63</sup> See generally Jan Hoogmartens, *EC TRADE LAW FOLLOWING CHINA'S ACCESSION TO THE WTO* (2004).

<sup>64</sup> See generally Edward Luck & Michael Doyle ed., *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* (2004).

<sup>65</sup> See generally Konstantinos Adamantopoulos & Maria Pereyra, *EU ANTISUBSIDY LAW AND PRACTICE* (2007).

<sup>66</sup> See generally Luca Rubini, *DEFINITION OF SUBSIDY AND STATE AID* (2009).



international trade agreements. Reputation matters a great deal in the multilateral trading system. Dispute settlement did not lead to policy change. For example, although the federal government is in charge of Canada's external relations, such as multilateral representation, the provinces set natural resource policy in their own jurisdictions. Cases analysis suggests that the WTO has less direct influence on policy than domestic groups. Power is a significant and illusive variable in Canada's network of bargains. Relational power (to get others to do what you want them to do) and structural power (to set the rules of the game).<sup>67</sup>

## **2. FTAs**

Some scholars point out that the FTAs are outcomes of the interplay of various political, policy, economic and legal factors. The U.S., EU and Asian RTAs could all be examined from these perspectives.<sup>68</sup> The experience of East Asian countries in the WTO system provides these countries a particular perspective to see their regional economic integration as well as the WTO issues.<sup>69</sup> Furthermore, it is perceived that FTAs concluded by the United States and the EU have been employed by these members to promote changes in partners' national laws and policies.<sup>70</sup>

Some experts even argue that African countries, developing countries, Asia-Pacific countries should adopt different attitude towards concluding FTAs. Some argue that the multilateral trading system has proved ineffectual in the surveillance of regional agreements. Some others, however, hold that only multilateral system can response to the proliferation of RTAs.<sup>71</sup>

## **3. Domestic (and regional) influence on the international regime**

As surveyed in Section I, a new strand of thought emerged in the past few years, which focuses on the influences of domestic (and regional) influences from Asian countries on the international regime – which is described as “Eastphalia.” This strand provides a new

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<sup>67</sup> See generally Marc Froese, *CANADA AT THE WTO* (2010).

<sup>68</sup> See generally David Gantz, *REGIONAL TRADE AGREEMENTS* (2009).

<sup>69</sup> See generally Mitsuo Matsushita & Dukgeun Ahn ed., *WTO AND EAST ASIA: NEW PERSPECTIVES* (2004).

<sup>70</sup> See generally David Gantz, *REGIONAL TRADE AGREEMENTS* (2009).

<sup>71</sup> See generally Richard Baldwin & Patrick Law ed., *MULTILATERALIZING REGIONALISM* (2009).

perspective to study the interaction between international regime and domestic regime. As Ginsberg defines it, Westphalia stands for principles of mutual noninterference, and emphasis on sovereignty, and formal equality of states. Eastphalia will emphasize similar structures, putting an end to the brief interlude of European universalism and global constitutionalism that intensified after the Second World War. He observes that Asian states have stood for application of relatively conservative principles to guide international order, principles oddly reminiscent of Westphalia. If this approach represents an enduring set of commitments, an Asian-centric world would likely emphasize a return to classical principles of state sovereignty and noninterference at the expense of human rights.<sup>72</sup>

#### **D. Participation of Members in Multilateral Disputes Settlement**

How to participate in the dispute settlement mechanism directly reflects an individual members' capacity in respect of multilateral regime. The literature finds that some leading Members have accumulated valuable experience and developed feasible strategies in trade dispute resolution. By contrast, some other countries still have difficulties utilizing the DSU. Findings of the literature surveyed above demonstrate that the capacity to make use of the dispute settlement mechanism varies among the members.

For example, a study on trade-related disputes between the United States and the EU testifies to the fact that the political economy of protection still exists in the WTO framework and challenges the efficacy of the WTO dispute settlement mechanism.<sup>73</sup> Furthermore, the United States adopted different strategies in trade dispute settlement.<sup>74</sup> By contrast, developing countries are in a bad need for their own strategies to participate in the WTO dispute settlement system.<sup>75</sup> The effectiveness of retaliation measures differs within WTO members, which

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<sup>72</sup> See generally Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 *Ind. J. Global Legal Stud.* 27 (2010).

<sup>73</sup> See generally Nicholas Perdakis & Robert Read, *WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES* (2005).

<sup>74</sup> See generally Charan Deveraux, Robert Lawrence & Michael Watkins, *CASE STUDIES IN US TRADE NEGOTIATION* (vol.2, 2006).

<sup>75</sup> See generally Gregory Shaffer, Victor Mosoti & Asif Qureshi, *TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM AT THE WTO* (2003).

manifests that the members have adopted different strategies in using retaliation measures.<sup>76</sup>

The analysis of the surveyed literature, on the one hand, shows that the international trading system, although having been strengthened significantly in the past decades, is not strong enough to prevent individual members from relying on alternative or supplementary approaches with regard to their participation in multilateral trade relations. On the other hand, an examination of the WTO's operations at the domestic level demonstrates that domestic contexts within individual members have manifest the Members' effort to incorporate their own political or economic interests into their implementation of WTO obligations, even if such incorporation might undermine the mandates of the multilateral trading system.

## Summary

The broad literature on the WTO regime, as surveyed in Section I above, provides a solid foundation for exploring the theme of this dissertation. The examination in Section II of the pertinent *content* revealed in that broad literature has particularly important features. An overriding feature, of course, is that opinions differ. Some observers emphasize the achievements of the DSB, the adequate coverage of the WTO agreements, and the efficiency of the WTO's surveillance over RTAs. This variety of views emerging from the review of literature undertaken in this chapter tends to confirm the (intended) objectivity of the review. However, among the many commentators who emphasize the difficulties and failings of the current international trade law system, these themes dominate:

- The significance of the theme of this dissertation – that is, the legal indigenization of WTO law in its Members – is verified by the literature on both the WTO mechanisms and the interaction between the WTO and its Members. The defects and contractual gaps in the WTO mechanisms provide the possibility for the WTO Members to incorporate their own understandings of WTO law and preferred approaches to implementing WTO obligations. The interaction between the WTO and its Members demonstrates the willingness and even

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<sup>76</sup> See generally Chad Bown & Joost Pauwelyn ed., *LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* (2010).

the practices of the latter to incorporate their preferred understanding or approaches regarding international issues.

- The capacity, degree, willingness, and approaches to incorporating their own preferred understandings and approaches in their WTO participation vary among different Members due to various domestic elements.

Despite the above findings, the existing literature has not addressed certain crucial facets. Principal among them is this: in addition to the *contemporary political and economic interests* of an individual WTO member, what is the role of *legal tradition and culture* in shaping its participation in the WTO system? Starting from this facet of insufficiency in the literature, two further questions arise accordingly:

- How will the legal tradition and culture of an individual member influence the WTO's operations at the multilateral level?
- How will the legal tradition and culture of an individual member influence the WTO's operations at the domestic level?

In sum, although the current state of the literature on the WTO regime is consistent with the underlying assumption of this dissertation – that WTO Members can and do engage in legal indigenization (of the sort to be explored more fully in Chapter 2), the literature does not in fact explore this issue directly, and it seems to have failed entirely so far to address it from the perspective being emphasized here – that is, by examining whether and how a WTO member's participation in the multilateral trading regime is influenced by its legal tradition and culture.

## Appendix 1.1

(Pertinent passages in main text are found largely in subsection IA1 of Chapter 1)

### Extended Survey of Key Literature

#### A. WTO Mechanisms

##### 1. Overall assessment

- John H. Jackson, *JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000).

It contains a collection of essays written by John H. Jackson during the previous four decades. Its comprehensive coverage improves the understanding of the whole trading system.

- William Davey & John H. Jackson ed., *FUTURE OF INTERNATIONAL ECONOMIC LAW* (2008).

The essays contained in this work examine various issues confronting the international economic regime today, and cover a wide range of international economic institutions such as the IMF, the World Bank, and the WTO. They pay particular attention to examining the WTO and its regulatory scope, its systemic and structural deficiencies, its role in development and in liberalizing trade in services, and its tense relationship to regionalism and to trade-related issues such as environment, competition and dispute settlement in the field of investment.

- Peter-Tobias Stoll & Frank Schorkopf, *WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW* (2006).

The book describes the WTO's institutional system, basic principles, and various rules. It aims at clarifying the structure and general concepts within the multilateral trading system. It gives special notice to the controversial WTO rules and tries to give a unified interpretation.

- WTO Secretariat, *FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (2000).

The book takes a fresh look at the future of the global trading system and gives a fascinating analysis of the new trade agenda.

- Peter Gallagher, *FIRST TEN YEARS OF THE WTO 1995-2005* (2005).

The book covers the principal activities of the WTO as the successor to the GATT as well as the steps taken by the organization to establish a global trading system.

- T.K. Bhaumik, *WTO: A DISCORDANT ORCHESTRA* (2006).

The work recapitulates all the interesting events and developments that the world has witnessed on the trade front since the establishment of the GATT back in 1947 until it was replaced by the WTO.

- Rorden Wilkinson, *WTO: CRISIS AND THE GOVERNANCE OF GLOBAL TRADE* (2006).

The book explores the reasons for the collapse of the Ministerial Meetings held within the WTO (as in Seattle in 1999 and Cancun in 2003) and the political conflicts that arose therein.

- Bernard Hoekman & Petros Mavroidis, *WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* (2007).

The observations provide an overview of the WTO's history, structure and policies, as well as a discussion of the future of the organization. It also addresses the criticisms directed toward the WTO and assesses their validity.

- Kym Anderson & Bernard Hoekman ed., *WTO'S CORE RULES AND DISCIPLINES* (2006).

The book *WTO's Core Rules and Disciplines* (Kym Anderson & Bernard Hoekman ed., 2006) collects some excellent papers that provide an overview of the WTO rules and disciplines from a historical perspective and addresses some current and future issues that confront the multilateral trading system. The first volume of this work focuses on the need for and the genesis of multilateral trade rules and disciplines, and examines the core nondiscrimination rules. The second volume looks into the reciprocity rule, the notification and surveillance mechanism regarding trade policy, the modalities for negotiating market access, and the difficulty in converting non-tariff trade measures into tariffs.

- Bernard Hoekman & Michel Kostecki, *POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* (2009).

The aim of this work is to explain how the WTO functions, why the GATT had been very successful in reducing tariffs, and why it has proven much more difficult to expand the reach of

multilateral disciplines to domestic policies impacting on trade under the WTO regime.

- Debra Steger ed., *REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE 21<sup>ST</sup> CENTURY* (2009).

The book explains why institutional reform of the WTO is necessary at this so-called critical juncture in world history, and provides innovative and practical proposals for modernizing the WTO to respond to the challenges of the twenty-first century.

- Kent Jones, *DOHA BLUES* (2010).

Kent Jones points out that all the issues faced by the WTO could be attributed to its institutional problems.

## **2. On certain mechanisms**

- Matthias Oesch, *STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION* (2003).

The book addresses, in the first place, the tense relationship that exists between international interdependence and national sovereignty which challenges the legitimacy of the WTO's dispute settlement mechanism. The book then examines the notion of standards of review as one of the crucial elements in shaping the balance of power and responsibility of the DSB for decisions on factual and legal issues. The current status of adjudicative practices emerging in panel and Appellate Body reports is then analyzed, showing the evolution of, and the inconsistencies amongst, the relevant DSB cases. The operation of the DSB reflects the controversial aspects of the relationship between WTO law and the Members' domestic law.

- Federico Ortino & Ernst-Ulrich Petersmann ed., *WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* (2004).

The essays covers both legislative and judicial activities encompassed by the WTO dispute settlement system, and challenges the legitimacy and foundation of the DSB's function.

- Petros Mavroidis & Alan Sykes ed., *WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT* (2005).

The work brings together some papers evaluating various aspects of the dispute settlement mechanism, such as its scope and function of the dispute resolution system, its relationship with national authorities, the remedies it offers for breach of WTO obligations, and the role of

unilateralism in enforcing the GATT commitments.

- WTO, HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2004).

The work tries to explain all the elements of the dispute settlement procedure, starting from initiating a case through implementing a final decision, along with pointing out some flaws of the mechanism.

- Tomer Broude, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION (2004).

The author overviews the operation of the WTO dispute settlement system.

- Rufus Yerxa & Bruce Wilson ed., KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS (2005).

The contributors provide insights into how the system has been operated in practice and how the lessons of its operation of the first decade can be applied to make the system even more successful in the years to come.

- Yang Guohua, Bryan Mercurio & Li Yongjie, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION (2005).

Through article-by-article interpretation of the DSU, the work analyses how panels and the Appellate Body have interpreted the DSU provisions. The authors provide detailed analysis on each article of the DSU, with commentary on how panel and Appellate Body reports and arbitral awards affect the interpretation and application of various DSU provisions.

- Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes ed., WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM (2006).

The book gives some comments on the operation of the dispute settlement mechanism and its relationship with multilateral trade negotiations.

- Dan Horovits, Daniel Moulis & Debra Steger ed., TEN YEARS OF WTO DISPUTE SETTLEMENT (2007).

The essays give analyses on jurisdiction, interpretation and accommodation of the WTO laws from the perspective of dispute settlement.

- Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes ed., WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS AND REGIONALISM IN ASIA (2007).



The book examines the issues of dispute settlement, multilateral negotiations, regional integration, and the interaction among them. In addition, some of its contributors focus their attention on the Asia-Pacific region, its participation in the WTO dispute settlement and negotiation mechanisms and recent trends within it towards greater regional integration.

- Andrew Mitchell, *LEGAL PRINCIPLES IN WTO DISPUTES* (2008).

In this book, the author tries to establish a framework for addressing key issues of the dispute settlement mechanism. These issues include legal basis of applying a given principle, whether this given principle is being applied in an interpretative manner or as applicable law, and the meaning of the principle in public international law. The adoption of such a framework should allay fears and misconceptions about the application of WTO principles and ensure that they are applied in a justifiable manner, so as to improve the quality of applied dispute settlement.

- Isabelle Van Damme, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (2009).

The work analyzes how the Appellate Body uses particular principles of general international law in interpreting the WTO-covered agreements.

- Robert Lawrence, *UNITED STATES AND THE WTO DISPUTE SETTLEMENT SYSTEM* (2007).

The author summarizes the successes of the WTO since its creation in 1995 and argues that radical changes to the system are ill-advised. Lawrence nonetheless suggests several areas for reform, from steps that require multilateral negotiations (such as improving opportunities for non-state actor participation in and enhancing transparency of the process) to changes the United States could make in its own behavior.

- James Mathis, *REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* (2002).

The author discusses (1) whether RTAs are “stepping stones” to a world of freer trade, and (2) whether the WTO Members remain unsettled on a criterion for determining the compatibility of agreements with the multilateral trading system. This book addresses legal aspects of GATT Article XXIV and its “internal” trade requirements as they define the WTO gateway for regional

trade agreements.

- Lorand Bartels & Federico Ortino ed., *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* (2006).

The essays focus on problematic relations between regional trade agreements and the WTO system.

- Richard Baldwin & Patrick Law ed., *MULTILATERALIZING REGIONALISM* (2009).

In the book, the mechanism of regional agreements covers under examination in the context of multilateral trading system.

- Rafael Leal-Arcas, *INTERNATIONAL TRADE AND INVESTMENT LAW* (2010).

The tensions among three levels of governance – multilateral, regional, and bilateral – in the global political economy are discussed in the book.

### **3. The WTO and domestic law**

- Gaetan Verhoosel, *NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY* (2002).

The author brings together the main WTO parameters defining the interface between the WTO and domestic legal orders in an integrated analytical framework, and examines how WTO adjudicators – panels and the Appellate Body – have construed those rules. The book points out the vagueness of the relationship between WTO law and domestic law.

- Sharif Bhuiyan, *NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM* (2007).

The book examines also the relationship between WTO law and national laws of the WTO Members.

### **4. The WTO and international law**

- Joost Pauwelyn, *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

The observations target the question of how trade agreements interact with human rights or environmental protection. That work also examines the relationship between international trade

law and general international law.

- Bradly Condon, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW (2006).

The author examines how WTO law can contribute to achieving consistency among general international law, international environmental law and international trade law and to avoiding conflicts between trade liberalization and global environmental protection.

- Stefan Grillier ed., AT THE CROSSROADS: THE WORLD TRADING SYSTEM AND THE DOHA ROUND (2008).

The book discusses both fundamental issues of world trade law – such as its position in the system of public international law and topics of legitimacy and democratic control – and some practical facets of the DDA.

- Petros Mavroidis, GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY (2005).

The work explains the amount of sovereignty that nations lose by joining the World Trade Organization.

- John Jackson, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006).

The book discusses also the interface between WTO law and general international law, giving much attention to the sovereignty issue.

## **5. Principles and interpretation of WTO agreements**

- Marion Panizzon, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS (2006).

It accounts for what the principle of good faith stands for in international trade law. The book describes how, why, and when the concept of good faith bridges WTO agreements with public international law.

- Markus Gehring & Marie-Claire Segger ed., SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW (2005).

The work interprets, from the perspective of sustainable development, some developments in WTO negotiations and recent decisions of the WTO Appellate Body. It also surveys relevant

developments in trade and economic agreements at the regional level. Its constituent essays focus on sustainable development aspects of trade negotiations regarding the Singapore Issues (investment, competition, trade facilitation, and government procurement), intellectual property rights, investment arbitration, and the linkage between the WTO and multilateral environmental accords. The significance of this collection lies in that it analyzes comprehensive trade issues from a perspective of sustainable development.

## **6. Design of WTO agreements**

- Melaku Geboye Desta, *LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE* (2002).

The author analyses the reality and future prospects of global trade in agricultural products. It seeks to explain the rationale behind the exemption of agricultural trade from the overall international trade regime – by examining a variety of domestic policy reasons that generate this crucial counter-current to the general sweep of trade liberalization. This book identifies defects in the Agreement of Agriculture as well as the Members' responses thereto.

- Jayashree Watal, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* (2001).

The book provides a detailed account of (1) how the TRIPs was negotiated at the Uruguay Round, (2) how various countries have implemented it so far, and (3) how the WTO monitors compliance. It also reveals how the WTO dispute settlement mechanism has worked to date in cases involving the TRIPs, and how the DSB is likely to deal with new pertinent disputes that will arise. Most importantly, it explains how developing countries can interpret the TRIPs to their best advantage, and how they will ensure that the “constructive ambiguity” that characterizes the agreement remains flexible.

- Marc Benitah, *LAWS OF SUBSIDIES UNDER THE GATT/WTO SYSTEM* (2001).

The aim of this book is to alter our understanding of subsidies in international economic law. The significance of this book lies in the particular attention it gives to the flaws existing in the Agreement of Subsidies and Countervailing Measures (ASCM).

- Won-Mog Choi, ‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW: TOWARDS A

## CONSISTENT GATT/WTO JURISPRUDENCE (2003).

The work focuses on a frequently-used concept of “like product” in the WTO-covered agreements, pointing out the inconsistency in understanding and using the concept within the WTO legal framework.

- WTO Trade in Services Division, HANDBOOK ON THE GATS AGREEMENT (2005).

The publication aims to provide a better understanding of the GATS as well as the challenges and opportunities of the ongoing negotiations relating to it.

- Joseph McMahon, WTO AGREEMENT ON AGRICULTURE: A COMMENTARY (2006).

It provides a comprehensive legal analysis of the obligations imposed by the Agreement on Agriculture and the complex history of the Agreement’s negotiation, its revision, and its effect on international development. The book’s commentary is structured around three areas of reform initiated by the Agreement: market access, domestic support, and export competition.

- Alan Sykes, WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY (2006).

The author reviews the literature in the economic field bearing on the soundness of safeguard policies. It also addresses the complex legal issues relating to the constraints on safeguard measures under WTO law, and it offers a thorough discussion and critical analysis of pertinent WTO disputes.

- Kyle Bagwell, George Berman & Petros Mavroidis ed., LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE (2010).

The essays review the regulatory framework of contingent protection in the WTO regime – antidumping, countervailing duties, and safeguard measures.

- Tania Voon, CULTURAL PRODUCTS AND THE WTO TRADE ORGANIZATION (2007).

The book examines how WTO rules apply to “cultural products” such as film, radio, music, and books. This book explains the current legal regime before proposing reforms aiming to better balance different objectives among the Members in respect of cultural products.

- Tracey Epps, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO’S SPS AGREEMENT (2008).

The author provides a comprehensive analysis of the intersection between international

trade law and domestic policy from the prospective of health protection.

- Simon Schropp, *TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION* (2009).

The author offers a legal and economic analysis of contractual escape and punishment in the WTO. It assesses the interrelation among contractual incompleteness, trade policy flexibility mechanisms, contract enforcement, and WTO Members' willingness to co-operate and to commit to trade liberalization.

## **7. The position of developing countries in the WTO**

- Peter Gallagher, *GUIDE TO THE WTO AND DEVELOPING COUNTRIES* (2000).

The book addresses how developing countries can benefit from special WTO articles relating to such issues such as market access to developed country markets with respect to all major commodities and services, the dispute settlement process, trade policy review, foreign direct investment, environmental and labor standards, and technical assistance. The book also offers the readers case studies on how some developing-country members of the WTO (Uganda, India, and Côte d'Ivoire) are making progress in working with the obligations and the benefits provided by the WTO agreements.

- Chantal Thomas & Joel Trachtman ed., *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (2009).

Various essays evaluate the general situation of developing countries within the WTO, examine market access policies and competition law within these countries, and discuss their arrangements with international financial institutions, capacity to litigate, and level of participation in WTO dispute settlements mechanism.

## **8. Domestic context**

- Fiona Smith, *AGRICULTURE AND THE WTO* (2009).

The author challenges the orthodoxy of international agricultural trade regulations and presents a conceptual method for understanding the Agreement on Agriculture in a context of "cultural divergence."

- Walter Mattli & Ngaire Woods ed., *POLITICS OF GLOBAL REGULATION* (2009).

The book examines systematically how and why the hijacking of governments by special interests or small groups of powerful firms or “regulatory capture” happens, and how it can be averted.

- Rafael Leal-Arcas, *INTERNATIONAL TRADE AND INVESTMENT LAW* (2010).

The author examines international trade and investment law at various levels of governance, including unilateral, bilateral, regional, and multilateral arrangements and gives special attention to the foreign relations of the European Union.

## **B. International Negotiation and Rule Making**

### **1. Current multilateral negotiations**

- Terence P. Stewart, *AFTER DOHA: THE CHANGING ATTITUDE AND IDEAS OF THE NEW WTO ROUND* (2002).

The author identifies major elements of the upcoming negotiations and reviews the major decisions taken in Doha. This book describes the changing context of the world trading system and the evolving attitude of the WTO members.

- Ross Buckley ed., *WTO AND THE DOHA ROUND: THE CHANGING FACE OF WORLD TRADE* (2003).

This book examines various ways that the WTO might be reformed or improved and the chances of success in the Doha Round thus enhanced. The challenge brought by a changing world must be met to avoid sliding backwards into a less interdependent, and far poorer, world. The specific issues researched and analyzed here include: the U.S.-led return to a unilateralist and interventionist approach to global problems; the importance of the rules-based WTO system to developing nations as a crucial alternative to power politics; the failure to achieve enhanced access to developed world markets for agricultural products, textiles, clothing, and footwear; the relevance of the GATS and the TRIPs to the developing world; internal WTO governance issues, including the important role of the Secretariat as negotiator and mediator; the implementation phase of the dispute settlement understanding; the continuing resistance to linking trade and environment; the place of human rights in the international trading system; and the likely impact

of the double scourge of AIDS and terrorism on flows of trade, capital, people, and knowledge.

- Sam Laird, David Vanzetti & Santiago Fernandez de Cordoba, *SMOKE AND MIRRORS: MAKING SENSE OF THE WTO INDUSTRIAL TARIFF NEGOTIATIONS* (2006).

The book also addresses the issue of concluding the Doha Round negotiations. This book demonstrates the academic focus on the strategies rather than the techniques to concluding current trade negotiations.

## **2. Power of rule-making**

- Ronald Wolf, *TRADE, AID, AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW* (2004).

The work examines the relationship between trade globalization and globalization of western law, admitting the fact that western law plays a dominant role in shaping international trade law.

- Charan Deveraux, Robert Lawrence & Michael Watkins, *CASE STUDIES IN US TRADE NEGOTIATION* (vol. 1, 2006).

The book reviews how the United States makes international trade rules according to its own preferences during trade negotiations.

- Douglas Irwin, Petros Mavroidis & Alan Sykes, *GENESIS OF THE GATT* (2008).

The contributors examine the motivations and contributions of the United States and the United Kingdom as well as the relatively small role that other countries played in creating the GATT.

- Soo Yeon Kim, *POWER AND THE GOVERNANCE OF GLOBAL TRADE* (2010).

Soo Yeon Kim evaluates the accountability of the WTO from the perspective of power-based bargaining led by the United States and the EU in *Power and the Governance of Global Trade* (Soo Yeon Kim, 2010).

## **3. Strategies or priorities**

- Giovanni Anania ed., *AGRICULTURAL POLICY REFORM AND THE WTO: WHERE ARE WE HEADING?* (2004).



The contributors deal with a broad range of topics regarding the strategies and priorities of the WTO Members with respect to their participation in the multilateral trade regime, including the evolution of domestic trade policies in the previous ten years across developed and developing countries. It also explores: (1) the proposals made in agricultural trade negotiations regarding market access, export subsidies, and domestic support; and (2) new issues emergent in agricultural trade negotiations (including the interaction between national regulatory systems and the international trade regime, intellectual property rights protection, food safety, and antidumping trade protection). Finally, the book discusses the future of international trade relations – in particular, the implications of enforcing domestic regulations to ensure compliance with international rules.

- Peter Gallagher, Patrick Low & Andrew Stole ed., *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASES STUDIES* (2005).

The reports in this publication document disparate experiences among a large number of economies to address the challenges of participating in the WTO.

- Ernst-Ulrich Petersmann ed., *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DOMESTIC GOVERNANCE* (2005).

The book provides discussion and policy recommendations submitted by leading WTO negotiators and policy-makers, as well as the analyses submitted by economists, political scientists, and trade lawyers on the Doha Round negotiations. Over 30 contributors explore the complexity of the world trading system and of the WTO negotiations from a multidisciplinary (political, economic, and legal) perspective.

- Roman Grynberg ed., *WTO AT THE MARGINS: SMALL STATES AND THE MULTILATERAL TRADING SYSTEM* (2006).

The book aims to document and explain almost ten years of experiences of small states with the WTO. It takes an evidential approach to explain the features of trade and economic development in small states. It then highlights the issues of concern to these states in relation to negotiations at the WTO. The experience of the African, Caribbean and Pacific (ACP) countries with the WTO dispute settlement mechanism is discussed, and the book ends with a discussion of key negotiating issues for the small states as well as means of facilitating trade reform.

- George Bermann & Petros Mavroidis ed., *WTO LAW AND DEVELOPING COUNTRIES* (2007).

The purpose of this work is to examine different aspects of WTO law and how developing countries are reacting to the Doha Development Round since 2001. This book also examines the differences between what developing countries require and what they can expect from the WTO.

- Dominique Njinkeu & Philip English ed., *AFRICAN COUNTRIES IN THE NEW TRADE NEGOTIATIONS* (2008).

In this publication, scholars discuss the African priorities in WTO negotiations.

- John Odell ed., *NEGOTIATION TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* (2006).

The book sheds light on three aspects of trade negotiations: the strategies developing countries use, how they form coalitions, and how they learn from and influence other participants' beliefs.

- Donna Lee & Rorden Wilkinson ed., *WTO AFTER HONG KONG* (2007).

In this work, the contributors address different impacts of the various participants – such as developing countries, the United States, the EU, and the G20 (the Group of Twenty Finance Ministers and Central Bank Governors) – in the DDA negotiations.

## **C. Domestic Legislation and Policy Making**

### **1. Legislation**

- Carlos Correa, *INTELLECTUAL PROPERTY RIGHTS, THE WTO, AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* (2000).

The book sheds light on domestic trade law and policy regarding IPR in developing countries.

- Michael Cardwell, Margaret Grossman & Christopher Rodgers ed., *AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO* (2003).

The essays address the interface between domestic law, agricultural policy reform, and the WTO mechanism, and the book brings together some scholarship in the areas of international trade law, agricultural law and policy, and environmental law.

- Federico Ortino, *BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW* (2004).

The author provides an in-depth analysis of core legal concepts characterizing the two most prominent efforts in the regulation of international trade – that is, trade liberalization in the WTO and the EU. From a comparative perspective, this study offers a fresh look at the principles underlying the basic rules of international trade law, such as the prohibition of border measures, the principle of nondiscrimination on grounds of nationality, and the principle of reasonableness.

- Konstantinos Adamantopoulos & Maria Pereyra, *EU ANTISUBSIDY LAW AND PRACTICE* (2007).

The book provides clear guidance on legal and practical considerations surrounding the European Commission's handling of anti-subsidy proceedings as well as pertinent WTO rules.

- Luca Rubini, *DEFINITION OF SUBSIDY AND STATE AID* (2009).

The book presents a conceptual analysis of the definitions of state aid and subsidy within EC and WTO trade regimes. It provides a comparative analysis of the regulations on subsidy in both systems, examining the coherence of the conceptual understanding of subsidy and the grounds for legitimate state intervention.

- Wolfgang Muller, Nicholas Khan & Tibor Scharf, *EC AND WTO ANTI-DUMPING LAW* (2009).

The authors address overall aspects of the EC anti-dumping regulation and makes extensive comparison with the WTO Agreement on Antidumping (formally the Agreement on Implementation of Article VI of GATT 1994).

- Jan Hoogmartens, *EC TRADE LAW FOLLOWING CHINA'S ACCESSION TO THE WTO* (2004).

The book clearly points the way to an equitable resolution of complex problems raised from the friction between China's economic regime and the EC trade policy instruments, such as China's unfinished legal and economic reforms, the danger that the EC may develop an abusive protectionist stance, the challenge posed to the EC by increased Chinese competition, the persistence of Chinese state-owned enterprises, the absence of a satisfactory methodology to deal with the Chinese variant of a nonmarket economy, the possible adjustment of EC

antidumping regulations vis-à-vis China, emergency safeguards, the role of the rule of law in trade regulation, and the translatability of Western social and political institutions.

- Edwin Vermulst, *WTO ANTI-DUMPING AGREEMENT: A COMMENTARY* (2005).

The aim of this book is to provide an analytical overview of the WTO Anti-Dumping Agreement, which is often perceived as the most technical and controversial WTO agreement. The book brings together both basic concepts and advanced interpretations provided by leading WTO members in a relatively non-technical manner.

- George Bermann & Petros Mavroidis ed., *TRADE AND HUMAN HEALTH AND SAFETY* (2006).

The book discusses how health issues arising from trade restrictive measures have fared in WTO case law. With an analysis of primary applicable law (*i.e.* the GATT, the TBT, and the SPS) and all case law relating to trade and health, this book offers a comprehensive discussion of the standards established for domestic regulations of public health and safety issues. It aims to demonstrate how the world trading regime has come of age and has acknowledged that trade liberalization cannot take place at the expense of nationally-defined social values.

- Koen Byttebier & Kim Van der Bourght ed., *WTO OBLIGATIONS AND OPPORTUNITIES: CHALLENGES OF IMPLEMENTATION* (2007).

The book explores the theme of legal implications of WTO rulemaking to its Members and the challenges it represents for both the WTO itself and regional trading blocs, governments, companies, and citizens.

- Edward Luck & Michael Doyle ed., *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* (2004).

The contributors examine the experiences of South Korea regarding its compliance with WTO obligations.

- Anwarul Hoda & Ashok Gulati, *WTO NEGOTIATIONS ON AGRICULTURE AND DEVELOPING COUNTRIES* (2007).

The book offers a detailed analysis of the Agreement on Agriculture, assesses the implementation experience in key members, outlines the developments in the negotiations during the Doha Round up to the breakdown of talks in mid-July 2006, and offers suggestions

for developing countries' participation in future negotiations.

- Marc Froese, *CANADA AT THE WTO* (2010).

The author analyzes how the WTO, especially its dispute settlement mechanism, affects Canadian public policy and how the Canadian government should respond accordingly.

## 2. FTAs

- Yoshi Kodama, *Asia Pacific Economic Integration and the GATT-WTO Regime* (2000).

The book presents a detailed analysis of applying the WTO rules to regional trade arrangements in the Asia-Pacific region.

- Mitsuo Matsushita & Dukgeun Ahn ed., *WTO AND EAST ASIA: NEW PERSPECTIVES* (2004).

The essays explore how the countries or regional groups in East Asia participate in the WTO.

- J.H.H. Weiler ed., *EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* (2000).

The book addresses the overlaps of the trade regimes established by the WTO, the EU, and the NAFTA.

- David Gantz, *REGIONAL TRADE AGREEMENTS* (2009).

The author analyses different uses of RTA mechanisms within several WTO members.

- Francis Snyder, *REGIONAL AND GLOBAL REGULATION OF INTERNATIONAL TRADE* (2002).

The book argues the pros and cons of regional and global trade regulations.

- Lorand Bartels & Federico Ortino ed., *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* (2006).

The publication investigates the facets of regional trade agreements that go beyond the WTO rules, regarding intellectual property, investment, competition, services, sustainable development, and mutual recognition. It also examines the dispute settlement mechanisms RTAs and includes illuminating case studies.

- Gary Horlick, *WTO AND NAFTA RULES AND DISPUTE RESOLUTION: SELECTED ESSAYS ON ANTI-DUMPING, SUBSIDIES AND OTHER MEASURES* (2003).

The contributors explore how the United States and Canada participate in the WTO and the NAFTA from a comparative perspective.

### **3. Domestic (and regional) influence on the international regime**

- Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 *Ind. J. Global Legal Stud.* 27 (2010); Chang-fa Lo, *Values to be Added to an “Eastphalia Order” by the Emerging China*, 17 *Ind. J. Global Legal Stud.* 13 (2010); and David P. Fidler, *Eastphalia Emerging?: Asia, International Law, and Global Governance*, 17 *Ind. J. Global Legal Stud.* 1 (2010).

They provide some leading research on this strand of thought, focusing on defining the core concept and analyzing attitudes held by certain Asian countries and this region as well as their implications for the international regime.

### **D. Participation of Members in Multilateral Disputes Settlement**

- Gregory Shaffer, Victor Mosoti & Asif Qureshi, *TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM AT THE WTO* (2003).

The authors advise developing countries on how to participate in the WTO dispute settlement system.

- Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes ed., *WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* (2007).

The essays address the Asia-Pacific countries' participation in the WTO dispute settlement mechanism.

- Nicholas Perdikis & Robert Read, *WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES* (2005).

The book provides a critical overview and assessment of the WTO's dispute settlement procedures in the context of several trade disputes between the EU and the United States. Topics covered include: a critique of dispute settlement mechanisms in the GATT, the WTO and the NAFTA mechanisms agriculture, the Doha Round and the Common Agriculture Policy (CAP), beef hormones and the banana dispute, the steel dispute, and foreign trade corporations' process

and production method (PPM) issues and cases.

- Charan Deveraux, Robert Lawrence & Michael Watkins, CASE STUDIES IN US TRADE NEGOTIATION (vol.2, 2006).

The book focuses on how the United States disposes of its international trade disputes through negotiations.

- Chad Bown & Joost Pauwelyn ed., LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT (2010).

Various experts analyze the WTO rules on permissible retaliation and assess the economic rationale and calculations involved in the mechanism. In addition, the book reports first-hand experiences of those countries that have obtained WTO authorisation to retaliate, ranging from the United States and the EC to Mexico and Antigua.

## **CHAPTER 2. THE CONCEPT OF LEGAL INDIGENIZATION**

This chapter is a two-part exercise. Both parts of the exercise involve definitions. Section I of this chapter defines a “problematic” world in which international trade relations have developed over the past three quarters of a century. Section II of this chapter defines “indigenization” as it applies to the efforts various countries have made to address some of the problems involved in participating in a globalized regime of international trade rules.

### **I. Responses to a “Problematic” World**

We are living in a world never lacking of “problems:” military conflicts, nuclear threats, financial crisis, climate change, and other problems seem to surround us. This is not, of course, a new phenomenon. The main problem of international trade in the interwar era – that is, between World War I and World War II – that is, “legal fragmentation,” served as the fuse for a strong enthusiasm for globalization in the post-war era. Indeed, the burst of trade globalization that began just after World War II emerged from the trade problems of the preceding years.

Now, however, the trade globalization from that earlier era has presented our world with new problems as well as benefits. New actions have been taken or called for to respond to the new problems. This section reviews briefly the problem of fragmentation before World War II and the consequences of that fragmentation. Then it explores problems arising over the past several decades from trade globalization, especially those of a legal character, and raises a question on appropriate responses to those problems. The review of problematic fragmentation and globalization provides us the background of the emergence of legal indigenization, considering that history from fragmentation to globalization can help us understand the history from globalization to indigenization.

#### **A. Legal Fragmentation in Trade before World War II**

World trade legislation before World War II can be summarized as “legal fragmentation,” which was characterized by “protectionism” or “beggar-thy-neighbor” policies. “The 1930s saw



great fragmentation of the world trading system as governments struggled with the global depression. ‘Solutions’ to deal with unilateral protectionism included regional preference schemes and currency blocs.”<sup>77</sup> Generally, the term “fragmentation” is used to describe a legal consequence of trade policy of protectionism. It mainly emphasizes unilateral legal measures and a lack of multilateral rules. The fragmentation was mainly among the western powers having economies and international influence that were roughly equivalent or similar in scale. This fragmentation has also been regarded as an underlying cause of the outbreak of World War II.<sup>78</sup>

Protectionism, which “had a long tradition in American trade policy,”<sup>79</sup> characterized various domestic trade laws before World War II. In the United States, “[h]igh tariffs protected the large American domestic market from foreign products from the early 19<sup>th</sup> century on until World War II. The taxation of trade was also one of the most important sources of wealth.”<sup>80</sup> In the rest of the world, “shortly after the Great Depression many countries tried to weaken the consequences of this economic crash by raising their tariffs.”<sup>81</sup>

Protectionist policies were challenged before World War II (WWII) in the United States. A change of trade policy was led by President Roosevelt partially based on Cordell Hull’s opinion that “unhampered trade dovetailed with peace,” partially on the high American export surplus, and partly on the country’s inability to finance this surplus through gold imports in the long run.<sup>82</sup>

This U.S. campaign for free trade was, however, hurt by the trade relations that the United States had with some of its trade partners, as described below:

Of top concern [about trade relations] were America’s major trade partners: the British Commonwealth of Nations. Britain, its dominions of Canada, Australia, New Zealand, South Africa,

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<sup>77</sup> Bernard M. Hoekman & Michel M. Kostecki, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* (2d ed., 2001).

<sup>78</sup> Isabelle Buffard, James Crawford & Gerhard Hafner, *INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION* 286 (2008).

<sup>79</sup> Theresia Schnell, *THE EMERGENCE OF THE GATT: WHAT DO REALIST AND NEOLIBERAL INSTITUTIONALISTS SAY?* 2 (2004).

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.*

and a number of colonies had turned to protectionism to retaliate against Smoot-Hawley [Act],<sup>[83]</sup> which denied them access into the large American market, and to combat the Great Depression.’’<sup>[84]</sup> Canada and the United States signed a trade agreement in 1935, yet an Anglo-Canadian accord in 1937 maintained imperial tariff preferences under the Ottawa Agreement of 1932.<sup>[85]</sup> Tariff preferences lowered or eliminated duties within the empire but raised them against nonmembers. This discriminatory network placed U.S. traders at an unfair disadvantage in empire markets. As Britain’s top export market, America responded by refusing to lower tariffs until the pernicious Ottawa system was abolished. A circle of retaliation characterized Anglo-American trade relations in the 1930s.<sup>86</sup>

Negotiation of a trade agreement between the United States and Britain in 1938 demonstrated the difficulties in achieving international cooperation in that period. The imbalance between the gains of the two countries – that is, Britain acquired more concessions from the United States than it gave to the latter – is summarized below.

Over a year in the making, the accord was consummated because of Hitler’s march through Austria and Czechoslovakia. Winning more concessions than it gave, Britain, under the watchful eyes of the southern dominions (Australia, New Zealand, and South Africa), barely lowered preferential Ottawa tariff rates.<sup>87</sup>

As shown in the above summary, although the United States tried to make a freer trade network, “the groundwork had yet to be laid for a multilateral trade system, under which nations would reduce barriers in a fair and simultaneous fashion.”<sup>88</sup>

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<sup>83</sup> The passage of the Smoot-Hawley Act in 1930 represented the high point of U.S. protectionism. Under this act, average tariffs of the United States were raised to 53 percent on protected imports. The legislation provoked retaliation by 25 trading partners of the United States, such as Spain, Switzerland, Canada, Italy, Mexico, Cuba, Australia, and New Zealand. For more elaborations on the Act, see Robert J. Carbaugh, *INTERNATIONAL ECONOMICS* (13th ed.) 188-190 (2010).

<sup>84</sup> The Great Depression was a severe worldwide economic depression in the decade preceding World War II. The timing of the Great Depression varied across nations, but in most countries it started in about 1929 and lasted until the late 1930s or early 1940s. It was the longest, most widespread, and deepest depression of the 20th century. In the 21st century, the Great Depression is commonly used as an example of how far the world’s economy can decline. The depression originated in the United States, starting with the fall in stock prices that began around September 4, 1929 and became worldwide news with the stock market crash of October 29, 1929 (known as Black Tuesday). From there, it quickly spread to almost every country in the world. Source: Great Depression, Wikipedia, at [http://en.wikipedia.org/wiki/Great\\_Depression](http://en.wikipedia.org/wiki/Great_Depression), last visited on July 3, 2011.

<sup>85</sup> The Ottawa Agreement of 1932 established a system of customs preferences covering present and previous members of the British Empire. The preferences – known as the Commonwealth Preferences – were made possible not only by lowering existing internal duties, but also by raising duties on goods from third countries. So it could be argued that the overall effect of the system was a reduction in international trade, not an increase. For more elaborations on the Ottawa Agreement of 1932, see E. Damsgaard Hansen, *EUROPEAN ECONOMIC HISTORY: FROM MERCANTILISM TO MAASTRICHT AND BEYOND* 248 (2001).

<sup>86</sup> Thomas W. Zeiler, *FREE TRADE, FREE WORLD: THE ADVENT OF GATT* 8-9 (1999).

<sup>87</sup> *Id.* at 9.

<sup>88</sup> *Id.*

One scholar reproaches the Smoot-Hawley Tariff of 1930, which “finally increased U.S. tariff rates to the highest levels in history.”<sup>89</sup> In his view, “[i]nstead of weakening the economic crisis it increased the crisis on the stock market, [it] led to a depression of American exports and international trade in general and [it] thereby contributed to the coming of World War II.”<sup>90</sup>

Another observer draws a similar conclusion as follows:

Prior to World War II, international trade was conducted primarily through trading blocs – among countries with similar economic systems and complementary needs. There was no true ‘global’ trade. In their zeal to compete, these blocs eventually became military blocs, and World War II began.<sup>91</sup>

The 1930 Act triggered revenges from the United States’ trade partners. The main leverage of their revenges was to adopt trade laws or construct trade blocs to implement the trade policy of protectionism. Consequently, various domestic trade laws emerged, without any multilateral discipline. In short, we might characterize the international trading regime in the early portion of the twentieth century as being one of “fragmentation.”

## **B. Legal Globalization as a Response to Fragmentation**

Attempts to fight against legal fragmentation can be traced back into the era before WWII. The efforts at the international level took center stage, however, at the conclusion of WWII. Trade globalization, embracing legal issues, is a direct outcome of these international efforts. It has succeeded, to some extent, in helping overcome the disadvantages of legal fragmentation.

Three features – the ideology of free trade, reciprocal trade agreements signed by the United States, and the desire for recovery in post-war era – constituted the context from which the GATT emerged. First, the ideology of free trade laid the foundation of the fight against legal fragmentation and protectionism, as briefly reviewed below:

[That ideology] gained ground in the United States in the early thirties; and following this thinking on free trade, the United States began to sign bilateral agreements with 29 countries with the prime objective of mutual tariff reduction. This paved the way towards the development of an idea of [a]

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<sup>89</sup> Schnell, *supra note 79*, at 2.

<sup>90</sup> *Id.*

<sup>91</sup> Thomas Covell Fischer, *THE UNITED STATES, THE EUROPEAN UNION, AND THE “GLOBALIZATION” OF WORLD TRADE 201* (2000).

liberalized trade regime in the world, particularly after the end of [ ] World War II.<sup>92</sup>

Second, enthusiasm for – or we might even say worship of – the ideology of free trade led to the conclusion of several reciprocal trade agreements by the U.S. in the 1930s. The following excerpt gives a brief review of the efforts to conclude trade agreements during that period:

Through the 1930s [Cordell] Hull<sup>[93]</sup> laid the foundation of the negotiations of the GATT by reaching several trade agreements with Belgium, Brazil [and] Switzerland. His Reciprocal Trade Agreement Program (RTAP) also remained one of the main pillars of the GATT. Benefits of one country's lower trade barriers should always be reciprocated by an equivalent extent so that all benefits of freer trade are mutually and equally profitable for both attending countries. In the course of World War II Hull and his aides continued to employ the RTAP to strengthen America's position in the world by signing agreements with several other states, such as Turkey, Argentina [and] Iceland.<sup>94</sup>

Third, the longing for recovery of Europe's economies was strong enough for the international powers to abandon the pre-war trade policies. The following excerpt gives a summary on the historical process in which the desire for European recovery as well as other factors have contributed to bring about a different world from the one prior to WWII:

After World War II the recovery and economic viability of the Western European Allies as well as the integration of former enemies were one of the focal points of American economic foreign policy to repress the expanding influence of the Soviet Union. A major step towards this goal should have been the International Trade Organization (ITO) – a parallel organization to the International Monetary Fund (IMF) – for international commercial relations. The GATT created in the Geneva Round of multilateral tariff negotiations 1947 was to be absorbed into this international organization. The Republican congress elected in 1946 turned down the ITO as highly imprudent and idealistic immediately after the World War and refused its approval to the ITO. So the GATT intended as a temporary agreement was transformed into a normative-institutional framework and persisted until it passed into the World Trade Organization in 1995.<sup>95</sup>

The contemporary world – a world much different from the one prior to World War II as described in the preceding paragraph – has been frequently described by the term “globalization” in the past decades. Although globalization, as a widely acknowledged phenomenon as well as a

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<sup>92</sup> Kh. Menjor Singh, *WORLD TRADE ORGANIZATION AND THE THIRD WORLD* 1 (2005).

<sup>93</sup> Cordell Hull (October 2, 1871 – July 23, 1955) was an American politician from the U.S. state of Tennessee. He is best known as the longest-serving Secretary of State, holding the position for 11 years (1933–1944) in the administration of President Franklin Delano Roosevelt during much of World War II. Source: Cordell Hull, Wikipedia, at [http://en.wikipedia.org/wiki/Cordell\\_Hull](http://en.wikipedia.org/wiki/Cordell_Hull), last visited on July 4, 2011.

<sup>94</sup> Schnell, *supra note* 79, at 4.

<sup>95</sup> *Id.* at 4-5.

commonly accepted concept, did not emerge until late 1980s,<sup>96</sup> the Bretton Woods Conference of 1944, which created the International Monetary Fund (IMF) and the World Bank, had lifted the curtain in front of international steps towards globalization.<sup>97</sup> The following excerpt sketches the history of the emergence of the three pillars of international economic mechanism in the post-WWII era— that is, the IMF, the World Bank, and the General Agreement on Trade and Tariffs (GATT). The three organizations contribute to globalization mainly by facilitating and improving currency policy, capital flows, and free trade in the world.

The 1944 Bretton Woods conference in the United States established the charters for the World Bank and the International Monetary Fund, two pillars of the post-World War II international economic institutional system. Because the Bretton Woods conference was directed and organized by the financial ministers of the governments concerned, it was not there felt appropriate to address the trade questions which generally belonged to other ministries. Yet the Bretton Woods conference explicitly recognized the necessity of an international trade organization to complement the responsibilities of the financial organizations. Indeed, in some ways the WTO, after many decades, has become the ‘missing leg’ of the Bretton Woods system.<sup>98</sup>

The GATT, which had operated for nearly 50 years as a transitional arrangement for the ITO before the establishment of the World Trade Organization (WTO) in 1995, has led the process of trade globalization since 1947. The principles announced in the GATT regarding international trade, as enumerated in the following excerpt, illustrate mirrors the fact that the GATT relied on liberalized and multilateral leverages to unite the fragmentary world that had existed in the pre-WWII era:

GATT is based on three principles. First, only a liberalized world trade could foster worldwide welfare and second, GATT should serve on a long term basis to cut down all trade barriers. Third, rules for a liberal trading system are best developed in multilateral forums.<sup>99</sup>

Both the context of the GATT’s advent and the principles of trade globalization established by the GATT indicated the determination of the international community to put an end to a fragmented world. Generally speaking, the GATT has contributed to this end in at least two ways.

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<sup>96</sup> Deward Clayton Brown, *GLOBALIZATION AND AMERICA SINCE 1945* xiii (2003).

<sup>97</sup> Singh, *supra note* 92, at 1.

<sup>98</sup> John H. Jackson, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 92 (2006) [hereinafter Jackson-WTO].

<sup>99</sup> Schnell, *supra note* 79, at 5.

On the one hand, it guided the international community to reach a consensus on primary principles in trade rule-making. On the other hand, it provided multilateral forums for rule-making and dispute settlement. In other words, it is the GATT that dominated the process of trade globalization and addressed, at least in part, the problems of legal fragmentation.

### **C. Legal Globalization – Inherent Problems**

Despite the historical contribution the GATT has made as indicated above, the GATT/WTO-led globalization efforts have eventually found themselves faced with two types of problems: “birth defects” (that is, inherent problems) and “acquired problems.” The deeper the globalization is, the more obvious these problems have become. This subsection and the next subsection portray the defects and problems in question, beginning with so called “birth defects.”

“Birth defects” refer to inherent flaws of the GATT mechanism . Several causes can be identified to explain their existence. First, the rules binding all participants were designed by forces that could not represent the majority. Second, the rules were made as compromises between the leading forces acting as a minority. Third, non-legal dispositions were turned to by the rule-makers when no compromises could be achieved regarding legal leverages. These flaws forced (1) the countries which constitute a majority but less powerful group, (2) the countries who have not gained their ideal negotiating results, and (3) the countries who are powerful enough to impose their preferences on other countries to rely on their own discretion regarding domestic implementation of multilateral rules to achieve their own goals.

First, as indicated in the preceding subsection, “the major initiatives leading to the establishment of GATT were taken by the United States during World War II, in cooperation with its allies, particularly the United Kingdom.”<sup>100</sup> The fact that the multilateral rules were developed by a small group of participants in the world trading system has implied the potential incompetence of the rules to serve multilateral trading relationships that have come to involve a large number of countries. The following excerpt briefly reviews such leadership of the United

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<sup>100</sup> Jackson-WTO, *supra* note 98, at 92.

## States and Great Britain:

Britain had provided the original blueprint for the charter during the war, but the Americans had seized the initiative by 1943. Since then, the United States had directed the show in two meetings in Washington, two nuclear club preparatory conferences, and the world gathering in Havana. A commercial code – a dream for years, if not decades – was now a reality. Considering that the ITO code had been negotiated in a chaotic era, its completion was a remarkable feat.<sup>101</sup>

Second, the outcome of the trade negotiations which resulted in the GATT 1947 was largely regarded as a compromise between the two leading forces, rather a fully reasoned system, although the outcome itself was impressive. One authority gives this positive evaluation of the early trade negotiations:

The arduous planning process had resulted in a weighty document that addressed all aspects of commercial relations. The Havana Charter [which would have created and governed the ITO] was complex. It reflected the difficult circumstances of the times and accounted for the diverse economic systems of its signatories. Multilateralism was still the goal, albeit in a far-off future. And the United States had shown leadership befitting its stature as a powerhouse and defender of the West.<sup>102</sup>

Behind the remarkable achievements of the GATT negotiations, however, were deep discrepancies between the two leading countries. As one of the critical discrepancies, different opinions between the USA and the UK regarding the aim of multilateral discipline resulted inevitably in compromises on some issues between them. The following excerpt provides some elaboration on this point:

Whereas the Americans endorsed multilateralism as an end in itself to promote private enterprises and prosperity, the British cared only that trade volume increased. For the British, regulation of commerce was the safe route to growth. ...Free trade frightened the British. Their economy was in shambles and the sun was setting over the empire. ...The Commonwealth put the United States on notice that a regime of free trade was unacceptable, but regardless, American officials forged ahead. They sought to assuage British concerns while pursuing their multilateral dreams. Their determination was strong, but so was the resistance at home and abroad to their vision. ...The Washington meeting had not given Britain all that it wanted. ...Yet Prime Minister Attlee also had good reason to be satisfied. British trade interests had been upheld and America's doctrinaire free trade ideas stymied.<sup>103</sup>

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<sup>101</sup> Zeiler, *supra note* 86, at 145.

<sup>102</sup> *Id.* at 145.

<sup>103</sup> *Id.* at 34, 40 & 57.

In addition to the *aim* of multilateralism, the *form* of multilateralism also invited debates among trading partners. As early as the wartime, two different strands of thought on the form of global trading system emerged. One of them cast doubt on the path of concluding trade agreements. The other criticized the trade policies adopted by main trading partners during the interwar period. Both of them regarded regionalism, bilateralism, or unilateralism insufficient to achieve an ideal order of world trade. The blending of the two strands then inevitably pointed to multilateralism, which founded the creation of the GATT.<sup>104</sup> One authority examines the blending of the two strands of thought regarding creating an organization of trade, as excerpted below:

The two strands of thinking about creating an organization for international trade began to merge in 1945. In the United States, Congress enacted the 1945 renewal of the reciprocal trade agreements legislation for a three-year period. In December of that year, the US government invited a number of nations to enter into negotiations to conclude a multilateral agreement for the mutual reduction of tariffs. Also in 1945, the United Nations was formed; and in 1946 its subordinate body ECOSOC (the Economic and Social Council) began work to develop a draft charter for what was to be designated the International Trade Organization (ITO). The major work was undertaken at Geneva in 1947.

The basic idea at Geneva in 1947 was that the ITO would be the organization and that GATT would be a specialized agreement as a part of the ITO and would depend on the ITO for institutional support such as decisions, dispute settlement, membership obligations, and so on.<sup>105</sup>

Besides ideological discrepancies among the negotiators, their differing political concerns also undermined the perfection of the global trading system. In the shadow of the Cold War, which since roughly 1946 brought about political conflict, military tension, proxy wars and economic competition between the Communist world (primarily the Soviet Union and its satellite states and allies) and the powers of the Western world (primarily the United States and its allies), the trade negotiations proceeded arduously due to a lack of necessary trust and cooperation among the negotiators. As Thomas W. Zeiler remarks, “the Cold War had an overriding impact on the outcome of the Havana conference. On the grounds of national security, free-traders retreated in the Geneva and Havana Charter discussions, just as they had in the

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<sup>104</sup> Jackson-WTO, *supra note* 98, at 92-93.

<sup>105</sup> *Id.* at 93.



GATT negotiations.”<sup>106</sup>

Despite the discrepancies in views between the USA and Great Britain, they were still both intent on establishing a multilateral trading mechanism as soon as possible. Therefore, compromise arose inevitably between the two countries on many issues:

For instance, the United States sought precise limits on state traders and cartels, which enjoyed price advantages over merchants left unsheltered from government aid or global combines. Britain welcomed large-scale organizations as long as they did not discriminate. Besides, the Soviet Union would insist on government monopolies. The experts left the extent of freedom allowed for cartels and state trading undetermined, but clearly, America would have to give way.<sup>107</sup>

Third, difficulties encountered by the founders of the GATT in trying to balance the soundness and attractiveness of the global trade system further weakened the GATT’s perfection. As one expert points out as follows:

Regimes always face the dilemma of granting a certain order and security on the one hand but leaving states the feeling that they are not locked in rigid compliance with the respective regime’s rules on the other hand. So called ‘safeguard clauses’ in international agreements vouch for exceptions of non-compliance with certain rules if compliance would seriously undermine the well-being of part or all of the population.<sup>108</sup>

Furthermore, the fact that the multilateral regulations did not cover every issue relating to international trade – a necessity in order to reduce criticisms from some participants in the negotiations –also undermined the accountability of the global trading system.

Taking into account the above factors, it should come as no surprise that the global trading system had some inherent defects. A mountain of literature on this point has emerged, involving nearly every aspect of the system. The illustrations that address the inherent problems of this multilateral system include article drafting,<sup>109</sup> the WTO legal structure,<sup>110</sup> limited coverage of

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<sup>106</sup> Zeiler, *supra note* 86, at 146.

<sup>107</sup> *Id.* at 34.

<sup>108</sup> Schnell, *supra note* 79, at 5.

<sup>109</sup> Simon Dodds, *United States/Common Market Agricultural Trade and the GATT Framework*, 5 NW. J. Int’l L. & Bus. 326, 349 (1983). “GATT sought to define precisely which practices are permissible and which are not [particularly in the context of subsidies]. It tried valiantly to provide a set of rules against which state actions could be judged. One of GATT’s flaws is that the definitions have proved imprecise and the inconsistencies suggest that a narrow definition would similarly fail. By contrast, the problem of definition does not arise with bilateral negotiations. Each party devises its ideal scenario and, in the course of the negotiations, attempts to persuade the other side to accept that scheme. The final result is a compromise, in which each side permits the other to engage in certain policies regardless of whether GATT might deem them domestic or export subsidies.” *Id.*

trade agreements,<sup>111</sup> and the power-orienting nature of trade negotiations.<sup>112</sup>

To summarize some key themes emerging from those observations: many aspects of the multilateral system bear inherent problems due to various causes. The contributions made by the United States and the United Kingdom in establishing the global trade system were undoubted – indeed, perhaps little short of magnificent. It was, however, this unshakable leadership that caused problems in the first place since the rules made by the minority had binding force on the majority. Furthermore, issues that could not be compromised between the two countries were excluded from multilateral rules. Consequently, trade globalization has been led by a defective mechanism with birth defects or inherent flaws.

#### **D. Legal Globalization – Acquired Problems**

The following paragraphs enumerate several main problems confronted by the GATT/WTO, including mainly (1) surge of sovereign countries; (2) self-evolution of the global trading system; and (3) development of international law. A direct result of the surge of sovereign countries is the increasing number of domestic legal systems, which will invite more processes of indigenization. The self-evolution of the global trading system, which has brought new challenges and tasks to

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<sup>110</sup> Steve Charnovitz, *The Boundaries of the WTO*, 96 A.J.I.L. 28, 35 (2002). “Most of the WTO Agreements represent attempts to strengthen GATT rules to respond to recurrent trade problems, as is evidenced by the six understandings and two WTO Agreements whose titles specifically reference the GATT. Furthermore, some of the agreements that might appear to be new topics (*e.g.*, Trade-Related Investment Measures) consist of little more than emendations of various GATT rules. Seven years after the GATT was transformed into the WTO, the atavistic pull of the earlier system still remains strong. This mimetic frame achieves some congruence with current WTO law but has two large flaws. The obvious one is its failure to take account of TRIPS, which is not just an incremental improvement to the GATT. The second flaw is less apparent, yet equally fatal. A close look at GATT 1947 and decisions approved by GATT bodies shows earlier attention to some of the so-called new issues facing the trading system today.” *Id.*

<sup>111</sup> William J. Snape, III & Naomi B. Lefkovitz, *Searching for GATT’s Environmental Miranda: Are “Process Standards” Getting “Due Process?”*, 27 Cornell Int’l L.J. 777, 780-781 (1994). “Although non-tariff barrier negotiations stalled during the preceding Kennedy Round of GATT talks, the Tokyo Round produced the Agreement on Technical Barriers to Trade (TBT), or the “Standards Code.” Although the Standards Code explicitly addresses environmental standards, it shares the flaw of its apparent successor, the Uruguay Round’s Agreement on TBTs. Both agreements exclude PPM [(production and process methods)] trade measures from protection.” *Id.*

<sup>112</sup> Harold Dichter, *Legal Implications of an Asia-Pacific Economic Grouping*, 16 U. Pa. J. Int’l Bus. L. 99, 104-105 (1995). “According to some commentators, GATT remedial measures, such as escape clause actions and anti-dumping sanctions, have mutated from their original purpose of ensuring a level playing field into devices for protecting domestic industries. In light of these problems with the current international trading regime, the GATT has two systemic flaws. First, although interested officials, policymakers, and scholars have identified these problems, the GATT has not yet developed an institutional framework to address them on an international legal level. Second, in the political realm, continuing discord between the United States and the European Union [has meant that many] areas of contentious disagreement were not definitively resolved in the Uruguay Round, and thus remain the subject of conflict...” *Id.*

the WTO, provides further space for the process of legal indigenization. The development of international law in the past decades, particularly in the areas of global governance, human rights, and multiple international actors, has not been sufficiently addressed by the multilateral trading rules, and then has provided ample space for the individual members to take advantage of their discretion to act according to their own preferences.

### **1. Surge of sovereign countries**

Many sovereign countries emerged in the movement of decolonization between the 1940s and the 1960s, and this development presented one of the main challenges to the global trading system. To date, the WTO has 153 members, which means that the global legal system has to be accepted by and implemented in 153 “domestic” legal systems. This number is roughly three times the number of states that even existed as of the 1940s.

Complexity stemming from the surge of sovereign countries has been further demonstrated by the trend of the overlapping groups of the members within the WTO. To date, there are 24 negotiating groups in the WTO, such as the African Group, the Recent New Members, the Cairns Group, the G-20, and the Friends of Fish. Some groups were formed based on geographic location – for instance, the African Group. Some were composed on the basis of similar trade interests, such as the Cotton-4. Some others were grouped according to economic development levels – for instance, least-developed countries. Individual WTO members may participate in multiple groups. For example, the United States is member of the Friends of Ambition (NAMA), the Friends of Fish, the Joint Proposal, and the APEC. China possesses membership in the G-20, the G-33, the Paragraph 6 Countries, the Friends of A-D Negotiations (FANs), the “W52” Sponsors, the APEC, and the Recent New Members (RNMs).

In a broader context, the surge of sovereign countries has also brought challenges to the legal foundations of general international law. One of the challenges, as identified by the following excerpt, might be a changing role of these newly established countries – that is, a role changing from ensuring the peaceful coexistence of states to ensuring comprehensive cooperation on international issues:

With more entities being recognized as full subjects of international law, the differences in the levels of economic development amongst the members of the international community became much more obvious than they had been in colonial times. These changes came to test the legal foundations of international law. It became, for instance, more and more evident that a strict reliance on the concept of legal equality could not be upheld in all circumstances within a growing community whose members had different economic, political and military capacities. These changes and the ensuing developments reflected to a certain extent the broader forces influencing international law whose function slowly changed from that of ensuring the peaceful coexistence of states to ensuring broad-ranging cooperation on a number of socio-economic issues.<sup>113</sup>

## **2. Self-evolution of the global trading system**

In 1995, the GATT mechanism evolved into the WTO mechanism, which implied further legalization of the global trading system. As Pitou van dijck summarizes, “[f]rom an institutional point of view, the establishment of the WTO is a major breakthrough and strengthens the rule of law in international trade.”<sup>114</sup> In short, there has been a remarkable process of evolution in the global trading system.

However, the institutional evolution cannot overcome all the insufficiencies of the former GATT mechanism. The new WTO mechanism still faces with new challenges. In the coming excerpt, Pitou van dijck and G. J. Faber enumerate three principal callings encountered by the WTO after its establishment. These three callings include: (1) a large number of yet-unfulfilled tasks resulting from the Marrakesh Agreement; (2) inconsistencies the WTO has to deal with between multilateral rules and regional rules; and (3) the WTO’s responsibility to pursue “the new trade agenda.”<sup>115</sup> Although 16 years has passed since van dijck and Faber raised these concerns, it seems that the WTO has not addressed them efficiently till now, on the grounds that: (1) since the establishment of the WTO, there are no substantive agreements have been passed within the multilateral trading system; (2) although more and more FTAs emerged in these years, the multilateral trading system has done little to address substantial consistence between FTAs and multilateral rules; and (3) the first round of multilateral trade negotiations since the establishment of the WTO – the DDA – has not been concluded. However, although these

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<sup>113</sup> Phipippe Cullet, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* 59 (2003).

<sup>114</sup> Pitou van dijck & G. J. Faber, *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION* 2 (1996).

<sup>115</sup> *Id.* at 2-3.

concerns have not been completely relaxed, they have deeply affected the focus and approaches of the WTO's operations.

In addition to these issues, another challenge to the WTO is that it operates within a proliferation of multilaterally binding agreements, understandings, and other legal documents. This has resulted in imbalanced legal context. The phenomenon of such a proliferation of legal documents is characterized as “legalization” in the WTO. One observer offers this definition:

Legalization is a particular form of institutionalization characterized along three dimensions: obligation, precision and delegation. In the context of the GATT/WTO system, obligation refers to norms set out in all WTO agreements, Understandings and other binding documents. Precision measures not only the clarity of the wording of related WTO agreements, but also the extent to which these substantive WTO obligations require (or prohibit) specific action by WTO members. Delegation reflects the willingness of the WTO members to relinquish their sovereignty in terms of both the DSM and the other activities of WTO institutions.<sup>116</sup>

Based on that three-pronged definition of legalization, the author evaluates the dynamic process of legalization in the GATT/WTO by further breaking down the system into three different parts – a decision-making mechanism, a surveillance mechanism, and a Dispute Settlement Mechanism – and draws this conclusion:

By reviewing both the current status of legalization in each part and the historical developments, this [analysis] concludes that as a general pattern, all three parts of the GATT/WTO have been significantly legalized and there are certain degrees of correlation between the processes.<sup>117</sup>

To sum up, the above analysis shows that the internal evolution of the multilateral trading system, such as the mechanical advancement and a proliferation of legal instruments, has brought about new challenges to the WTO, or at least has not completely resolved the problems faced by the organization.

### **3. Development of international law**

General international law has witnessed impressive developments since the conclusion of World War II. Not surprisingly, globalization has contributed to such developments. The Hague Academy of International Law offers the following observations regarding the way in which

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<sup>116</sup> Yan Luo, ANTI-DUMPING IN THE WTO, THE EU, AND CHINA 195-196 (2010).

<sup>117</sup> *Id.* at 196.

globalization influences international law, which can be summarized as that globalization has constituted a new factor to test the adequacy and effectiveness of international law:

It would appear that no general answers may be provided concerning [the] debate [on pros and cons of globalization]. In any event, what can be said is that globalization constitutes essentially a factual phenomenon which may, on the one hand, prove beneficial to humankind but which, on the other, may raise a challenge to the public interest mandate of governmental institutions. In any event, the concept captures in a nutshell the current state of increased transnationalism which constitutes the background against which the adequacy and effectiveness of international law and its institutions must be carefully tested.<sup>118</sup>

Two particularly noteworthy aspects of international law have emerged from globalization: rules on global governance and the law of human rights. On the one hand, global governance provides new legal foundations for the global trading system with regard to its missions. On the other hand, since one of the main characteristics of global governance is to regulate originally “domestic” affairs, the operation of global governance will directly confront legal culture and tradition at the domestic level.

a. From law of nations to global governance

It is probably not too much of a generalization to say that before 20<sup>th</sup> century most issues were local – that is, internal to the states or provinces or municipalities to which most people saw themselves as owing loyalty and from which they drew benefit. This began to change following World War I. The concept of international law in the early days of the 20th century was different from that of today. A text from a century ago asserted that “[i]nternational law, otherwise called the Law of Nations, is the law of the society of states or nations.”<sup>119</sup> The change emerged as early as the pre-WWII era. As Christopher C. Joyner points out, “[t]he League [of Nations] attempted to realize the ideal that national might should be subordinated to collective international right, codified in the rule of law. But it was not to be, as the onslaught of the Second World War destroyed that international order and created the need for a new international system governed by new legal rules.”<sup>120</sup>

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<sup>118</sup> Hague Academy of International Law, RECUEIL DES COURS 42-43 (2001).

<sup>119</sup> John Westlake, INTERNATIONAL LAW 1 (1910).

<sup>120</sup> Christopher C. Joyner, INTERNATIONAL LAW IN THE 21<sup>ST</sup> CENTURY 20 (2005).

To a large extent, that need was met. As a main trait of international governance, many issues which used to be “internal” affairs now fall within the coverage of international law:

Looking backward, the scope and substance of international law expanded tremendously during the 20<sup>th</sup> century. ...It is wrong to assert that national policies with significant international impacts are not regulated by international prescriptions and are remanded exclusively to policymakers as national decisions...The process of taking effective decisions to govern transnational events describes the essence of international law. By the early 21<sup>st</sup> century, this process has already been subjected to effective restraints that limit the freedom of national decision makers and promote policy choices compatible with an international political system comprising associated states who share a common set of fundamental rights and duties.<sup>121</sup>

Obviously, it is the ideology of “global governance” that has accompanied the expansion of the concept of international law. A fundamental question revolves, however, over what global governance is. So far, there is little agreement on a uniform definition of global governance among scholars. One observer offers this summary of the various strategies that have been adopted by scholars to explain this concept:

In the literature, three strategies to categorize global governance have emerged. The first offers a non-definition consisting of the denial that something like global governance exists at all...; the second is to offer a positive definition that often very idealistically assumes that a new form of managing global affairs has developed that can be characterized through specific actors, instruments, or practices. The third is by juxtaposing global governance to a term with which we feel more comfortable.<sup>122</sup>

Despite disagreements on the definition of global governance, James Muldoon finds out and summarizes four important aspects of the concept of global governance – (1) non-governmental mechanisms, (2) diverse actors, (3) three dimensions (*i.e.*, political, economic, and social cultural), and (4) operations at multiple levels:

First, global governance recognizes non-governmental mechanisms as having as much influence on how the global system is governed as do governmental mechanisms. Second, the actors involved in creating or forming instruments of global governance include “individuals, voluntary groups, localities, regions, ethnic groups, nation-states and all kinds of transnational actors.” Third, global governance infers the gradual integration of the three domains of governance – political, economic, and socio-cultural – and the fragmentation of world order due to transitory and contested spheres of authority which are disaggregative or anti-systemic. And fourth, global governance architecture is

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<sup>121</sup> *Id.* at 20-21.

<sup>122</sup> Markus Lederer & Philipp S. Muller, *CRITICIZING GLOBAL GOVERNANCE* 3 (2005).

projected to be predominantly non-hierarchical in structure and to operate at multiple levels.<sup>123</sup>

Among various ways to understand the concept of global governance as contained in the preceding paragraphs, one is to understand the concept from the perspective of the core public goods it should provide. The following list enumerates several essential purposes of global governance with regard to providing public goods at the international level:

- International stability and security, for which the greatest powers carry the main responsibility;
- An international legal order which should ensure the effective equality of all;
- An open and inclusive economic world system that meets the needs of all, especially the poorest, so as to enable all to participate fully in decision-making;
- Global welfare as the global equivalent of national human security systems; and
- The shared commitment to combat pockets of lawlessness and settle regional conflicts.<sup>124</sup>

The ideology of global governance provides new legal foundations for the global trading system with regard to its mission. Sol Picciotto points out that, “[t]he creation of the WTO has established a focus for global renegotiation of a virtually unlimited range of global governance issues, by linking them to the bargaining of market access.”<sup>125</sup> Another authority has, on the other hand, highlighted the challenges presented to the WTO by the proposition of global governance, especially the challenge to identify the WTO’s role in such a context:

[T]here are very different perceptions of the responsibilities of the WTO in the realm of global governance and what they should be in the future. Current criticisms of the WTO are in large measure linked to these different perceptions. Some say it is not living up to its responsibilities, while other say it is meddling in their affairs. Achieving a common understanding of the role of the WTO is an absolute priority for the international community if the enormous contribution that the multilateral rules-based trading system has made to world economic growth and stability over the past 50 years is to continue for the next half-century and beyond.<sup>126</sup>

#### b. Human rights law and international trade

The development of a global law of human rights in the past decades has also proven to be a key feature of the evolution of international law. Human rights law has experienced a rapid

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<sup>123</sup> James P. Muldoon, *THE ARCHITECTURE OF GLOBAL GOVERNANCE* 9-10 (2004).

<sup>124</sup> Rik Coolsaet & Valerie Arnould, *GLOBAL GOVERNANCE: THE NEXT FRONTIER* 8 (2004).

<sup>125</sup> Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 *NW. J. Int’l L. & Bus.* 1014, 1053 (1996).

<sup>126</sup> Gary P. Sampson, *Overview*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* (Gary P. Sampson ed.) 1, 16-17 (2001).



development since the conclusion of WWII.<sup>127</sup> The emphasis given to human rights by international trade law has not provided a sufficient discipline for the WTO Members to address the relationship between human rights and international trade law at the domestic level. In other words, to what degree an individual member can deviate from multilateral trading rules due to human rights concerns are not yet much clear. It is a wide discretion for individual members to address this issue by their own approaches.

In short, the past several decades have witnessed dramatic changes in the identification, observation, and documentation of international human rights. How does this story bear on the international trade system? Article XX of the GATT 1994 gives a typical illustration of how the global trade system has been influenced by the ideology of human rights. With the expansion of human rights laws at the international level, the frequency of the citation of Article XX has largely increased among trading partners. Article XX actually establishes the linkage between the trade laws and human rights. However, in addition to an exceptional clause, it also serves as an embedded human rights clause, within the GATT, by investing discretion to individual members to address human rights concerns.<sup>128</sup>

To sum up, human rights concerns have been accepted by both the organization and its Members as not only an exception to existing trade rules, but also an integral part of the elements that influence trade measures. The lagging responses to these requirements from multilateral rules has provided the opportunity for the individual countries to dispose pertinent issues with their own leverages or methodologies.

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<sup>127</sup> David S. Weissbrodt & Connie de la Vega, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 14-26 (2007). “The UN Charter established human rights as a matter of international concern. ...In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, articulating the importance of rights that were placed at risk during the 1940s: the rights to life, liberty, and security of person; freedoms of expression, peaceful assembly, association, religious belief, and movement; and protections from slavery, arbitrary arrest, imprisonment without fair trial, and invasion of privacy. The Universal Declaration also contains provisions for economic, social, and cultural rights. ...Following adoption of the Universal Declaration, the UN Commission on Human Rights drafted the remainder of the International Bill of Human Rights, which contains the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and an Optional Protocol to the Civil and Political Covenant. ...In addition to the International Bill of Human Rights, the United Nations has drafted, promulgated, and now helps implement more than eighty human rights treaties, declarations, and other instruments dealing with genocide, racial discrimination, discrimination against women, religious intolerance, the rights of disabled persons, the right to development, and the rights of the child. Human rights law has thus become the most codified domain of international law.” *Id.*

<sup>128</sup> Anthony Cassimatis, *HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW* 290, 401-402 (2007).

c. International actors – beyond states

Accompanying the emergence of global governance has been an expansion of the range of actors regarded as members of the international community, so that it includes not just sovereign states but also international organization, nonstate actors, terrorist groups, regimes, and individuals. Joyner offers these observations:

Different types of actors, operating at different levels, participate in the international community. National, transnational, and certain nonstate actors exert notable influence within the international system. To varying degrees, all have been made persons or subjects with legal status, personality, rights, and duties under international law.<sup>129</sup>

Generally speaking, the emergence of new actors in the international community has challenged WTO operations in various aspects. The following paragraphs provide a collection of analyses from several authorities that illustrate how these new actors have interacted with the WTO.

- Global civil society<sup>130</sup> and the WTO

The dynamic set into motion by global civil society's claim to occupy the space of international community in the current juncture can be illustrated by reference to the efforts of "global civil society" in relation to one international institution, the World Trade Organization. ... The critique [from the global civil society] of external transparency argues that the WTO should become more open and accessible to the civil society representatives of the world community directly, and not only via the representatives of member-states. Implicitly, the argument is that the laws that are negotiated at the WTO lack a legitimate "ground" because the institution is not representative of the "global community" ... if that community is no longer understood to be authentic, so must law's claim to authority and legitimacy fail.<sup>131</sup>

- Terrorist groups and the WTO

Terrorist organizations also engage in what on the surface appears to be legitimate businesses.... Indeed, the business network of terrorist organizations is truly multinational. Al-Qaeda and other radical Islamic groups are suspected of receiving funding from Al Taqwa, a group of companies in Switzerland, Liechtenstein, the Bahamas, and Italy, with shares of business throughout Europe, the Middle East, and Africa. Al Taqwa has cement plants, drydocks, textile and brick factories, a

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<sup>129</sup> Joyner, *supra note* 120, at 25.

<sup>130</sup> "Global civil society" is a term that has become widely, if not always precisely, deployed to describe the growth of both new types of transnational actors and a new realm of advocacy in and around international institutions over the last several decades.

<sup>131</sup> Ruth Buchanan & Sundhya Pahuja, *Law, Nation and (Imagined) International Communities*, 8 LTC 137, 150-152 (2004).

division that trades factories, and a division that trades steel, wheat, oil, and other commodities. The business networks that fund al-Qaeda and similar terrorist groups certainly rely on globalized trade facilitated by the WTO. Thus, the sanctions available in the WTO regime, amongst them notably Article XXI, have the ability to minimize the terrorist funding.<sup>132</sup>

- Individuals and the WTO

WTO law does not prescribe that domestic courts should set aside domestic laws found to be incompatible with WTO rules. ..[I]ndividuals depend upon their own national legal and political system to enforce the benefits of trade liberalization commitments. In some WTO Members, they can ask their government to take action against another WTO Member when their trading rights are impaired.<sup>133</sup>

[In addition, the] universal recognition of human rights as part of modern general international law requires a human rights approach also to WTO law. If the value of governments derives from maximizing human rights as a legal precondition for enabling individuals fully to develop their personalities and participate in democratic governance, then also international organizations derive their value for enhancing human rights.<sup>134</sup>

The general picture that emerges from the above details can be summarized in this way: with the emergence of new actors in the international community as the new subjects of international law, the WTO has to face new challenges regarding issues such as legitimacy, judicial procedure, anti-terrorism and domestic implementation of international rules.

## **E. Legal Indigenization as a Response to Problematic Globalization**

The significance of the above analysis lies in clarifying that trade globalization being thrust upon or led by the GATT/WTO mechanism presents serious challenges. How should the WTO react to these challenges? Two competing strands of thought regarding the direction of the reactions have invited intense attention from academia. The two competing strands of thought are not sufficient to address the realistic needs of the participators of the international community, however. One of the strands – reversibility of globalization – is unrealistic, considering the fact that so many aspects of a country’s economic life have been involved in the process of globalization. The other strand – focusing on further globalization – confronts the difficulties to

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<sup>132</sup> Eric J. Lobsinger, *Diminishing Borders in Trade and terrorism: An examination of Regional Applicability of GATT Article XXI National Security Trade Sanctions*, 13 ILSA J Int’l & Comp L 99, 127 (2006).

<sup>133</sup> Jochem Wiers, *TRADE AND ENVIRONMENT IN THE EC AND THE WTO* 17-18 (2002).

<sup>134</sup> Grainne De Curca & Joanne Scott, *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 96-97 (2001).

conclude the current multilateral negotiations. Furthermore, these two strands focus on the international level only, and incline to ignore the corresponding responses at the domestic level. In practices, the individual countries do have a third option – that is, legal indigenization.

On the one hand, the belief that globalization is beneficial and irreversible has offered firm support for the promotion of further globalization. Advocates for this belief come from both political and legal fields. The following two excerpts recall the assertion made by some politicians who have asserted the irreversibility of globalization:

Our political leaders take pleasure in constantly repeating that globalization is a force of nature as irresistible and inevitable as the tides. On 18 May 1998, before the representatives of 132 countries meeting in Geneva to celebrate the fiftieth anniversary of the GATT-WTO, Bill Clinton proclaimed that ‘Globalization is not a policy choice, it is a fact.’ And Tony Blair added: ‘Globalization is irreversible and irresistible.’<sup>135</sup>

In a speech on U.S. foreign policy, President Clinton told his audience: ‘Today we must embrace the inexorable logic of globalization – that everything from our economy to the safety of our cities, to the health of our people, depends on events not only within our borders, but half a world away.’ On another occasion he emphasized that ‘globalization is irreversible. Protectionism will only make things worse.’<sup>136</sup>

Many sources from academia also assert the irreversibility of globalization:

In *Globalization from Below*, Jeremy Brecher, Tim Costello, and Brendan Smith (2000) argue that the economic, political, and cultural interconnectedness signified by globalization is irreversible and possibly a good thing: this interconnection, they assert, could potentially serve the interests of people and the earth, not just the elites.<sup>137</sup>

On the other hand, some scholars have cast doubt on the irreversibility of globalization. According to Robert Went, political forces, if mastered in support of anti-globalization sentiment, would be strong enough to reverse the trend of globalization, as discussed in the paragraph cited below:

Although nobody denies that technological developments play an important enabling role in processes of globalization, very few contemporary analysts or observers claim that globalization is brought about by ‘some natural or technologically driven phenomena’. To talk about a ‘backlash against globalization’ would be senseless if globalization was to be understood as the automatic

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<sup>135</sup> Jacques Gelinas, *JUGGERNAUT POLITICS: UNDERSTANDING PREDATORY GLOBALIZATION* 56 (2003).

<sup>136</sup> Manfred B. Steger, *GLOBALISM: MARKET IDEOLOGY MEETS TERRORISM* 61 (2005).

<sup>137</sup> Samir Dasgupta & Ray Kiely, *GLOBALIZATION AND AFTER* 30 (2006).

outcome of exogenous technological processes, since that would imply that globalization is irrevocable. As Frankel argues: '(T)here is a tendency to see globalization as irreversible. But the political forces that fragmented the world for 30 years (1914-1944) were evidently far more powerful than the accretion of technological progress in transport that went on during that period. The lesson is that there is nothing inevitable about the process of globalization.'<sup>138</sup>

Jude C. Hays also underscores the significance of political change in seeking alternatives to economic openness. As he observes,

[t]hose who argue that globalization is irreversible because there are currently no alternatives to the policies of economic openness – at least not ones supported by major parties – underestimate the potential for political change.<sup>139</sup>

Similarly, John Madeley rebuts the irreversibility of globalization by asserting the *existence* of “alternatives,” as demonstrated by the excerpt below:

It has been said that the only certain things in life are taxes and death. But there's something else. When politicians tell us 'there is no alternative' to this or that, one thing is certain – there is an alternative. So when Tony Blair says that globalization is 'irreversible and irresistible' and Bill Clinton describes it as 'not a policy choice, but a fact', we can be sure that globalization is reversible and that it is quite obviously a policy choice. Otherwise humanity has lost control to an impersonal force.<sup>140</sup>

I agree with Madeley's argument that countries do have choices in the process of globalization. However, I do not agree with him that the existence of choices equals to the reversibility of globalization. Contrary to what Madeley posits regarding the reversibility of globalization, these choices are not inevitably opposite to the principles established by globalization. The motive for countries to weigh among and choose from these choices with extreme carefulness is to gain a better position in the context of globalization. The process to weigh among these choices and to make a final decision can be conceptualized as “indigenization” which serves as the theme of this dissertation.

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<sup>138</sup> Robert Went, *THE ENIGMA OF GLOBALIZATION: A JOURNEY TO A NEW STAGE OF CAPITALISM* 4 (2002).

<sup>139</sup> Jude C. Hays, *GLOBALIZATION AND THE NEW POLITICS OF EMBEDDED LIBERALISM* 20 (2009).

<sup>140</sup> John Madeley, *A PEOPLE'S WORLD: ALTERNATIVES TO ECONOMIC GLOBALIZATION* 9 (2003).

## **II. The Concept of Indigenization in the Context of International Law**

Despite the pros and cons of the two strands of thought – for further globalization and for anti-globalization – we should bear in mind that the context of the contemporary international community is quite different from that of the world immediately after WWII in which the ideology of globalization was first conceived. At that time, the legal and policy context in which to conceive globalization was fragmentation. However, in today’s world, the context is globalization itself. Whether or not we believe that process is irreversible, we cannot deny that it is a reality of the contemporary world. In other words, ours is a globalized world, not a fragmentary world, and this constitutes the context for how the WTO member states participate in the WTO regime in response to a problematic legal globalization. The approach many states take in response to such a problematic legal globalization is described in this dissertation as “legal indigenization.”

### **A. Meaning**

In a nutshell, “indigenization” refers to the process or ideology in which domestic authorities, when behaving as international actors, make and implement international or domestic rules in a way appealing to their native features (especially legal traditions), as responses to globalization led by a defective global legal system, for the purpose of getting an advantageous position in the context of globalization. The following paragraphs explore this definition in detail.

The concept of indigenization invited wide attention for the first time from developing countries during the 1970s. The following excerpt recalls how this concept was employed at that time:

The concept of indigenization gained currency during the 1970s when scholars from developing countries reacted to neocolonialist domination of social science by Western disciplines, calling for the development of independent, locally meaningful theoretical frameworks and methodologies for guiding research and scientific discourse. Interest grew during the 1980s, with much attention to disciplinary adaptation, including the epistemologies and practices of psychology, social work, and

sociology.<sup>141</sup>

The meaning of the term “indigenization” varies in different contexts. In the following bullet-point paragraphs, some illustrations are offered of how it is defined in different fields.

- In the Oxford English Dictionary

**Indigenization** The act or process of rendering indigenous or making predominantly native; adaptation or subjection to the influence or dominance of the indigenous inhabitants of a country; spec. the increased use of indigenous people in government, employment, etc.

- In the movement of decolonization

Indigenization, a concept identified with the movement among many African countries to re-assess the impact of Western elements on traditional cultural and social institutions, denotes systematic actions of sub-Saharan countries to re-establish traditional elements or to introduce functional alternatives to conditions that were imposed upon them under the hegemony of colonial powers. ... Indigenization refers to the conscious effort of a once subjugated group either to reestablish traditional elements or to introduce functional alternatives to conditions imposed under the hegemony of an alien group.<sup>142</sup>

- From an anthropological perspective

The word ‘indigenization’ simply understood [in the context of anthropology in East and South Asia] ... means the process of deciding which native ideas, concepts, or institutions are valid or appropriate in the present state of research in a given country. As a concept, it can serve as an analytical tool to explain a phenomenon occurring or taking place in a country. The word ‘indigenous’ ... therefore, means ‘native to a place’ while ‘indigenize’ means ‘to make something originate from a place’ (Bennagen 1998).<sup>143</sup>

- From a cultural perspective

The concept of indigenization helps explain how transculturation and hybridization occur. Indigenization means that imported cultural elements take on local features as the cultural hybrids develop.<sup>144</sup>

Although there is no uniform concept of the term, we can still observe at least two overlapping aspects of these various definitions. One is that “indigenization” involves a process of transformation. The other is that the aim of such transformation is to imbue the targets with

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<sup>141</sup> Robert A. Hahn & Marcia Claire Inhorn, *ANTHROPOLOGY AND PUBLIC HEALTH: BRIDGING DIFFERENCES IN CULTURE AND SOCIETY* 246 (2009).

<sup>142</sup> Charles Jarmon, *NIGERIA: REORGANIZATION AND DEVELOPMENT SINCE THE MID-TWENTIETH CENTURY* 28-32 (1988).

<sup>143</sup> Shinji Yamashita, Joseph Bosco & Jeremy Seymour Eades, *THE MAKING OF ANTHROPOLOGY IN EAST AND SOUTHEAST ASIA* 337 (2004).

<sup>144</sup> James Lull, *MEDIA, COMMUNICATION, CULTURE: A GLOBAL APPROACH* 244 (2000).

“native features,” including native ideas, methods, institutions, etc.

In order to get a better understanding of the above definition of “indigenization” in the context of international law, we can dissect it into several elements as listed below:

- Nature: an ideology, a process, and a consequence;
- Actors: domestic authorities when behaving as international actors;
- Backgrounds: unsatisfactory international regime of trade globalization;
- Leverages: making and implementing international and domestic rules by boosting legal traditions and cultures of individual participants;
- Purpose: to gain an advantageous position in the context of globalization; and
- Consequence: undermining or rendering uncertain the expected efficacy of uniform multilateral rules.

For the purpose of this dissertation, “legal indigenization” serves as a tool:

- to analyze the process in which the WTO Members inject their own legal traditions into international and domestic rule making and implementation;
- to provide a perspective from which to observe domestic authorities’ participation in the global trading system;
- to account for reactions of the member states to a growing GATT/WTO-led globalization;
- to deepen the understanding among the WTO member states of each other; and
- to explain the elements that might undermine or render uncertain the efficacy of international trade regulations.

## **B. Comparisons with Other Relevant Terms**

In order to further understand the meaning of legal indigenization, the following paragraphs offer comparisons between this term and two other relevant terms: globalization and localization.

There is no consistency, of course, in the concept of globalization. Many scholarships have provided descriptions of the concept, as enumerated below:

- Globalization – the ever-increasing integration of national economies into the global economy through trade and investment rules and privatization, aided by technological advances.<sup>145</sup>
- For protestors in Seattle, Gothenburg, or Genoa, globalization represents a state of the world wherein international organizations implement the wishes of transnational corporations, ensuring

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<sup>145</sup> Colin Hines, LOCALIZATION: A GLOBAL MANIFESTO 4 (2000).



that free trade rules will combine with global market pressures to eliminate the ability of local and national governments to implement policies.<sup>146</sup>

- Within corporations and business groups, globalization usually refers to a global market reach and to an imperative that firms must ‘globalize or die.’<sup>147</sup>
- Among economists, globalization refers to a situation in which the so-called ‘law of one price’ applies on a global basis. This assumes that goods and services will be freely and costlessly traded over space and borders.<sup>148</sup>
- Globalization can be defined as a compression of the world by flows of interaction that are broadening as well as deepening around the world. These flows have brought about a greater degree of interdependence and economic homogenization; a more powerful burgeoning global market, financial institutions, and computer technologies have overwhelmed traditional economic practices.<sup>149</sup>
- [There are] five key propositions about globalisation:
  1. Globalisation is the economic integration of regional and national economies.
  2. It is caused by falling cost of distance.
  3. It has exceptionally powerful effects when the reduced costs of distance combine with economies of scale.
  4. It first became important in the early nineteenth century.
  5. It is not solely an economic phenomenon in a historical and geographical context. It has political and social consequences. In particular, it impacts on, but does not eliminate, cultural differences, and it reduces, but does not eliminate, the policy discretion of nation-state.<sup>150</sup>
- Globalization addresses the business issues associated with taking a product global. In the globalization of high-tech products this involves integrating localization throughout a company, after proper internationalization and product design, as well as marketing, sales, and support in the world market.’<sup>151</sup>

A scrutiny of the above various concepts of globalization from a legal perspective shows that the process of globalization calls for legal homology, which means that international agreements and rules should serve as the common and even sole ancestors of domestic laws of the Member States. Legal homology helps to realize the economic, political and social

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<sup>146</sup> John F. Helliwell, GLOBALIZATION AND WELL-BEING 15 (2002).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 17.

<sup>149</sup> Richard Grant & John Rennie Short, *Globalization: An Introduction*, in GLOBALIZATION AND THE MARGINS (Richard Grant & John Rennie Short ed.) 1, 8 (2002).

<sup>150</sup> Brian Easton, GLOBALISATION 2 (2007).

<sup>151</sup> Bert Esselink, A PRACTICAL GUIDE TO LOCALIZATION 4 (2000).

expectations of the process of unification.

In short, “globalization” stands in obvious contrast to “indigenization.” Another concept, that of “localization,” appears at first glance to be much closer in meaning to “indigenization.” Indeed, “localization” may be confused with “indigenization.” The concept of “localization”, which also lacks consistency, is different from the concept of “indigenization”.

- Localization – a process which reverses the trend of globalization by discriminating in favour of the local. Depending on the context, the ‘local’ is predominantly defined as part of the nation state, although it can on occasions be the nation state itself or even occasionally a regional grouping of nation states. The policies bringing about localization are ones which increase control of the economy by communities and nation states. The result should be an increase in community cohesion, a reduction in poverty and inequality and an improvement in livelihoods, social infrastructure and environmental protection, and hence an increase in the all-important sense of security.<sup>152</sup>
- Localization is not about restricting the flow of information, technology, trade and investment, management and legal structures ..., indeed these are encouraged by the new localist emphasis in global aid and trade rules. Such transfers also play a crucial role in the successful transition from globalization to localization. It is not a return to overpowering state control, merely governments’ provision of a policy and economic framework which allows people, community groups and businesses to rediversify their own local economies.<sup>153</sup>
- Localization involves taking a product and making it linguistically and culturally appropriate to the target locale (country/region and language) where it will be used and sold.<sup>154</sup>

Despite the diversity of the definitions of localization, we could ascertain that the process it brings about is more a kind of business behavior than a legal one in most cases. The aim of localization is to maximize the local influence of economic globalization, rather to alter or resist it.

Based on the above concepts, Table 2.1 gives some comparisons of the three terms – globalization, localization and indigenization – regarding several critical aspects. Some explanations of the entries in Table 2.1 appear in the paragraphs that follow.

Table 2.1 Comparisons of Globalization, Localization, and Indigenization

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<sup>152</sup> Hines, *supra note* 145, at 4-5.

<sup>153</sup> *Id.* at 5.

<sup>154</sup> Esselink, *supra note* 151, at 3.

	<b>Globalization</b>	<b>Localization</b>	<b>Indigenization</b>
<b>Nature</b>	Process/ideology /consequence	Process/ideology /consequence	Process/ideology /consequence
<b>Actors</b>	International organizations	Transnational corporations and local entities	Domestic authorities
<b>Backgrounds</b>	Problematic Fragmentation	Influential globalization	Problematic globalization
<b>Leverages</b>	International rule making	Business behaviors	International and domestic rule making and implementing
<b>Foundations</b>	Legal homology	Local physical factors (language mainly)	Native cultural factors (ideas, traditions, institutions, etc.)
<b>Purposes</b>	To benefit all participants	To acquire benefits of similar amount as other participants of globalization	To acquire more benefit than other participants of globalization
<b>Affected scope</b>	International and domestic communities	Local communities	International and domestic communities
<b>Legal consequences</b>	Characterizing domestic rule making and implementing with international features	Local rules receive more attention and emphasis from transnational corporations.	Characterizing international and domestic rule making and implementing with native features

In most cases, it is international economic institutions that lead the process of globalization, considering the fact that one of the indispensable prerequisites for globalization is the development of uniform international rules by the international economic institutions such as the WTO. The leading forces of localization, by contrast, usually comprise transnational corporations and local entities that represent certain types of interests of local people. The propellers of indigenization are domestic authorities (*i.e.*, the individual states), because only domestic authorities enjoy the power or legitimacy to participate in negotiations of international rules, to decide the approaches to implement the international rules domestically, to enact relevant domestic laws, and to supervise the enforcement of pertinent domestic laws.

As indicated in the preceding sections, globalization was introduced to the contemporary world as a means of overcoming a fragmentary world before WWII. With the expansion of the influence of globalization, local entities and transnational corporations in local areas began to adopt localization to make globalization more acceptable in a way that appeals to local physical

factors such as language and slogans. However, globalization does not bring about only *benefits*. With more and more *disadvantages* of globalization being highlighted due to its defects, individual states, as traditional and significant participants of globalization, start to employ indigenization as a means of counterbalancing the disadvantages of globalization and to get an advantageous position therein. It is worth underscoring that globalization serves as a practical prerequisite for both localization and indigenization.

The main leverage employed by globalization is international rule making which targets at establishing uniform standards of international conducts among individual countries. The leverages of localization mainly include business behaviors, such as adapting a product's shape, color, packing and weight to local taste or preference, translating manuals of imported goods into local languages, putting forward business slogans that appeals to local custom, and adjusting terms of foreign investment contracts to meet the requirements of local regulations or policies. The leverages of indigenization are different from those of either globalization or localization. Individual states engaging in indigenization mainly rely on domestic legal traditions and cultures to influence the making and implementation of international rule as well as the enactment and enforcement of domestic law.

The foundation of globalization is legal homology, which refers to the fact that international law has served as the uniform source or origin of pertinent domestic law. The grounds of localization and indigenization are similar – that is, local or native features. The difference between the grounds of localization and indigenization is that in the case of localization, local features mainly refer to physical factors such as language, while in the case of indigenization, native features mainly refer to ideological or cultural factors, such as legal traditions.

The asserted purpose of globalization is to benefit all participants of the process. The aim of localization is to magnify the influence of globalization to improve the welfare of both transnational corporations and local communities. Indigenization attempts to balance the conflicting aspects of globalization with native features, so as to weaken or avoid disadvantages that an individual participant (usually a sovereign state) might encounter in an imperfect system of globalization.

The influential scope of globalization covers both international and domestic communities. At the international level, more and more issues that used to be “internal” (domestic) ones have fallen within the scope now of international regulations. At the domestic level, national laws have to adapt to pertinent international rules. The influential scope of localization is usually limited to local areas (sometimes a part of a country), since the measures regarding localization aim to magnify the influence of globalization in local areas. Similar to that of globalization, the influential scope of indigenization covers both international and domestic communities. At the international level, an individual state avails itself of the opportunities of international negotiations to persuade the international community to adopt principles or rules the state itself advocates. At the domestic level, the state both (i) manipulates the approaches to implement international rules in a way appealing to its own legal tradition and culture and (ii) controls the enactment and enforcement of national laws pertinent to its international rights and obligations in the same way.

The essential legal consequence of globalization lies in the fact that domestic legal regimes have been imbued with international features. In most cases that involve foreign elements, international principles and rules have become the principles and rules of domestic law. In the process of localization, local rules usually are barely impacted by business behaviors that involve foreign elements. On the contrary, local rules will receive more attention and emphasis from transnational corporations, considering the fact that these corporations try to make the influence of globalization more acceptable among local communities. As to indigenization, its legal consequence is contrary to that of globalization. Principles or rules backed by domestic legal traditions or cultures are employed by individual states to influence international rule-making and implementation as well as domestic law enactment and enforcement.

## **Summary**

The international trading regime was marked in the early portion of the twentieth century by fragmentation – that is, every participant involved in international trade adopted its own principles and rules of conduct regarding trade issues. The destructive consequences of such

legal fragmentation triggered the emergence of multilateral rules which largely contributed to globalization. However, scrutinizing the legal aspects of globalization reveals that the multilateral trading system – which serves as one of the most important pillars of globalization – suffers from both inherent and acquired problems. As a response to the shortcomings of globalization, individual states rely on their own legal traditions and cultures to influence the development and implementation of international rules as well as their own enactment and enforcement of domestic laws. Such a response is defined in this dissertation as legal indigenization, which means the process or ideology in which domestic authorities, when behaving as international actors, make and implement international or domestic rules in a way appealing to their native features (especially legal traditions), as responses to globalization led by a defective global legal system, for the purpose of getting an advantageous position in the context of globalization.

## CHAPTER 3. LEGAL INDIGENIZATION OF WTO LAW IN CHINA

From the conceptual account of legal indigenization offered above in Chapter 2, we turn now to a substantive account – highlighting how China has indigenized WTO law in certain aspects. In this chapter, as well as the succeeding chapters, we need to be quite selective, identifying just some of the aspects of legal indigenization in China that seem especially fundamental in character. Consistent with “legal indigenization,” the aspects of legal indigenization in China discussed in this chapter reflect deeply rooted attitudes taken in China towards WTO law. Among the most prominent topics emphasized in the pages that follow are four aspects of the process of legal indigenization taking place in China: international trade negotiations, international trade disputes, domestic legislation, and domestic adjudication.

### I. International Trade Rule-making

Since its WTO accession in 2001, China has participated actively in WTO-sponsored multilateral trade negotiations, submitting proposals and transmitting various documents to the WTO. The proposals submitted by China reflect what kind of organization China expects the WTO to become and what effects China will take to help it do so.

As of now, China has concluded FTAs with ASEAN, Pakistan, Chile, New Zealand, Singapore, Peru, and Costa Rica.<sup>155</sup> Pertinent FTAs cover trade in goods, trade in services, and investment.<sup>156</sup> The contents of FTAs relating to trade in goods usually comprise the rules of classification, the formula of tariff reduction, rules of origin, safeguards measures, quantitative restrictions and other non-tariff barriers, acknowledgement of China’s status as a market economy, and other issues.<sup>157</sup> The FTAs on trade in services comprise provisions regarding market access, national treatment, and specific commitments.<sup>158</sup> The FTAs on investment include provisions regarding national treatment, MFN treatment, transparency of the legal

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<sup>155</sup> The Ministry of Commerce, available at <http://fta.mofcom.gov.cn/list/ftanews/1/catlist.html>, last visited on Feb. 27, 2012.

<sup>156</sup> For example, China-ASEAN FTA and China-New Zealand FTA, available at <http://fta.mofcom.gov.cn/list/ftanews/1/catlist.html>, last visited Feb. 27, 2012.

<sup>157</sup> For example, China-ASEAN FTA (Trade in Goods) and China-Chile FTA, available at <http://fta.mofcom.gov.cn/list/ftanews/1/catlist.html>, last visited Feb. 27, 2012.

<sup>158</sup> For example, China-ASEAN FTA (Trade in Services) and China-Costa Rica FTA, available at <http://fta.mofcom.gov.cn/list/ftanews/1/catlist.html>, last visited Feb. 27, 2012.

system governing foreign investment, construction of a favorable investment environment, and legal protections provided for foreign investors.<sup>159</sup>

For the purpose of this section, proposals submitted by the negotiating groups of which China is a member are excluded – an approach that is also adopted in Chapters 4 and 5 – since it would be difficult to differentiate precisely the specific proposals made by China from those made by other members. Instead, we shall focus on the proposals and propositions offered independently by, or directly attributable to, China.

## **A. Review of the Chinese Proposals**

The Chinese proposals can be grouped into three types – those on S&D treatment, substantive provisions, and procedural provisions. As shown in the coming examination, China gives particular attention in its proposals to the improvement of Special and Differential Treatment (S&D treatment). This principle – the benefit of which is afforded to developing and least-developed countries under Part IV of GATT<sup>160</sup> and in several Uruguay Round agreements – constitutes a fundamental principle in the WTO regime.

### **1. Special and Differential (S&D) treatment in China’s proposals**

The term “S&D” appears frequently in the documents China submits to the WTO regarding various issues of international trade. For instance, China has argued that “S&D treatment should be accorded to developing countries while participants aim to clarify and improve the disciplines on fisheries subsidies.”<sup>161</sup> Likewise, for market access for non-agricultural products, China has called for safeguarding “the benefits of developing country Members through implementing the principle of ‘less than full reciprocity’.”<sup>162</sup>

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<sup>159</sup> For example, China-ASEAN FTA (Investment) and China-Peru FTA, available at <http://fta.mofcom.gov.cn/list/ftanews/1/catlist.html>, last visited Feb. 27, 2012.

<sup>160</sup> Part IV is entitled “Trade and Development.”

<sup>161</sup> China, *Proposal on Fisheries Subsidies*, TN/RL/W/9, June 20, 2002 [*hereinafter* China-TN/RL/W/9].

<sup>162</sup> China, *Market Access for Non-agricultural Products*, TN/MA/W/20, ¶2, December 24, 2002 [*hereinafter* China-TN/MA/W/20].

Less than full reciprocity is usually taken to mean that the developing countries would undertake less tariff reduction commitments, in percentage terms, compared to developed countries.



Furthermore, the granting of S&D treatment to developing and least-developed participants regarding antidumping issues should, according to China, be demonstrated by implementing the principles of “lesser duty rule,” “increasing of negligible import volume and *de minimis* dumping margin,” preferring “price undertakings,” and enforcing “automatic sunset of anti-dumping measures.”<sup>163</sup>

The attention China has given to S&D treatment also appears in other trade areas as well. For example, as for risk management in importing and exporting procedures, China suggests that “developing and least-developed Members, including low-income economies in transition shall not be obligated to introduce the risk management techniques without the acquisition of such capability.”<sup>164</sup> Similarly, with respect to environmental goods, China recommends creating a development list for developing members – that is, a list of S&D-eligible items drawn from the common list that comprises specific product lines on which there is consensus that they constitute environmental goods.<sup>165</sup> China also suggests establishing in the Dispute Settlement Body (DSB) explicit S&D-related provisions applicable to all developing-country members,<sup>166</sup> accompanied with a draft of “proposed text.”<sup>167</sup>

## 2. Substantive provisions in China’s proposal

In addition to increasing adherence to the principle of S&D treatment, China has also suggested the improvement of some substantive provisions covered by the WTO agreements. Overall, China has identified the following substantive issues as needing improvement: the scope of fisheries subsidies; “non-actionable” subsidies as to the fisheries industry;<sup>168</sup> base rates

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<sup>163</sup> China, On the Negotiation on Anti-dumping, TN/RL/W/66, ¶2.1-2.4, March 6, 2003 [hereinafter China-TN/RL/W/66].

<sup>164</sup> China, *Communication*, TN/TF/W/148, July 18, 2007 [hereinafter China-TN/TF/W/148].

<sup>165</sup> China, *Statement on Environmental Goods at the Committee on Trade and Environment Special Session (CTESS) Meeting*, TN/TE/W/42, July 6, 2004 [hereinafter China-TN/TE/W/42].

<sup>166</sup> China, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding*, TN/DS/W/29, ¶1-4, January 22, 2003 [hereinafter China-TN/DS/W/29].

<sup>167</sup> China, *Specific Amendments to the Dispute Settlement Understanding – Drafting Inputs from China*, TN/DS/W/51, March 5, 2003 [hereinafter China-TN/DS/W/51].

<sup>168</sup> China-TN/RL/W/9, *supra note* 161.

and reduction formula of market access for non-agricultural products;<sup>169</sup> antidumping-related provisions and terms such as “product under investigation,” “major proportion,” “back to back investigations,” “particular market situation,” “constructed normal value,” “constructed export price,” “cumulative assessment of injury,” “causality between dumping and injury,” “threat of material injury,” “prohibition of zeroing,” “treatment to affiliated parties and their transactions,” “all others rate,” “reviews” and “‘non market economy’ clause;”<sup>170</sup> criteria for identifying trade-related MEAs (multilateral environmental agreements);<sup>171</sup> and risk management techniques applied for the purpose of reducing physical inspections on goods.<sup>172</sup>

### **3. Procedural matters in the Chinese proposals**

Beyond substantive issues, overall, proposals made by China on procedural issues concentrate on three areas: (i) institutional and operational aspects of the Dispute Settlement Body (DSB); (ii) transparency of information relating to member governments’ trade-related laws, regulations, and other measures; (iii) and the procedures to be followed in handling trade remedy issues.

As for the DSB mechanism, China’s advice mainly regards three issues: (1) shortening the consultation period and the time-frame of working procedures, (2) time requirements for notification to be a third party, and (3) the improvement of rights of third parties during the working procedure.<sup>173</sup>

### **B. Characteristics**

As introduced in the *Introduction*, there would be various ways to characterize pertinent practices of each member. Consequently, there would be more “characteristics” of those practices than those identified in this work. For the purpose of this dissertation, the approach I

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<sup>169</sup> China-TN/MA/W/20, *supra note* 162.

<sup>170</sup> China-TN/RL/W/66, *supra note* 163.

<sup>171</sup> China, *Identification of Multilateral Environmental Agreements (MEAs) and Specific Trade Obligations (STOS)*, TN/TE/W/35/Rev.1, July 3, 2003 [hereinafter China-TN/TE/W/35/Rev.1].

<sup>172</sup> China-TN/TF/W/148, *supra note* 164.

<sup>173</sup> China, *Specific Amendments to the Dispute Settlement Understanding – Drafting Inputs from China*, TN/DS/W/51, March 5, 2003 [hereinafter China-TN/DS/W/51].

have adopted is to underscore the aspects that could distinguish one member's behavior from those of the others on the ground of its own legal tradition and culture. In other words, in this dissertation, these listed characteristics warrant special attention and further analysis.

## **1. S&D treatment**

To sum up the proposals cited above, the design of nearly any WTO mechanism, from China's point of view, should embrace S&D treatment. China has attributed its enthusiasm about S&D treatment to its admiration for WTO mandates and the Doha Ministerial Declaration, on grounds that (1) “[providing] special and different treatment to developing countries, particularly to the least developed countries, is an important principle in the WTO and has been consistently emphasized in previous rounds of negotiations,”<sup>174</sup> and (2) the Doha Declaration takes “balancing the interests of the WTO Members at different levels of development” as a mandate.<sup>175</sup>

For China, incorporating S&D treatment into all future WTO agreements has become a priority for its participation in international trade rule-making. The motive for China to attach particular emphasis to S&D treatment might be multi-faceted. Basically, China itself is a large developing country that wishes to see the S&D principle working to its own specific national interests. In addition, like other developing countries, China might take the position that the S&D provisions need improvement more badly than do some other aspects of the WTO rules and mandates, considering the expected benefits that might be brought about by this treatment. Furthermore, from China's point of view, perhaps only the practice of “differentiated treatment” among different countries can achieve real *equality* among them in the long run. This last account, in turn, directs our attention to the Chinese legal tradition and culture, which we shall examine in subsection C1, below.

## **2. An inclination for vagueness**

A closer examination of the Chinese proposals revolving around substantive issues shows

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<sup>174</sup> China-TN/RL/W/9, *supra note* 161.

<sup>175</sup> China-TN/MA/W/20, *supra note* 162.

that the Chinese suggestions, in most cases, stay on the level of identifying the issues that should be improved or further negotiated, but without actually proposing specific text or advice that would bring or facilitate such improvements or negotiations.

For example, in a proposal regarding fisheries subsidies, China enumerates, in the first place, several kinds of such subsidies – for example fish breeding agriculture, fishing at high seas, and fishing in the Exclusive Economic Zones (EEZs) – aiming to prove the wide scope of this kind of subsidies. Then it calls for “early determination on the scope of subsidies.”<sup>176</sup> In similar fashion, it mentioned subsidies on infrastructure construction, on prevention and control of disease, on scientific research and training, and on fishermen’s switching to other businesses to illustrate what can be incorporated into the scope of “non-actionable” subsidies in a context of the fisheries industry<sup>177</sup> – all without further suggesting what, from China’s perspective, should be the complete scope of them.

Another example appears in a proposal submitted by China regarding anti-dumping issues. In it, China challenges many terms and provisions in the Antidumping Agreement (ADA), by calling for pertinent terms and standards in the ADA to be “further elaborated,” “further defined,” “clarified,” “clarified and improved,” “established,” “improved,” and “formulated.”<sup>178</sup> Similarly, with regard to risk management in the importing and exporting procedures, China stays again on the level of urging that “appropriate criteria to select traders to be eligible for different treatments shall be established accordingly.”<sup>179</sup>

### **3. Procedural matters**

As for the transparency issue, China offers several suggestions, relating to: (1) scope of trade regulations that are subject to publication; (2) designating the appropriate methods of publication; (3) identifying an enquiry point where, upon request of any individual, enterprise or WTO member, all information relating to the relevant laws, regulations and measures may be

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<sup>176</sup> China-TN/RL/W/9, *supra* note 161.

<sup>177</sup> *Id.*

<sup>178</sup> China-TN/RL/W/66, *supra* note 163.

<sup>179</sup> China-TN/TF/W/148, *supra* note 164.

obtained; and (4) prescribing a comment period which allows reasonable time for other members to make comments in writing, and take these written comments into consideration after such laws, regulations and measures are publicized while before implemented or enforced.<sup>180</sup>

In respect of trade remedy procedures, China's suggestions largely center on supplementing existing provisions pertinent to the issues of (1) the establishment of response and comment procedures after initiation,<sup>181</sup> (2) sunset review,<sup>182</sup> (3) standing of the application,<sup>183</sup> (4) pre-initiation consultations in countervailing duty investigations,<sup>184</sup> (5) treatment of new subsidy allegations in the course of an on-going investigation,<sup>185</sup> and (6) the use of the facts available under Article 12.7 of the ASCM.<sup>186</sup>

In raising concerns about these procedural matters, China offers specific suggestions for improvement. For example, on the issue of the Dispute Settlement Understanding (DSU), China has made the following suggestions, with regard to procedures relating to consultation, establishment of panel, participation of third party, reasonable period of time, and working procedures. For example, China proposed in this proposal to shorten the consultation period from 60 days to 30 days. In addition, for China, if a developing-country Member as respondent requests, this consultation period should be extended by up to 30 days.<sup>187</sup> The reader may refer to Appendix 3.1 for other suggestions from China relating to the DSB procedures.

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<sup>180</sup> China, *Communication*, TN/TF/W/26, March 21, 2005 [hereinafter China-TN/TF/W/26].

<sup>181</sup> China, *Proposal on Establishment of Responding and Comment Procedure after Initiation*, TN/RL/GEN/55, July 4, 2005 [hereinafter China-TN/RL/GEN/55].

<sup>182</sup> China, *Proposal on Sunset Review*, TN/RL/GEN/149, June 29, 2007 [hereinafter China-TN/RL/GEN/149].

<sup>183</sup> China-TN/RL/GEN/148, *supra note* 164.

<sup>184</sup> China, *Pre-initiation Consultations in Countervailing Duty Investigations*, TN/RL/GEN/161, December 4, 2009 [hereinafter China-TN/RL/GEN/161].

<sup>185</sup> China, *Treatment of New Subsidy Allegations in the Course of An On-going Investigation*, TN/RL/GEN/160, December 4, 2009 [hereinafter China-TN/RL/GEN/160].

<sup>186</sup> China, *Proposal on the Use of the Facts Available under Article 12.7 of ASCM*, TN/RL/GEN/169, October 14, 2010 [hereinafter China-TN/RL/GEN/169].

<sup>187</sup> China-TN/DS/W/51, *supra note* 173.

## C. Legal Tradition and Culture

### 1. Sovereign equality

Equality has always been a higher priority principle in China's international relations, both political and economic. It serves as both the prerequisite and the purpose for China to participate in the international community.<sup>188</sup> China's sensitivity to equality has roots in its attitude toward international law.

#### a. In dynastic China

Ann Kent, who offers a detailed, objective, and complete analysis of China's changing attitude toward international law from the beginning of the 19<sup>th</sup> century to the present, divides that long period into four stages – 1800-1949 (from powerless to empowerment), 1949-1978 (asymmetry or power and clash of political cultures), 1978-2000 (modernization phase reflecting the fruits of globalization, power, and cultural change), and 2000-present (a defender of international law).<sup>189</sup>

The first phase of this history may provide us with some historical insight as to why China takes equality so seriously in its international relations. Kent offers the following accounts of the phase of 1800-1949, in which China's dominant attitude toward international law, especially before the conclusion of WWII, can be featured by the terms “dismissiveness” and “instrumentalism.” By using of the term “dismissiveness,” Kent means China's resistance to being considered a subject to international law, a concept brought by the Western powers. By using the term “instrumentalism,” she means that, to Chinese scholars, international law was only an excuse or a leverage adopted by the Western powers to justify their “incursions into

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<sup>188</sup> For example, the Foreign Minister of the People's Republic of China, Yang Jiechi, stated at a G-20 meeting on September 26, 2009 that: “Mutual respect and equality are the basic norms governing international relations and constitute the important guarantee for common development. In the current context, it is of particular and practical importance to adhere to the purposes and principles of the Charter of the United Nations, to uphold the authority and role of the United Nations, to observe in good faith and the principle of non-interference in each other's internal affairs, and to promote democracy in international relations.” Available at the UN website: <http://www.un.org/apps/news/story.asp?NewsID=39793&Cr=global+economic&Cr1>, last visited on January 7, 2012.

<sup>189</sup> See Ann Kent, *China's Changing Attitude to the Norms of International Law and Its Global Impact*, in CHINA'S “NEW” DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE? (Pauline Kerr, Stuart Harris, Yaqing Qin ed.) 55 (2008).

China and the imposition of unequal treaties upon the country.”<sup>190</sup> “China saw international law as designed to consolidate power in the hands of the militarily powerful and to undermine states that were militarily, if not culturally, weak.”<sup>191</sup>

This attitude of dismissiveness and instrumentalism was gradually displaced (at least temporarily) by one of increasing confidence, largely due to China’s status as a victorious nation in WWII. “China began to be treated as an emerging power and was invited to participate, for the first time on an equal basis, with the great powers.”<sup>192</sup>

However, this transition only existed for a short period between the conclusion of WWII and the establishment of the PRC. In other words, the age-old attitude of “dismissiveness” and “instrumentalism” had not been shaken much by this temporary transition.

#### b. In contemporary China

In the first 30 years of the PRC, its attitude toward international law – which would also be described as one of instrumentalism – was greatly strengthened by both Marxism and the frustration China encountered in the international community. In Marxist thought, “international law was conceived as an instrument of a state’s foreign policy[.]”<sup>193</sup>

In addition to having influenced by Marxist thought, China’s attitude of instrumentalism reflected the country’s frustrations in effectively participating in the international community. “The shock of rebuff by the United Nations shaped China’s view of international law and

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<sup>190</sup> *Id.* at 56.

<sup>191</sup> *Id.* For elaborations: Until the early twentieth century ... China conceived its power as that of a “Middle Kingdom” at the apex of a hierarchically based system of tributary states. This was far from the principle that developed in international law of the sovereign equality of states. On the other hand, to China’s rulers, European public international law, as a mechanism used to justify foreign incursions into China and the imposition of unequal treaties upon the country, appeared precisely as the West then conceived it – as an instrument available only to so-called “civilized” Western states. China saw international law as designed to consolidate power in the hands of the militarily powerful and to undermine states that were militarily, if not culturally, weak. In the short term, this hard power of the West, together with the moral force of international law, assumed ascendancy over China’s relational power. It was therefore not surprising that China’s early attitude to international law was, at worst, dismissive and, at best, instrumental... (*Id.* at 56-57).

<sup>192</sup> *Id.* at 57. “Its increasing dependence on international law reflected its closer integration into the international system. At Yalta, in February 1945, it was decided that China, the United States, the United Kingdom, the Soviet Union, and France should be foundation members of the new body. China thereupon accepted an invitation to become a sponsor of the San Francisco Conference, which drew up the UN Charter.” *Id.* at 57.

<sup>193</sup> *Id.* at 58-59.

international organizations for the next twenty-one years[,]”<sup>194</sup> because, for China, international law was employed by western powers as an instrument to isolate it from the international community.

On the other hand, China perceived that the rights and obligations prescribed by an international treaty were associated with the power a party possessed, rather than with equality. “[T]he contents of an international treaty are decided by the ratio of the relative strength of the contracting states and the prevailing general international situation at the time of concluding the treaty.”<sup>195</sup>

To sum up the above observations given by Kent, China’s attitude toward international law between 1949 and 1979 had two elements: on the one hand, it reflected the Marxist theory of international law as an instrument of a state’s foreign policy; and on the other hand, China reinforced this opinion by viewing international law as a set of rules employed by the Western world to exclude or isolate it from the international community.

According to Kent, China’s attitude, since 1978, toward international law has shifted, from instrumentalism alone to instrumentalism *and* international rule of law, due to both domestic reform and globalization. At the same time, the notions of sovereignty, equality, and non-interference, as the main principles of traditional international law, are still firmly adhered to by the Chinese government.<sup>196</sup> Kent characterizes this period as bringing “the fruits of globalization, power and cultural change,” and elaborates on the two causes of this shift: (1) China’s “four modernizations” agenda since 1978 in the domestic context, and (2) the beginning of globalization in the international context.

... China’s new “four modernizations” agenda entailed a variety of new international and domestic goals.<sup>[197]</sup> ... These changes in China’s political priorities had a critical impact on its attitude toward international law and international organizations, as well as toward the domestic rules of law. ...

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<sup>194</sup> *Id.* at 58.

<sup>195</sup> *Id.* at 59.

<sup>196</sup> For example, see China-TN/RL/GEN/161, *supra note* 184.

<sup>197</sup> These new goals mainly include: the preservation of a peaceful international environment; an enhanced position in the international community, particularly in international organizations; modernization of the Chinese economy; and the maintenance of a credible nuclear deterrent. Kent, *supra note* 189, at 60.



... The convergence between China's new goals and ... globalization ... strengthened Chinese power, while Chinese culture acted both as a barrier protecting the society and ... as a carrier of the norms and structures of globalization into domestic society...<sup>198</sup>

A partial shift of China's attitude towards international law – from instrumentalism to international rule of law – as shown in the above excerpt, however, has not affected its adherence to traditional principles of international law, such as equality.<sup>199</sup> In Kent's view, the most recent period – 2000 to the present – has seen China become a defender of international law. For Kent, the reason for this shift in attitude is that China has perceived the United States' behavior as displaying a disregard of international law after the terrorist attacks on the United States, which promoted President Hu's call for respect for international law in various occasions.<sup>200</sup>

Kent summarizes her observations of this long history regarding China's attitude toward international law as “from the use of international law as an instrument of ‘civilized states’ to exploit China's lack of hard power, to its role empowering China's rise, to its current threatened status where the sole superpower has declared itself above the international rule of law, and China has challenged its right to do so.”<sup>201</sup>

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<sup>198</sup> *Id.* at 60-63 (italics added).

<sup>199</sup> See *id.* at 63-64. China's attitude toward international law was still characterized by strong support for traditional principles of international law, in particular, state sovereignty, the sovereign equality of states, and the principle of noninterference. Such continuity was consistent with China's political culture and its continuing concern to ensure the more equal redistribution of international power. Just as China adhered to a market economy with Chinese characteristics and to a rule of law with Chinese characteristics, so its approach to the international rule of law exhibited some unique features. For instance, while Russia as a postrevolutionary state had modified its traditional interpretation of sovereignty, China's transition to a socialist market economy status did not affect its formal, theoretical position. *Id.*

<sup>200</sup> “In May 2003, President Hu Jintao called for equal status for every country, a new security perspective and respect for international law. On October 14, 2004, Russia and China stated in their joint declaration that they believed it “necessary to settle international disputes and crisis situations under the auspices of the UN and on the basis of universal principles of international law.” At the forty-fourth session of the Asian-African Legal Consultative Organization, Liu Zhenmin of China's Ministry of Foreign Affairs insisted that “UN reform should contribute to the promotion of multilateralism, maintenance of the authority of international law and enhancement of unity among its member states.” On July 1, 2005, China and Russia again called for the promotion of multilateralism in world affairs and respect for international law. In the same year, China argued that UN reforms should be “in the interests of multilateralism and enhance the UN's authority and efficiency”; they “should safeguard the purposes and principles enshrined in the UN Charter”; they should “aim at reversing the trend of the UN giving priority to security over development”; and they should “accommodate the propositions and concerns of all UN members, especially those of the developing countries.” Premier Wen Jiabao even observed that “the abiding resilience of the Five Principles [of Peaceful Coexistence] lies, in the last analysis, in their consistency with the purposes and principles of the UN Charter.” *Id.* at 64-65.

<sup>201</sup> *Id.* at 66. For more comments on reasons for China's renewed interest in international law, see Hungdah Chiu, *Chinese Attitudes toward International Law in the Post-Mao Era: 1978-1987*, in *FOREIGNERS IN CHINESE LAW* 1,1 (1997).

Whether or not Kent's assertion that China is now a "defender of international law" is persuasive or not (a matter on which I would prefer to reserve judgment for now), Kent's description of China's continuous adherence to traditional principles of the international law – and in particular the principle of sovereign equality – seems beyond any question. Indeed, that point is confirmed by the following excerpts in which Chinese scholars focus on the issue of China's attitude toward the relationship between S&D treatment and sovereign equality. According to one of the scholars, Guan'en Xiao, S&D treatment safeguards the substantial equality in economic and social fields between developed and developing countries, and, thus, achieves justice and fairness.<sup>202</sup> For the other scholar, Lianzeng Cai, S&D treatment can achieve stable and durable development in both developed and developing countries. Therefore, it does not constitute discrimination against developed countries.<sup>203</sup>

To sum up, for most Chinese legal scholars, S&D treatment represents a pursuit of substantial equality, considering the realities of different levels of economic development.

## 2. Attitude toward international law

As shown in the above analysis, the Chinese model of making proposals (especially on substantive issues) seems to be simple in many cases – that is, to throw out a topic for multilateral discussion or negotiation without giving specific recommendations. Why would China behave so cautiously as this in presenting its own opinions and suggestions to an

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<sup>202</sup> "[I]n economic and social fields, the pro forma equality did not certainly bring about substantial equality. The Most-Favored-Nation treatment and the principle of reciprocity can operate effectively only in international trade between two countries with similar levels of economic development. In other words, substantial inequality and injustice will appear if these principles are applied in trade between two countries that differ greatly regarding their levels of economic development. Although S&D treatment – which confers on developing countries certain privileges and extra benefits – seemingly goes against the principles of equality and reciprocity, it rectifies substantial inequality and, thus, achieves justice and fairness." Guan'en Xiao, *Study on the Development and Reforms of S&D Treatment in the WTO*, in 10 JIAN HAN FORUM 28, 28 (2003) [as translated in pertinent part by Lijuan Xing].

<sup>203</sup> "S&D treatment for developing countries reflects the principle of "fairness and mutual benefit" in international economic law. It calls for the pursuance of substantial equality. ... The pursuance of substantial equality requires formal distinction between developed and developing countries, between economic relations among countries with similar levels of development (North-North relation) and economic relations among countries with different levels of development (South-North relation). ... [In addition,] promotion of fairness in the relations between developed and developing countries will bring about stable and durable development in both of them. Such development will, in turn, contribute to further national economic progress in developed countries. Therefore, S&D treatment does not represent discrimination against developed countries." Lianzeng Cai, *S&D Treatment in the WTO Agreements*, in 2 JOURNAL OF XIAMEN UNIVERSITY (ARTS AND SOCIAL SCIENCE) 81, 83 (2001) [as translated in pertinent part by Lijuan Xing].

international organization it belongs to? We may find answers by resorting to China's legal tradition and culture, as we have already done with the issue of S&D treatment.

On the one hand, the powerlessness of China in international negotiations for most of the period since the 19<sup>th</sup> century, even after its accession to the United Nations in 1970s, makes the country less confident in placing its suggestions in front of the Western members. The logic behind this cautiousness might be summarized in this way: fewer words coming out, fewer skeptics coming in. To some extent, the Chinese philosophy on this mirrors its distrust in, as well as alertness to, international organizations.

On the other hand, its attitude toward international law – reflecting more instrumentalism than international rule of law – also contributes to China's rather faint enthusiasm for giving attention to specific rules as opposed to general principles.

As one scholar points out, one key motive of China for entering the WTO was in fact sovereign equality itself, as explained below. In other words, substantial involvement in international rule-making is only a subsidiary goal for China's WTO accession:

China's 'WTO entry' ... signifies that China no longer has to stand on the sidelines while other countries draw up regulations to which it has to adapt. On the contrary, it can totally participate in and draw up rules of competition for the new century in negotiations through a multilateral trading system and become the beneficiary of certain relevant regulations to ensure China's equal entry into the world market.<sup>204</sup>

In addition, the same observer points out that China's progressive "open door" approach to "economic globalization" remains rooted in domestic policy rather than in multilateral rules. The heavy reliance on domestic policy rather than on international rules can, in turn, account for the Chinese indifference to specific international rules in some cases of trade negotiations.<sup>205</sup>

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<sup>204</sup> Ronald C. Keith, *China as a Rising World Power and Its Response to 'Globalization'*, in *CHINA AS A RISING WORLD POWER AND ITS RESPONSE TO 'GLOBALIZATION'* (Ronald C. Keith ed.) 1, 9 (2005).

<sup>205</sup> "In effect China's progressive 'open door' approach to 'economic globalization' remains rooted in domestic policy designed to support China's domestic economic development. [It] requires that China not be marginalized in multilateral rules of play, and it requires that the PRC, in its own national interest, campaign with alacrity against the new dangers of protectionism." *Id.* at 9-10.

### 3. Procedural issues in the legal tradition and culture

The fact that China does propose specific text with regard to procedural reform, which contrasts with its vague proposals on substantive provisions, may come as a surprise to those who are accustomed to criticizing China for ignoring procedural justice.

However, if we look back again into the Chinese history,<sup>206</sup> the emphasis we see there on (legal) procedure may offer an explanation. In dynastic China, trial organs emerged from the Xia Dynasty – that is, well over three thousand years ago.<sup>207</sup> In the Shang Dynasty (following the Xia Dynasty), legal provisions were developed relating to evidence and litigation procedure.<sup>208</sup> Procedural aspects of the legal system acquired maturity in the succeeding centuries. Although procedural provisions were substantive ones in dynastic China,<sup>209</sup> the existence of and the emphasis on these procedural provisions should not be ignored.

Some efforts on drafting separate procedural laws could be observed in the late Qing Dynasty, as influenced by Western legal theories.<sup>210</sup> However, that Western influence was not strong enough to overcome the tradition. No separate law on procedure had been promulgated in dynastic China. Consequently, despite the long existence of procedural provisions, the ideology of due process had not taken root in dynastic China. Procedural provisions constituted general guidelines for government officials to employ in exercising their duties, rather a set of rules to safeguard fairness and efficiency of substantive legal rules. This tradition can be observed also in the proposals made by China regarding the procedural issues in the WTO. Its proposals reflect rather narrowly on how to organize a trial.

The foregoing discussion has focused on international trade rule-making. A review of

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<sup>206</sup> A timeline of dynasties in the Chinese history is provided by Appendix 3.2 of this chapter.

<sup>207</sup> Jian Pu, *A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: XIA, SHANG, AND ZHOU* 117 (1999) [as translated in pertinent part by Lijuan Xing].

<sup>208</sup> *Id.* at 170.

<sup>209</sup> Shihong Xu, *A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: QIN AND HAN* 174 (1999) [as translated in pertinent part by Lijuan Xing].

<sup>210</sup> Yong Zhu, *CHINESE LEGAL HISTORY: THE LATE QING AND THE REPUBLIC OF CHINA* 291 (1999) [as translated in pertinent part by Lijuan Xing]. For example, Shen Jiaben, an official and famous jurist in the late Qing Dynasty, used to submit memorials to the throne regarding the plan of drafting procedural laws in 1906. He also hosted the drafting of the Law on Criminal and Civil Litigations. On January 24, 1911, a Draft of Criminal Litigation Lu and a Draft of Civil Litigation Lu were completed. (See *id.* at 292-295.)

China's suggestions on such rule-making shows us how China has approached the matter in a way that reflects its own legal tradition and culture. Its proposals on substantive issues and procedural matters have reflected China's long-held attitude of dismissiveness and instrumentalism toward international trade, its adherence to traditional principles of international law, and its recognition of procedural law.

## **II. International Trade Disputes**

In addition to international trade rule-making, international trade disputes constitute another setting in which we can see legal indigenization of WTO law in China. WTO trade disputes usually arise from conflicting attitudes towards one or more specific trade practices involving a WTO member and its trading partners. Therefore, these disputes constitute a mirror of how one member fulfills its relevant WTO obligations within the context of its own legal tradition and culture.

Overall, China was involved in 8 cases as complainant and 21 cases as respondent as of the end of 2011. For the purpose of this section, only the cases in which China has found itself in the position of respondent are studied, since these cases involve specific practices conducted by China grounded on its own initiative and within its own territory. Among the 21 cases involving China as the respondent, 5 cases have resulted in DSB reports as of May 2011. These are designated in the DSB system as the DS 339/340/342, DS 362, and DS 363 cases. Among them, the DS 362 and DS 363 cases have much to do with Chinese legal tradition and culture. The following paragraphs give a brief review of the challenged Chinese measures in these two cases.

### **A. Review of Dispute Settlement Body (DSB) Cases Involving China**

The DS 362 case is referred to as the Case of "China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights" (or "China – Intellectual Property Rights"). The United States complained about: (i) China's Criminal Law and related Supreme People's Court Interpretations which establish thresholds for criminal procedures and penalties for infringements of intellectual property rights; (ii) China's Regulations for Customs Protection of

Intellectual Property Rights and related Implementing Measures that govern the disposal of infringing goods confiscated by customs authorities; and (iii) Article 4 of China’s Copyright Law of 2001 which was alleged to have denied protection and enforcement to works that had not been authorized for publication or distribution within China.<sup>211</sup> This case relates to such aspects of Chinese legal tradition and culture as: (1) cautiousness in employing criminal penalties to protect individual rights; and (2) legal protection of subjects involving illegality.

The DS 363 case is referred to as the Case of “China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products” (or “China – Publications and Audiovisual Products”). The United States complained about a series of Chinese measures regulating activities relating to the importation and distribution of certain publications and audiovisual entertainment products.<sup>212</sup> This case relates to such aspects of Chinese legal tradition and culture as: (1) the relationship between publications and public morality, and (2) the relationship between trading rights and state control.

## **B. Conflicting Ideologies behind the Disputes**

The disputes between China and its trading partners reflected not only their disagreement on the specific provisions or practices that China adopted, but also deep discrepancies between those countries with regard to certain Chinese ideologies deeply rooted in its legal traditional and culture. The succeeding paragraphs try to identify these conflicting ideologies behind the above disputes, especially the DS 362 case and the DS 363 case.

### **1. Protection of subjects involving illegality**

In the DS 362 case, the United States claimed that “Article 4(1) of China’s Copyright Law denies to the authors of works ‘the publication or distribution of which is prohibited by law’ the broad set of rights enumerated in Article 10 of the Copyright Law, which largely encompasses the rights contemplated by the provisions of the Berne Convention (1971).” Furthermore, it argued that the “authors of works denied protection of the Copyright Law [cannot] benefit from

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<sup>211</sup> WTO, *One-page Summary of Key Findings of DS 362*.

<sup>212</sup> WTO, *One-page Summary of Key Findings of DS 363*.

the remedies specified in Articles 46 and 47 of the Copyright Law. Consequently, the authors of such works do not enjoy the minimum rights that are “specially granted” by the Berne Convention, inconsistently with Article 5(1) of that Convention.”<sup>213</sup>

Before turning to China’s defence, it is worth reviewing the disputed article – that is, Article 4 of China’s Copyright Law:

Works the publication and dissemination of which are prohibited by law shall not be protected by this law.

In exercising their copyright, no copyright owners may violate the Constitution or laws, nor may they impair their public interests.

In response to the United States’ accusation, China offered some arguments that the panel handling the dispute summarized as follows. In essence, China argued that “copyright” and “copyright protection” was distinguishable in the Chinese system. Therefore, for China, denial of copyright protection did not equal to denial of copyright:

Article 4(1) simply provides that such a work shall not be protected by the Copyright Law. ... Article 4(1) was not dependent on content review or any other regulatory regime related to publication and that the only result of a finding of prohibited content in that process was a denial of authority to publish, not a denial of copyright.<sup>214</sup>...

China asked the Panel to note that under the Chinese system of copyright, ‘copyright’ and ‘copyright protection’ are distinguishable. To the extent that Article 4(1) of the Copyright Law would come into play with respect to a work, it would operate not to remove copyright, but to deny the particularized rights of private copyright enforcement.<sup>215</sup>

The Panel dismissed China’s argument that Article 4(1) of the Copyright Law does not remove copyright but only “the particularized rights of private copyright enforcement.” In other words, the term “works the publication and dissemination of which are prohibited by law” in Article 4 was originally used to mean the term “works the contents of which are illegal.” That is to say, the meaning that Article 4 intended to convey is actually that: “works the contents of which are illegal shall not be protected by law.” The ideology being challenged was actually that of whether a subject involving illegal elements can be provided legal protection.

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<sup>213</sup> WTO, *Panel Report*, WT/DS362/R, ¶7.16, January 26, 2009 [hereinafter WTO-WT/DS362/R].

<sup>214</sup> *Id.* ¶7.17.

<sup>215</sup> *Id.* ¶7.21.

## **2. Publications and public morality**

In the DS 363 case, China tried to invoke GATT XX (a) (“public morality” exception) to justify its monopoly of importation of reading materials (for example, books, newspapers, periodicals, electronic publications), audiovisual home entertainment (“AVHE”) products (for example, videocassettes, video compact discs, digital video discs), sound recordings (for example, recorded audio tapes), and films for theatrical release. However, the Panel rejected its argument on the ground that “China had not demonstrated that the relevant provisions were ‘necessary’ to protect public morals.”<sup>216</sup>

It is worth observing that in invoking GATT XX (a), China gave attention only to its opinion that the disputable practices were relevant to the country’s public morality. It did not give much further deduction as to why it is “necessary” for the state to monopolize the importation and distribution of these products in order to protect its public morality. This weakness in China’s arguments partially reflects a traditional ideology in China: monopoly of the above products is certainly a first choice for a country to protect its public morality. It is obvious, however, that this traditional ideology cannot be agreed to by the Panel its trading partners.

## **3. Trading rights and state control**

In the DS 363 case, China was accused of violating its WTO obligations regarding granting trading rights. China argued that the trading rights for importing or distributing films and other products at issue did not fall within its WTO obligations with regard to trading rights in “goods,” because importation or distribution of films and other products at issue should be classified as trade in services. Again, this argument was rejected by the Panel. Both the accession document and the Foreign Trade Law have provided clear provisions regarding trading rights and state trading. The fact that this dispute still arose reflects one of the most sensitive issues in the Chinese trade regime and China’s tough process in carrying out pertinent reform in this area – that is, the liberalization of state-controlled trading rights.

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<sup>216</sup> WTO, *One-page Summary of Key Findings of DS 363*.



#### **4. Criminal thresholds and protection of IPR as civil rights**

In the DS 362 case, the United States attacked China's practice of establishing thresholds in criminal provisions with respect to Intellectual Property Rights (IPR) protection. Under those provisions, IPR offences which do not involve "relatively large" amount of sales (or illegal gains) or serious circumstance would not be subject to criminal sanction. The United States claimed that such a "minimum threshold" was unjustified. (The Panel disagreed.) The discrepancies between the two countries on this issue reflected both: (1) the United States' skepticism over China's determination to provide effective IPR protection, and (2) the Chinese traditional reluctance to protect civil rights (including economic rights) by means of criminal punishments.

### **C. Legal Tradition and Culture**

The preceding discussion highlighted ideologically different perspectives bearing on several types of international trade disputes involving China. The *sources* of those ideologically different perspectives can be found partly in the Chinese legal history or contemporary China's legal system.

#### **1. Protection of subjects involving illegality**

For the United States, since Article 4 of the Copyright Law states that "works the publication and dissemination of which are prohibited by law shall not be protected by this law," the works that possess copyright but are not permitted to publicize or disseminate within China cannot receive the protection prescribed in Article 10 of the Copyright Law, which identifies 17 types of copyrights.

At the same time, such works will also be denied the rights specified in Articles 46 and 47 of the Copyright Law, which prescribe civil, administrative, and criminal liabilities on the copyright offenders.

According to the USA, the denial of legal protection provided by Articles 10, 46, and 47 had violated the Berne Convention which guarantees minimum standards of protection. On the opposite side, China presented a different logic before the panel: Article 4 of the Copyright Law

did not deny the copyright of the relevant works; only “the particularized rights of private copyright enforcement” were denied. In other words, there existed a distinction between “copyright” and “copyright protection” within the Chinese legal system. Did this argument stand up to scrutiny? My answer is “no.” The following paragraphs dissect this question into several sub-questions.

First of all, is it possible to, acknowledge a right on the one hand, and, deny its protection by law on the other hand? According to China, “copyright” and “copyright protection” is distinguishable in the Chinese system. Were this argument sounds, it could be inferred from it that copyright does not inevitably invoke copyright protection. What kinds of rights could be denied legal protection, then? China’s answer was: “the particularized rights of private copyright enforcement.”<sup>217</sup> Of course this raises the issue of what is the “particularized rights of private copyright enforcement”?

An examination of Chinese argument summarized by the Panel demonstrates that China did not given a definite meaning or scope of so-called “the particularized rights of private copyright enforcement.” Neither did it specify which facets of copyright had not been denied according to the Copyright Law. In other words, it did not specify what “particularized rights of private copyright enforcement” were.

Second, we may turn to the question of whether or not there exists a kind of right that is not protected by law within the general context of the Chinese legal regime. Despite the fact that the prevailing Chinese laws have not given a clear definition of “right,” we can resort to the wording of them to get a sense of the understanding of the concept of “right” contained therein:

**Article 4 of the Constitution:** All nationalities in the People’s Republic of China are equal. The State protects the *lawful rights* and interests of the minority nationalities and upholds and develops a relationship of equality, unity and mutual assistance among all of China’s nationalities. Discrimination against and oppression of any nationality are prohibited; any act which undermines the unity of the nationalities or instigates division is prohibited. (emphasis added)

**Article 5 of the General Principles of the Civil Law:** The *lawful civil rights* and interests of citizens and legal persons shall be protected by law; no organization or individual may infringe

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<sup>217</sup> WTO-WT/DS362/R, *supra* note 213, ¶7.21.

upon them. (emphasis added)

**Article 1 of the Administrative Procedure Law:** Pursuant to the Constitution, this Law is enacted for the purpose of ensuring the correct and prompt handling of administrative cases by the people's courts, protecting the *lawful rights* and interests of citizens, legal persons and other organizations, and safeguarding and supervising the exercise of administrative powers by administrative organs in accordance with the law. (emphasis added)

**Article 1 of the Contract Law:** This Law is enacted for the purpose of protecting the *legitimate rights* and interests of the parties to contracts, maintaining the socio-economic order and promoting the socialist modernization. (emphasis added)

A first glance of these articles of some fundamental laws in China – the Constitution, the General Principles of the Civil Law, the Administrative Procedural Law, and the Contract Law – shows that there is always an adjective such as “lawful” and “legitimate” placed in front of the term “right.” It seems that there exists an antonym of lawful right or legitimate right – which might be possibly “unlawful right” or “illegal right.” However, the fact is that there is no such antonym existing in the Chinese legal system at all. The use of terms of “lawful right” or “legitimate right” only reflects an accustomed expression in the Chinese legal system.

The following paragraphs examine the connotations of the works the content of which are illegal. Article 25 of the Regulations on Publication Administration, Article 25 of the Regulations on Administration of Films, and Article 3 of the Regulations on Administration on Audio-Visual Products include provisions similar to Article 4 of the Copyright Law. That is, they deny legal protection of ten types of works that contain illegal contents and, consequently, are prohibited from publication and dissemination:

- (1) anything that goes against the basic principles determined by the Constitution;
- (2) anything that endangers the unification, sovereignty and territorial integrity of the country;
- (3) anything that divulges secrets of state, or endangers state security, reputation and interests;
- (4) anything that instigates national separatism, infringes on the customs and habits of minority nationalities and disrupts solidarity of nationalities;
- (5) anything that publicizes heresy or superstition;
- (6) anything that impairs social order and stability;
- (7) anything that publicizes pornography and gambling or plays up violence;
- (8) anything that insults or slanders others, or infringes on the legitimate rights of others;

(9) anything that endangers social ethics and the fine traditions of national culture; and

(10) any other contents prohibited by the provisions of laws and regulations.

According to the legislative interpretation of the Copyright Law submitted by the Standing Committee of the National People's Congress, the original purpose of Article 4 is to deny any legal protection to the works containing illegal contents:

It is widely disputed within China that whether or not works prohibited from dissemination enjoy copyright. One of the strands holds that although works containing reactionary or pornographic contents are prohibited from circulation, the right of authorship, the right of revision, and the right to protect a work against distortion and mutilation do exist and should be protected from infringement. ... The other strand argues that rights are invested by law. Works containing reactionary contents should not enjoy rights. Therefore, works prohibited from dissemination do not enjoy copyright and should not be protected by law...Chinese law has always been prohibiting works containing reactionary or pornographic contents.<sup>218</sup>

Obviously, the latter strand of opinion was adopted by the final articles of the Copyright Law. However, the wording of Article 4(1) has intentionally avoided clearly answering the central question of whether such works enjoy copyright.

Article 4 of the Copyright Law reflects the age-old Chinese proposition that subjects involving illegal aspect receive little protection from law. This proposition has been rooted in China for thousands of years. One of the features of the Chinese legal tradition is summarized as “addressing obligations and ignoring rights.” The following excerpt offers some elaborations on this feature:

The legal system in dynastic China addressed obligations and ignored rights. Laws were enacted to establish common people's obligations and punishments on violators. Therefore, in dynastic China, penalties constituted the main contents of laws. It was rarely that laws would establish rights for the people. The concept of right had not existed in China until a late time. If a person violated law, he should be punished by law. There was a definite causation here. More importantly, protection from law and punishment imposed by law could not be implemented at the same time. Laws provided protection to those who did not violate them at all. In other words, when a person did not violate law, he could be protected by law fully and completely. Once he violated law and triggered legal punishments, all other aspects of his rights that had nothing to do with his violation could not be

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<sup>218</sup> Standing Committee of the National People's Congress, *Interpretation of the Copyright Law of the People's Republic of China* (in Chinese), available at [http://www.npc.gov.cn/npc/flsyywd/minshang/2002-07/15/content\\_297588.htm](http://www.npc.gov.cn/npc/flsyywd/minshang/2002-07/15/content_297588.htm), last visited on July 21, 2011 [as translated in pertinent part by Lijuan Xing] [hereinafter NPC-Copyright].

protected by law. This was an extreme strategy to safeguard the authority of laws.<sup>219</sup>

## 2. Publications and public morality

A second topic of international trade disputes involving China revolves around publications and governmental control over them on grounds of public morality. China's approach to this issue also reflects ideological values rooted in Chinese legal history and China's contemporary legal regime.

### a. In dynastic China

In the Qin Dynasty, with the aim of using law to unify the thoughts of common people, the first Qin emperor – Qinshi Huangdi – prohibited the keeping of books that set forth views that deviated from or contradicted the views of Legalism<sup>220</sup>, and be imposed severe punishment on violators.<sup>221</sup>

Since its establishment in the Qin Dynasty, the crime of unlawful keeping of prohibited books had been classified as one of the crimes threatening the supremacy and ruling authority of emperors; consequently the most severe punishments would be imposed on offenders in dynastic China, from the Han Dynasty to the Qing Dynasty. The prohibited books were defined as those that contained contents questioning or subverting the status of emperors. The crime of keeping prohibited books would trigger the most severe punishments, such as capital penalties extending to the whole clan (*i.e.*, extended family) of the person who kept such books.<sup>222</sup> The efforts of the governing elite within China to control the thoughts and expressions of common people lasted

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<sup>219</sup> Zhang-Transition, *supra note* 6, at 62.

<sup>220</sup> In Chinese history, Legalism (Chinese: 法家; literally “School of Law”) was one of the main philosophic currents during the Warring States Period, although the term itself was invented in the Han Dynasty and thus does not refer to an organized ‘school’ of thought. Legalism was a utilitarian political philosophy that did not address higher questions such as the nature and purpose of life.

<sup>221</sup> Xu, *supra note* 209, at 60.

<sup>222</sup> For elaborations on the crime of unlawful keeping of books in dynastic China, see Xu, *supra note* 209, at 497; Pengsheng Chen, A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: SUI AND TANG 246 (1999) [as translated in pertinent part by Lijuan Xing] [hereinafter Chen-History]; Jianfan Zhang & Chengwei Guo, A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: SONG 495 (1999) [as translated in pertinent part by Lijuan Xing]; Yulin Han, A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: YUAN 249 (1999) [as translated in pertinent part by Lijuan Xing]; Jinfan Zhang & Xiaofeng Huai, A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: MING 441 (1999) [as translated in pertinent part by Lijuan Xing]; Jinfan Zhang, A COMPLETE HISTORY OF CHINESE LEGAL SYSTEM: QING at 197 (1999) [as translated in pertinent part by Lijuan Xing] [hereinafter Zhang-Qing].

for thousands of years. Such control on publications was justified in dynastic China as being an indispensable and primary means of acquiring spiritual control.

This effort to exercise cultural or spiritual control in dynastic China has been analyzed by one authority as follows:

More than one thousand years [ago,] ... China had begun to enact rules to control the dissemination of ideas. Emperors, beginning with the Wenzong Emperor in A.D. 835, prohibited the unauthorized reproduction of items that could be used for prognostication. Subsequent emperors expanded the ban to include heterodox items and materials under the exclusive control of the state, such as the Classics and official government documents. After the invention of the printing press, production of printed materials increased, and Chinese emperors ordered private printers to submit works to government officials for prepublication review.<sup>223</sup>

b. In contemporary China

In contemporary China's legal regime, the freedom of speech and of the press is guaranteed by Article 35 of the Constitution of the People's Republic of China, which states that:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

According to the method of classification provided by the Ministry of Culture of the PRC, film, book publication, television programs, broadcasting, press, and newspapers all fall within the concept of "culture" and are subject to administrative supervision.<sup>224</sup> Moreover, the mechanism of pre-publication review by competent authorities, such as the Ministry of Culture, the State Administration of Radio, Film and Television, and the General Administration of Press and Publication, is regarded as an indispensable constituent of the administrative functions of the state. This mechanism of pre-publication review may easily invite criticisms on grounds that it has violated or nullified Article 35 of the Constitution. An authority notes that "pre-publication review by the state was part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights, whether for printers,

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<sup>223</sup> Connie Neigel, PIRACY IN RUSSIA AND CHINA: A DIFFERENT U.S. REACTION, 63 AUT Law & Contemp. Probs. 179, 189-190 (2000).

<sup>224</sup> Ministry of Culture of the PRC, CHINESE CULTURE, available at <http://www.ccnt.gov.cn/xxzy/zgwh/>, last visited on July 17, 2011.

booksellers, authors, or anyone else.”<sup>225</sup>

An examination of the ten types of works that are prohibited from publication and dissemination enumerated above, shows us that the scope of prohibited works is relatively wide. It includes anything that goes against the basic principles determined by the Constitution, that endangers the unification, sovereignty and territorial integrity of the country, that endangers state security or reputation, that instigates national separatism, that impairs social order and stability, that endangers social ethics and the fine traditions of national culture, and that is prohibited by the provisions of laws and regulations.

Moreover, it is the competent administrative authorities that have discretion to determine whether or not a work contains the above contents, considering that the above scope lacks clear or definite criteria.

The purpose of this dissertation, however, is not to comment on how the Chinese authorities should balance between safeguarding the freedom of speech and press (e.g., relaxing the standards of pre-publication review of publications and motives) and exercising state governance. Indeed, my reference to the Constitution and the mechanism of pre-publication review aims to explain the emphasis attached by the Chinese authorities to protecting “public morality” through contemporary China’s legal system.

### **3. Trading rights and state control**

Being one of the essential legal leverages of state governance, the centralization of trading rights had been practiced for centuries in dynastic China. Even in the post-1949 era, it served as a most important mechanism regarding foreign trade. The situation did not change until 2004, when the new Foreign Trade Law was enacted. It is no wonder, then, that the right to trade used to be one of the most sensitive issues that had impeded China’s implementation of its WTO obligations. It is a painful process for China to completely release control over trading rights, even though corresponding legal reforms have taken place in legislation.

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<sup>225</sup> Marc H. Greenberg, *The Sly Rabbit and the Three C’s: China, Copyright and Calligraphy*, 7 Loy. U. Chi. Int’l L. Rev. 163, 175 (2010).

a. In dynastic China

For thousands of years in dynastic China, trading rights – that is, the authorization to engage in commercial trade across borders with foreign persons or entities – were centralized in the hands of the rulers, considering the significance that such trade had for national security.

In the Qin Dynasty, based on the regime of centralized powers, the government authority adopted strict policy on foreign trade. Traders could take up foreign transactions on the conditions of holding trespassing licenses which were subject to officials' examination.<sup>226</sup>

Since the Han Dynasty, roads to western region were opened. Foreign trade received great development compared with that in the Qin Dynasty. Trade legislation was adjusted accordingly. Traders must hold trespassing licenses.... At the same time, horses and weapons were prohibited from selling to alien tribes. Prohibited items originating from alien tribes were not allowed to be purchased also. These regulations aimed to control foreign trade and maintain national security.<sup>227</sup>

Before the Tang Dynasty, in fact, cross-border trade (*i.e.*, trade by land) was the major object of trade legislation, eclipsing in importance all other kinds of (internal) trade regulations. The tradable items at that time were strictly limited by the authorities. In addition, merchants involved in border trade were required to acquire official licenses or permissions *ex ante*.<sup>228</sup> One characteristic of trade legislation of that period is that foreign trade and internal trade were not separated from each other with regard to the form of regulations. In other words, there did not exist an independent code on foreign trade.

With gradual expansion of overseas trade (*i.e.*, trade by sea), it developed into a separate object of trade legislation in the Sui and Tang times. However, even in the Tang Dynasty – the most open era in Chinese history – trading rights of both domestic people and foreign merchants within China were subject to the authorization from the emperors.<sup>229</sup>

Even worse, trading rights of common people were completely removed by the Ming and Qing emperors. Indeed, throughout the Chinese history, trading rights were never granted to common people completely and thoroughly. Instead, the rights were regarded as an

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<sup>226</sup> Zhang Jinfan, DEVELOPMENT OF LEGAL CIVILIZATION IN CHINA 165 (2010) [as translated in pertinent part by Lijuan Xing] [hereinafter Zhang-Civilization].

<sup>227</sup> *Id.* at 254-255.

<sup>228</sup> Chen-History, *supra note* 222, at 416.

<sup>229</sup> See *id.* at 416-438.



indispensable constituent of the rulers' emperorship, and a primary leverage the rulers could exercise to maintain social control.

b. In contemporary China

In the post-1949 era, development of legal system on foreign trade has undergone three stages. In the first stage, from 1949 to 1978, the foreign trade system was established under a planned economy and the state monopolized foreign trade. It had these key features: (1) both the rights for operation of and the rights for administration of foreign trade were centralized in the hands of the state; (2) operative enterprises were not separated from the administrative organs; and (3) the national finances bore the benefits and debts arising from foreign trade.

There were two reasons for the PRC to adopt such a foreign trade system in its first 30 years: one is that the state was deeply influenced by the highly centralized planned economy adopted by the former Soviet Union and its foreign model which advocated state-controlled foreign trade; the other is China's consciousness of its own independence following many decades of existing in essence as a semi-colony.

Laws and regulations pertinent to foreign trade mainly comprised (i) the Temporary Rules of Management of Foreign Trade of 1950 and (ii) the Implementing Rules on the System of Licenses in Importing and Exporting Trade of 1951, which were enacted based on the Common Program of the Chinese People's Political Consultative Conference of 1949 and the Constitution of 1954. These regulations only constructed basic legal foundations to maintain and manage the tiny volume of foreign trade at that time. This situation remained in place until the end of the Cultural Revolution in 1976.

The second stage of the development of Chinese trade system lasted from 1978 through 2001. In this period, some reforms occurred regarding a modest relaxation of trading rights.

Since the Reforms and the Opening up in 1979, the foreign trade system underwent a transition also. Between 1979 and 2001, reforms in the foreign trade system generally went through four stages – (1) transferring the trading rights to a lower level of administration, (2) implementing a contract system in foreign trade, (3) removing national subsidies on foreign

trade, and (4) reforming the system of currency exchange rates as well as abolishing the contract system in foreign trade.

During this entire period, some problems still existed within the foreign trade system. For example, rights to foreign trade were not completely liberalized. The thresholds for private entities to acquire trading rights were extremely high. State-owned enterprises still monopolized importation and exportation in effect. However, a system of “review and approval” was still enforced with regard to the acquisition of trading rights.

The third stage of the development of foreign trade system started in 2001, in the context of globalization. The period immediately before China’s WTO accession was important because it saw the legal construction of China’s foreign trade system. In order to implement its promises relating to its WTO accession, China modified and sorted out a large number of trade regulations.

The enactment of the Foreign Trade Law of 2004 is a milestone both of the trade system and generally in the legal history of Chinese trade. The central tenet of the 2004 legislation is that trading rights can be exercised by private sector persons and entities. This release of trading rights, however, is still “limited.” According to Articles 8, 9, 10, and 11 of the Foreign Trade Law, trading rights in goods are exempted from governmental authorization in general; but if laws or administrative regulations prescribe otherwise, such laws and administrative regulations will prevail over this presumed freedom. Furthermore, the trading rights in services are not clearly released, according to the wording of Article 10:

The units and individuals engaged in international trade in services shall observe the provisions of this Law, and of the relevant laws and administrative regulations.

The units engaged in contracted construction of foreign projects or service cooperation with other countries shall have the necessary eligibility or qualification. The specific measures in this regard shall be formulated by the State Council.

Based on his many years of experience, former Minister of Foreign Trade Li Qiang elaborated on China’s view of foreign trade. In short, for China, international trade should be based on equality and mutual benefit, and respect for each other’s sovereignty. “China’s foreign trade policy consists of two basic objectives: development of the national economy and

promotion of international relations.”<sup>230</sup>

#### 4. Protection of civil rights through the criminal law

The determination of China to protect intellectual property was questioned by the USA in the DS 362 case. The contested issue revolved around whether or not China should establish a minimum threshold to impose criminal sanctions on infringement of intellectual property rights. An examination of China’s historical attitude toward employing criminal law to protect civil rights can help us further understand such legislation.

##### a. In dynastic China

The thoughts of “matching Heaven with morality” and “encourage morality and punish with prudence”<sup>231</sup> emerged in the Western Zhou times.<sup>232</sup> Since that era, emperors of every dynasty adopted the principle of “prudence” in imposing criminal penalties in a general sense, except for the Qin emperors who advocated the doctrine of severe punishment as urged by the Legalists.<sup>233</sup>

With regard to protecting civil rights, the employment of criminal-law instruments in dynastic China was limited. Crimes and penalties relating to civil rights were restricted to the issues of marriage and family, property rights (mainly theft and robbery), and bodily injuries. Moreover, when criminal provisions were applied to protect a person’s civil rights, the main purpose of such application was to maintain the social order rather to protect individual rights.<sup>234</sup>

##### b. In contemporary China

Chinese criminal provisions that were challenged in the DS 362 case<sup>235</sup> were Articles 213,

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<sup>230</sup> Gene T. Hsiao, *THE FOREIGN TRADE OF CHINA: POLICY, LAW AND PRACTICE* 8-10 (1977).

<sup>231</sup> The Duke of Zhou argued that the Heaven only advocated those of virtues, and that rulers should boost morality and impose penalties with prudence. See Zhang-Civilization, *supra note* 226, at 59-60.

<sup>232</sup> Pu, *supra note* 207, at 334.

<sup>233</sup> Xu, *supra note* 209, at 63. In the Qing Dynasty, the emperors advocated Legalism, and relied on laws in unifying the thoughts of common people.

<sup>234</sup> For elaborations on criminal penalties in Dynastic China, see Xu, *supra note* 209, at 128-140, 485-499; Chen-History, *supra note* 222, at 239-270; Zhang & Guo, *supra note* 222, at 494-508; Han, *supra note* 222, at 249-379; Zhang & Huai, *supra note* 222, at 441-459; Zhang-Qing, *supra note* 222, at 196-197, 497-551.

<sup>235</sup> Article 213. Whoever, without permission from the owner of a registered trademark, uses a trademark

214, 215, 217, and 218 of the Criminal Law. These provisions constitute a part of Section 7 (“Crimes of Infringing on Intellectual Property Rights”), which is located in Chapter III (“Crimes of Disrupting the Order of the Socialist Market Economy”), Part Two (“Specific Provisions”) of the Criminal Law of the PRC. Of particular interest – and under scrutiny in the DS 362 case – were the so-called “thresholds” prescribed in those provisions. These “thresholds” refer to the requirement of “commercial scale” that can invoke criminal penalties: the higher the degree or extent of commercial scale, the more onerous the punishment.

In order to find out whether these thresholds are designed by China as a block to providing appropriate protection for IPR, we must put these disputable provisions into their context – Chapter III of the Criminal Law (since this chapter prescribes crimes of the same nature, namely economic crimes) – to see whether the penalties imposed on the infringement of IPR are obviously and inappropriately lower than those applicable to other economic crimes.

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which is identical with the registered trademark on the same kind of commodities shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined .

Article 214. Whoever knowingly sells commodities bearing counterfeit registered trademarks shall, if the amount of sales is relatively large, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of sales is huge, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

Article 215. Whoever forges or without authorization of another makes representations of the person's registered trademarks or sells such representations shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined .

Article 217. Whoever, for the purpose of making profits, commits any of the following acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined: (1) reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner; (2) publishing a book of which the exclusive right of publication is enjoyed by another person; (3) reproducing and distributing an audio or video recording produced by another person without permission of the producer; or (4) producing or selling a work of fine art with forged signature of another painter.

Article 218. Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this Law shall, if the amount of illegal gains is huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.

Article 220. Where a unit commits any of the crimes mentioned in the Articles from 213 through 219 of this Section, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the Articles respectively.

Before turning to Chapter III of the Criminal Law, we should review the specific thresholds at issue established by the disputed provisions. Generally speaking, in cases of committing infringement of an IPR, if the circumstances are *serious* or the amount of sales is *relatively large*, an offender shall (according to these criminal law provisions) be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are *especially serious* or the amount of sales is *huge*, an offender shall be sentenced to fixed term imprisonment of not less than three years but not more than seven years. An exception is stipulated in which selling works reproduced by infringing on the copyright of the owners, if the amount of illegal gains is *huge*, result in an offender being sentenced to fixed-term imprisonment of not more than three years or criminal detention.

Now we can turn to Chapter III of the Criminal Law to study the justification of these provisions. In Chapter III, economic crimes are classified into eight types: (1) crimes of producing and marketing fake or substandard commodities, (2) crimes of smuggling, (3) crimes of disrupting the order of administration of companies and enterprises, (4) crimes of disrupting the order of financial administration, (5) crimes of financial fraud, (6) crimes of jeopardizing the administration of tax collection, (7) crimes of infringing on intellectual property rights, and (8) crimes of disrupting the market order.

Imposing thresholds to trigger penalties on economic crimes is very common in Chapter III. For example, an offender shall be sentenced to fixed-term imprisonment if he alters currencies and the amount involved is relatively large (Art. 173 of the Criminal Law). The reader may refer to Appendix 3.3 for a complete list for the penalties requiring thresholds prescribed in Chapter III of the Criminal Law.

Some provisions impose no thresholds before triggering criminal penalties. For example, an offender shall be sentenced to fixed-term imprisonment if he produces or sells fake medicines (Article 141 of the Criminal Law). The reader may refer to Appendix 3.4 for a complete list of the penalties not requiring thresholds prescribed in Chapter III of the Criminal Law.

Now let us examine what kinds of economic crimes would trigger a sentence of fixed-term imprisonment of not more than three years or criminal detention, as prescribed in Chapter III.

Under those prescriptions, an offender shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention if he sells or buys counterfeit currencies or knowingly transports such currencies, and the amount involved is relatively large (Article 171 of the Criminal Law). The reader may refer to Appendix 3.5 for a complete list of the penalties of fixed-term imprisonment of not more than three years or criminal detention prescribed in Chapter III of the Criminal Law.

Offences similar to several of those enumerated above will invite heavier punishment if they produce more serious or extensive repercussions. For example, Chapter III provides that an offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years if he (1) smuggles weapons, ammunition, nuclear materials or counterfeit currency, and (2) the circumstances are minor (Article 151 of the Criminal Law). The reader may refer to Appendix 3.6 for a complete list of penalties of fixed-term imprisonment of not less than three years but not more than seven years prescribed in Chapter III of the Criminal Law.

The crimes referred to above have been grouped into two separate lists – one list for those whose effects are relatively serious and that therefore trigger imprisonment of up to three years, and one list for those whose effects are more serious and that therefore trigger imprisonment of three to seven years. As noted earlier, those are the two degrees of punishment applicable to IPR infringement. After examining the corresponding crimes that receive the same punishments as IPR infringement, it is fair to conclude that the crimes of IPR infringement are *not* obviously more hazardous to the society than those crimes are. Therefore, the treatment of IPR infringement is not obviously inappropriate taking into account the general context of the punishments on economic crimes. In other words, the thresholds imposed on the invocation of criminal penalties do not constitute an intentionally designed block to IPR protection.

On May 1, 2011, the Eighth Amendment to the Criminal law came into force. It revoked capital punishment on 13 kinds of economic crimes. This is also the first time for the Chinese legislature to reduce the kinds of crimes for capital punishment since 1979. This amendment reflects a willingness on the part of the state to relieve or relax criminal punishments in response to economic crimes. In this process, however, penalties on the infringement of IPR received no

relaxation. This demonstrates, in yet another way, the significance attached to IPR protection by the Chinese legislature through the operation of China's criminal law.

## 5. Protection of IPR – more fundamental issues

The last one of the categories of international trade disputes mentioned above in subsection IIB involves the protection of IPR. As noted there (see specifically subsection IIB4), the DS 362 case challenged China's use of "thresholds" in its relevant criminal law provisions. That issue was discussed in the proceeding paragraphs. However, the DS362 case also reflects more fundamental ideological issue. These go right to the heart of the reasons underlying IPR protection.

### a. In dynastic China

One expert analyses the contemporary protection of IPR in China from a historical perspective, starting by addressing the objectives of the traditional legal system of China. Not surprisingly, those objectives were to maintain social order and moral goodness and to maintain the power of the state over the people.<sup>236</sup>

The hostility from Confucianism toward the use of law to protect individual rights and the age-old ideology of "the power of the past" had an adverse impact on IPR protection:

[A] significant traditional force that shaped the P.R.C. Copyright Law is the "power of the past." Chinese intellectuals rely on historical developments in literature, fine arts, and calligraphy to a greater degree than Westerners. This appreciation of the past is also reflected in the Chinese view of copying as "the greatest compliment that authors can receive." Essentially, Chinese intellectuals feel that the works of prior authors and artists should be available for scholars and artists to build upon. An intellectual property system is seen as selfish because it restricts the rights of artists and authors by forcing them to "reinvent the wheel."<sup>237</sup>

The first copyright law in China was put into effect under the Qing Dynasty in 1910.<sup>238</sup> However, a commentator points out that the so-called "protection" of IPR in the 1910 law or in

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<sup>236</sup> June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 *Law & Pol'y Int'l Bus.* 1185, 1201 (1996).

<sup>237</sup> *Id.* at 1203-4.

<sup>238</sup> Perry W. McConnell, *Battling Pirates in China: The Effective Role for the U.S. in Fighting Film Piracy in China*, 11 *Gonz. J. Int'l L.* 3, 4 (2007-2008).

the preceding centuries was not aimed at protecting the *creators* of the works at issue but rather on protecting the interests of the *state*:

Professor Alford notes that historically, focus on control, via registration, of published works was motivated not by a desire to secure property rights for authors, but rather by the state's need to control the content of published works to ensure that works did not challenge the social order or improperly reveal "the inner workings of government, politics and military affairs." A further reason for granting protection to certain works was to ensure that the designs embodied in those works, if used by the Imperial family, would not be available for use by common people.<sup>239</sup>

b. In contemporary China

Since 1949, Marxism has played an influential role (waxing and waning in different periods, of course) in China's legal development. The influence of Marxism on IPR protection in contemporary China is generally negative – that is, Marxism considered the renunciation of private property (including IPR) essential to both economic growth and group interests:

Mao ... believed that "literature and art are for the masses of the people, and in the first place for the workers, peasants and soldiers; they are created for the workers, peasants and soldiers and are for their use." ... Traditional Marxism considered the renunciation of private property essential to economic growth, and so the acquisition of private property was largely forbidden in China. Copyright, being essentially a private property right, was consequently forbidden because it conflicted with the basic tenets of Marxism.<sup>240</sup>

Another commentator also points out the negative role of Marxism in IPR protection on the grounds that both Marxism and Confucianism convey a disdain for the rule of law.<sup>241</sup>

These accounts explain to some extent the ideological indifference to IPR protection in contemporary China, especially before its WTO accession. Such ideological indifference has been overcome, at least in form, by domestic legislation. However, the ideological transition needs more time and efforts than legislation does. Even if the corresponding reform has taken place, the traditional indifference might bring about other problems in law enforcement. Therefore, the concerns on IPR protection within China from its trading partners cannot be relieved largely by the changes in legislation only.

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<sup>239</sup> Greenberg, *supra* note 225, at 175.

<sup>240</sup> Lazar, *supra* note 236, at 1204-1205.

<sup>241</sup> Greenberg, *supra* note 225, at 176-177.



Before we turn to another form of “legal indigenization,” let us summarize the foregoing discussion. The international trade disputes involving China as respondent have revealed how China has implemented its WTO obligations in a way that reflects values deeply rooted in its legal tradition and culture. For example, the contemporary Chinese authorities still take trading rights as a central leverage to exercise state governance. Another illustration revolves around the state control of publication, which is *certainly* regarded as a first choice to exert influence on social morality. One more example appears in the dispute of IPR protection which reflects the Chinese strategy to employ criminal sanctions to protect civil rights.

### **III. Domestic Legislation on Trade**

Having examined trade negotiations and trade disputes in sections I and II of this chapter, let us look now at domestic Chinese legislation on trade, to see how China adapts trade legislation to both WTO obligations and its own legal tradition and culture.

#### **A. Legal Regime of Trade**

The Foreign Trade Law of 2004 serves as the fundamental law of China in the area of trade. It provides general principles and overall guidance for foreign trade practice. The State Council enacted in 2001 the Regulations on Anti-dumping, the Regulations on Anti-subsidies, and the Regulations on Safeguards, all of which, as amended in 2004, lay the foundation of the trade remedy system in China. These regulations clarify some basic concepts and mechanisms as to trade remedies, such as dumping, subsidies, damages, causality, investigation and measures.

In addition to the fundamental law and administrative regulations, trade authorities such as the Ministry of Commerce (MOC) of the PRC have enacted a large number of departmental rules. For example, the MOC and its predecessors have formulated the Temporary Rules on Hearings of Antidumping Investigation (2002), the Temporary Rules on Filing of Anti-subsidies Investigation (2002), and the Rules on Investigation of Foreign Barriers to Trade (2005). According to Announcement No. 2 of the MOC in 2011— publicizing a list of effective departmental rules enacted by the ministry and its predecessors – 183 rules are currently

effective, most of which relate to foreign trade.

## **B. WTO Law in Domestic Context and Characteristics of Domestic Legislation**

### **1. WTO law in domestic context**

After the WTO accession, China modified dramatically some important trade legislations according to the multilateral rules. The Foreign Trade Law of 2004 and three laws pertinent to IPR protection – the Copyright Law, the Trademark Law, and the Patent Law – represent typically this significant legal reform. This subsection takes the Foreign Trade Law as an example. The following comparison between the protocol of China's WTO accession and the Foreign Trade Law demonstrates China's effort to incorporate its multilateral obligations into domestic law.

The following excerpt from China's accession protocol contains its obligations relating to the issue of trading rights of trade in goods:

#### *Right to Trade*

1. ... China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. ...China shall complete all necessary legislative procedures to implement these provisions during the transition period.
2. Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

According to Article 10 the Foreign Trade Law of 2004, trading rights in trade in services have not been liberalized within Chinese legal system. This article states that:

The units and individuals engaged in international trade in services shall observe the provisions of this Law, and of the relevant laws and administrative regulations.

The units engaged in contracted construction of foreign projects or service cooperation with other countries shall have the necessary eligibility or qualification. The specific measures in this regard shall be formulated by the State Council.

Another pertinent aspect of China's WTO obligations involves state trading, as expressed in

its accession document:

### *State Trading*

1. China shall ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement.

2. As part of China's notification under the GATT 1994 and the Understanding on the Interpretation of Article XVII of the GATT 1994, China shall also provide full information on the pricing mechanisms of its state trading enterprises for exported goods.<sup>242</sup>

The issue of state trading is prescribed in Article 11 of the Foreign Trade Law, which states that:

The State may put the import and export of certain goods under the control of State- operated trading. Such goods shall only be imported and exported by the authorized enterprises, except the import and export of certain quantities of the goods under State- operated trading which the State permits to be operated by unauthorized enterprises.

The catalogues of the goods under the control of State- operated trading and the authorized enterprises shall be determined, adjusted and published by the department for foreign trade under the State Council in conjunction with the relevant department under the State Council.

Where, in violation of the provisions in the first paragraph of this Article, the goods under State- operated trading are imported or exported without authorization, the Customs shall not grant to them clearance.

## **2. Characteristics**

Despite the fact that the wording of the domestic provisions are consistent with pertinent WTO rules, the legal system of China relating to trade issues still exhibits some Chinese features. These characteristics include mainly (1) a contrast between principled law and specific regulations, (2) a focus on trade "management," and (3) a dominance of "temporary" rules.

### **a. Principled law and specific regulations**

The Foreign Trade Law of 2004 comprises 11 chapters and 70 articles. In other words, That is to say, on average, there are less than 7 articles in each chapter that deals with a huge topic. These huge topics include "Foreign Trade Dealers," "Import and Export of Goods and

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<sup>242</sup> *China's Protocol of Accession to the WTO*, WT/L/432.

Technologies,” “International Trade in Service,” “Protection of Trade-related Aspects of Intellectual Property Rights,” “Foreign Trade Order,” “Foreign Trade Investigation,” and “Foreign Trade Remedies.” Therefore, it is no wonder that most of the articles can only aim at setting forth general principles instead of specific rules with regard to trade practice.

By contrast, the administrative authorities such as the Ministry of Commerce (MOC) have enacted a great many rules and regulations on trade issues with specific topics and detailed provisions. Take anti-dumping as an example. The MOC has enacted at least 16 departmental rules to address this issue, as enumerated in Appendix 3.7.

#### b. Temporary rules

As indicated by the titles of the above rules, many of them were enacted as “temporary” rules. Similarly, if examining the 183 departmental rules enacted by the MOC that are currently effective, we will find 53 “temporary” rules. Some of these have proven to be long-term as a practical matter. The oldest “temporary” one – the Temporary Measures of Managing Cooperation with Foreign Countries in Labor Services – was enacted in November 1993; so it has been in force for eighteen years.

#### c. Focus on “management”

Among the 183 departmental rules enacted by the MOC and its predecessors, 106 of them are titled with the term “management,” and most of these 106 rules relate to foreign trade, which has evidence the main purpose for the MOC to enact these rules – that is, to “manage” foreign trade.

### **C. Legal Tradition and Culture**

Here again, we can gain insights into the characteristics of China’s legislation on international trade by exploring its legal history and culture.

#### **1. Forms of law in dynastic China**

The multiple levels of trade legal regime in contemporary China reflects not only the contemporary Chinese legal regime, but also some legislative custom in dynastic China – which

provided significant flexibility of legislation. In an overall sense, the source of Chinese law in dynastic society was simple – domestic law (that is, no territorially-external influence) as promulgated by the imperial bureaucracy (that is, no democratically-created rules). An examination into the law in dynastic China will reveal its various forms. *Lü*<sup>243</sup> was the basic and fundamental form of domestic law in dynastic China. Compared with other forms, *Lü* was relatively stable over time, both in contents and structure. In addition to *Lü*, the emperors' orders (usually free-standing and uncodified) constituted another significant form of law, and typically had the same, or even superior, effect as compared with *Lü*. Administrative agencies could also enact regulations with the purpose to supplement the provisions in *Lü* or to provide detailed guidance for applying *Lü* as well as other forms of law. In some dynasties such as the Qin and Ming Empires, judgments of cases as well as jurist interpretations also constituted sources of law in certain occasions.<sup>244</sup> In short, in dynastic China, it was an age-old practice to adopt various forms of law.

## 2. Contemporary China's legal regime

### a. General Structure of the legal regime

The general practice of trade legislation aims to keep the stability and provide flexibility of trade rules, considering the different procedures to amend laws, administrative regulations, and departmental rules within China's legal system. Such flexibility is grounded on the Legislation law and results in a contrast between principled law and specific regulations.

The issue of foreign trade is regulated by laws and regulations at different levels – laws (in a narrow sense), administrative regulations, departmental rules, and local regulations.<sup>245</sup> Their

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<sup>243</sup> *Lü* was the fundamental form of law in dynastic China since the Qing Dynasty. It literally meant general binding or discipline. Zhang-Civilization, *supra note* 226, at 140.

<sup>244</sup> The names of sources of domestic law varied in Dynastic China. For example, After China's unification in the Qin Dynasty, the orders of the emperors were named as "Zhi" or "Zhao." (Xu, *supra note* 209, at 64) While in the Sui Dynasty, the emperors' orders were called "Ling." (Chen-History, *supra note* 222, at 11) With regard to administrative regulations, they were named as "Ge" or "Shi" in the Sui Dynasty, and as "Cheng" in the Qin Dynasty (Xu, *supra note* 209, at 65). With respect to compilation of cases, it was called as "Ting Xing Shi" in the Qin Dynasty (*Id.* at 66), and as "Da Gao" in the Ming Dynasty (Zhang & Huai, *supra note* 222, at 13).

<sup>245</sup> According to the Legislation Law of 2000, Chinese law (in a broad sense) comprises mainly: (1) laws (in a narrow sense, which are enacted by the National People's Congress and its Standing Committee) [Article 7]; (2) administrative regulations (which are formulated by the State Council) [Article 56]; (3) rules (which are developed by the ministries and commissions of the State Council, the People's Bank of China, the State Audit Administration

legal effect descends in the order of law (in a narrow sense), administrative regulations, departmental rules and local regulations. However, their degree of specification ascends in this same order. That is, administrative regulations are enacted to implement laws (in a narrow sense). Departmental rules are developed to implement administrative regulations. Such practices of legislation aim mainly to keep the stability of law and to guarantee the “flexibility” of specific rules, considering that the procedure to modify administrative regulations or departmental rules is much simpler than that relating to laws (in a narrow sense).

This “flexibility” has its legal foundation in the Legislation Law. In general, the authority to enact and amend law (in a narrow sense) is exercised by the NPC and its Standing Committee. The State Council enjoys the right to amend administrative regulations. Various ministries and departments are entitled to enact and amend departmental rules. In the latter two cases, the amendment does not require voting among representatives of the NPC and adopts a relatively simple procedure.

Therefore, it is no surprise that the fundamental Foreign Trade Law will give just principles and general rules. The administrative regulations and departmental rules regarding international trade provide more detailed and specific provisions.

#### b. Trade remedy as a new area

To China, the concept of trade remedy is new. The Foreign Trade Law of 1994 did not include any chapter or provision on this concept. Indeed, China did not have any law, regulation or rule on it until the State Council enacted the Regulations on Anti-dumping and Anti-subsidies in 1999. The late entry of Chinese law into this area makes China feel an urgent need to catch up with its trade partners. This helps explain why there are so many administrative regulations and departmental rules focusing on trade remedies.

Moreover, the fact of late entry by China into the realm of trade remedy can also account

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as well as other organs endowed with administrative functions directly under the State Council) [Article 71]; and (4) local regulations, autonomous regulations and separate regulations (which are formulated by local People’s Congresses or their standing committees of the provinces, autonomous regions, municipalities directly under the Central Government, and the comparatively larger cities) [Article 63].

for the reasons the rules enacted by the MOC are often entitled as “temporary” rules. Trade authorities might still try to figure out the most appropriate provisions and approaches to regulate pertinent issues. The aim of most of the trade regulations to “manage” trade, which has been reflected in their titles, again, demonstrates its deeply-rooted ideology of state control of foreign trade.

## **IV. Domestic Adjudication of Trade Issues**

Generally speaking, domestic adjudication of trade issues – that is, the trade-related operations of the judicial branch of government or the administrative agencies that carry out the function to enforce trade laws and regulations – is another facet that can illustrate how domestic legal tradition and culture has influenced a WTO member to implement its WTO obligations. The ways a country’s judicial bodies treat trade-related cases, carry out judicial review, apply WTO law domestically, and exercise the jurisdiction over trade cases can all influence the extent to which WTO law has been implemented domestically.

### **A. Administrative and Judicial Regimes relating to Trade**

This subsection will briefly review the administrative and judicial authorities and practices relating to trade, in order to provide a background for further exploration into the characteristics of pertinent issues. The MOC of the PRC is the main administrative authority that takes charge of foreign trade issues, as authorized by the State Council.<sup>246</sup> It takes the responsibility to (1) enact and implement foreign trade policies, (2) participate in multilateral, regional, and bilateral trade negotiations, (3) investigate trade barriers, and (4) determine the imposition of AD and CVD duties. As indicated in Section III, the MOC also carries the function of enacting departmental rules on trade. In addition, the General Administration of Customs, the Tariffs Commission of the State Council, and the National Commission of Economy and Trade of the State Council also exercise certain administrative authority over foreign trade issues, such as imposing tariffs or AD duties and investigates industry injury caused by dumped or subsidized

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<sup>246</sup> Ministry of Commerce of the People’s Republic of China, *Missions of the Minister of the Commerce*, available at <http://english.mofcom.gov.cn/column/mission2010.shtml>, last visited on July 29, 2011.

goods.

Article 53 of the Regulations on Anti-dumping enacted by the State Council provides two options for interested parties to appeal if they are dissatisfied with the administrative determinations emerging from the government's handling of anti-dumping (AD) complaints. The interested parties can choose to initiate procedure of either administrative reconsideration *or* administrative litigation.

According to Article 53 of the Regulation on Antidumping, the following decisions are subject to either administrative reconsideration or judicial review:

- (1) The final determination of an AD investigation provided in Article 25 of the AD Regulation.<sup>247</sup>
- (2) The decision to impose an AD duty, or to collect duty retroactively or a refund, or to impose a duty on new shippers pursuant to Chapter 4 of the AD Regulation.<sup>248</sup>
- (3) A decision provided for in Chapter 5 of the AD regulation.<sup>249</sup>

Article 52 of the Regulations on Anti-subsidies prescribes similar provisions regarding the types of appeal available in a countervailing duty case.

Within the MOC, the Bureau of Fair Trade for Imports and Export takes the responsibility to carry out investigations relating to foreign trade and to make determinations on trade remedy measures. According to the Applicable Measures of Administrative Reconsideration within the Ministry of Commerce of 2004, applications for administrative reconsideration of administrative determinations on trade issues should be delivered to the Ministry itself.

As for judicial review of administrative determinations, the intermediate or higher people's courts have jurisdiction over complaints about the MOC's administrative decisions or activities, according to Article 5 of the Rules of the Supreme People's Court on Trials on Administrative Cases of International Trade of 2002 (hereinafter, "the Rules of the SPC on International Trade Cases"). The exercise of the right to initiate administrative litigation does not require the

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<sup>247</sup> Article 25 of the Regulation on Antidumping authorizes the Ministry of Commerce to make and publicize a final determination of an antidumping investigation.

<sup>248</sup> Chapter 4 of the Regulation on Antidumping is entitled *Antidumping Measures*.

<sup>249</sup> Chapter 5 of the Regulation on Antidumping is entitled *Period and Review of Antidumping Duties and Price Undertaking*.



exhaustion of administrative remedies. In other words, if a party who dissatisfies with a final determination made by the Bureau of Fair Trade for Imports and Exports, he can file an administrative litigation directly, without turning to the procedure of administrative reconsideration. It is the party's choice to initiate the procedure of administrative reconsideration or the procedure of administrative litigation. Moreover, if a party who had initiated the procedure of administrative reconsideration and were not satisfied with the second determination, he is still entitled to file an administrative litigation. These provisions explain how China formally puts its WTO obligations into its own administrative and adjudicative system.

## **B. WTO Law in Domestic Context and Characteristics of Domestic Adjudication**

### **1. WTO law in domestic context**

Judicial review has constituted a most important WTO obligation for its Members to protect the trade interests of other members within one member. Article X(3)(b) of the GATT prescribes that the tribunals or procedures of judicial review shall be independent of the agencies entrusted with administrative enforcement. Article X(3)(c), however, provides a loophole to the requirements of the independence. According to this article, arrangements that precede a country's membership in the World Trade Organization may continue if they "provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement." However, China's obligation relating to judicial review contained in its protocol of accession is more demanding. In its protocol of accession, China was required to establish tribunals that "shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter," without having the opportunity of relying on its administrative reconsideration system that had been established before the WTO accession. Furthermore, "the administrative actions subject to review by these independent tribunals go far beyond the trade and customs issues specified in the General

Agreement on Tariffs and Trade.”<sup>250</sup>

In order to implement the above WTO obligations, China has initiated corresponding reforms in the area of adjudication in trade cases, including clearly acknowledging the right to file administrative case on trade, as elaborated by one observer below:

Previously under Chinese law, administrative decisions on certain trade-related matters were excluded from judicial review, including decisions concerning the validity of patents and trademarks, and determinations in antidumping and countervailing cases. To implement its WTO commitments, China has amended relevant legislation so as to provide the right to appeal to courts in all such WTO-related matters. In 2002, the Supreme people’s Court issued three judicial interpretations to clarify the scope of and standards for judicial review of WTO-related administrative decisions. It also designated courts at the intermediate or higher level as the first-instance trial courts for international trade cases – a move aimed to ensure impartiality and quality of judgment in the adjudication of WTO-related cases, given that judges in upper level courts tend to be less vulnerable to external interference and are generally better qualified than judges in the basic courts. It is, however, still too early to assess the situation of judicial review in WTO-related cases since few such cases have been reported.<sup>251</sup>

## **2. Characteristics**

In fulfilling its WTO obligations, China’s domestic adjudication of trade issues still takes on some characteristics that have roots in Chinese legal tradition and culture, as analyzed in the following paragraphs. The classification of trade cases, the application of WTO law in Chinese courts, the distribution of jurisdiction over trade cases, as well as the types of judgments a Chinese court can make on trade disputes, directly determine the extent to which a pertinent WTO obligation has been fulfilled on the ground of Chinese legal tradition and culture.

### **a. Trade cases as a kind of administrative cases**

As prescribed in Article 2 of the APL, administrative litigation means that, if a citizen, a legal person or any other organization considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel,

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<sup>250</sup> “The coverage includes any administrative measure within the scope of the World Trade Organization including, but not limited to, China’s commitments on trade-related aspects of intellectual property rights, services, balance-of-payments measures, and so forth. The scope of review seems unprecedentedly broad.” Nicholas R. Lardy, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* 98-99 (2002).

<sup>251</sup> Donald C. Clarke, *CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES* 181-182 (2008).

he or it shall have the right to bring a suit before a people's court in accordance with this Law.

Article 1 of the Rules of the SPC on International Trade Cases specifies the scope of trade cases that can be accepted by the people's courts as administrative cases: (1) administrative cases involving international trade in goods; (2) administrative cases involving international trade in services; (3) administrative cases involving trade-related IPR; and (4) other administrative cases involving international trade. Article 3 of the adjudicative interpretation clarifies that only specific (or concrete) administrative activities can be the subject of a legal challenge.

What are specific (or concrete) administrative activities regarding international trade? The answer appears in the Supreme People's Court on Applicable Laws of Administrative Cases involving Anti-Subsidies of 2002 (hereinafter, "the Rule of the SPC on Administrative AS Cases). Article 1 of this adjudicative interpretation defines the specific (or concrete) administrative activities as including:

- (1) Final determinations relating to subsidies, amount of subsidies, damages, and extent of damages;
- (2) Decisions relating to imposing countervailing duties or not and retroactive collection;
- (3) Decisions of review relating to maintaining, modifying, or withdrawing countervailing duties; and
- (4) Other administrative activities relating to anti-subsidies according to laws and administrative regulations.

Article 1 of the Rules of the Supreme People's Court on Applicable Laws of Administrative Cases involving Anti-dumping of 2002 ("the Rule of the SPC on Administrative AD Cases") prescribes similar provisions to those summarized above for countervailing duty cases.

#### b. Applicable law in trade cases

Generally, the Supreme Court has not acknowledged the direct application of WTO law in Chinese courts. Articles 7 and 8 of the Rules of the SPC on International Trade Cases specify the applicable laws in handling such administrative cases. These two articles provided that: (1) the laws, administrative regulations, and local regulations that relate to or have an influence on international trade and are enacted by local legislatures within their power of legislation shall be

used as applicable law; and (2) local administrative rules that are relevant shall be used as references. In addition, the departmental rules can be used as references, according to Article 6 of the Rules of the SPC on Administrative AD Cases and Article 6 of the Rules of the SPC on Administrative AS Cases.

One noteworthy aspect of the provisions enumerated above is that they make no reference to the WTO agreements or any other pertinent international agreement that China has concluded or acceded. Hence, the WTO agreements seem to have been excluded from the direct application in Chinese courts with regard to these administrative cases on trade.

#### c. Jurisdiction

According to Article 2 of the Rules of the SPC on International Trade Cases, the intermediate and higher courts have the jurisdiction over administrative cases on international trade for first instance trial. Article 5 of the Rules of the SPC on Administrative AD Cases and Article 5 of the Rules of the SPC on Administrative AS Cases further specify that administrative cases on anti-dumping and anti-subsidies shall be tried by the higher people's courts of the domicile of the defendant or the intermediate people's courts appointed by such higher courts.

#### d. Types of judgments

Article 10 of the Rules of the SPC on Administrative AD Cases and Article 10 of the Rules of the SPC on Administrative AS Cases clarify the types of judgments that a competent court can make – judgments that uphold, quash or partially quash the disputed administrative activities.

A further question may arise that whether a party can claim for compensation caused by overruled administrative determinations or activities. Theoretically, such compensation is supported by Chinese legal system, as illustrated by the following provisions. Article 67 of the Administrative Procedural Law of the PRC states that:

A citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have the right to claim compensation.

If a citizen, a legal person or any other organization makes an independent claim for damages, the case shall first be dealt with by an administrative organ. Anyone who refuses to accept the

disposition by the administrative organ may file a suit in a people's court.

Conciliation may be applied in handling a suit for damages.

Furthermore, Article 4 of the Law on State Compensation states that:

The victim shall have the right to compensation if an administrative organ or its functionaries, in exercising their functions and powers, commit any of the following acts infringing upon property right:

- (1) Illegally inflicting administrative sanctions such as imposition of fines, revocation of certificates and licences, ordering suspension of production and business, or confiscation of property;
- (2) Illegally implementing compulsory administrative measures such as sealing up, distraining or freezing property;
- (3) Expropriating property or apportioning expenses in violation of the provisions of the State; or
- (4) Other illegal acts causing damage to property

e. Model of trade law enforcement by administrative agencies

As for the administration of trade laws and regulations, there is a perceived trend relating to the application of pertinent trade law. One example is that, as of today, all the periods for collecting anti-dumping duties designated by the MOC's final determinations are 5 years, the maximum period allowed by the WTO rules<sup>252</sup> and pertinent domestic provisions, despite the differences that may exist in dumping margins and the injuries the dumped goods may cause to domestic industries.

The other example is that, in analyzing elements other than dumping practice that might cause injury to the relevant industries, the MOC has taken the same model and arrived at the same conclusions in most cases. The elements in the AD cases, as analyzed by the MOC, include: (1) importation from other countries or regions; (2) changes in market demands; (3) consuming models and substitutable products; (4) commercial channels of circulation and trade policies; (5) quality and techniques of domestic products; (6) status of operations and management of the

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<sup>252</sup> Article 11.3 of the Antidumping Agreement states that: Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

domestic enterprises and industry; (7) exportation of domestic products of similar kinds; and (8) impact of force majeure.

In examining the analysis of these elements, especially in the cases that dumping margin is found to be positive, the findings relating to these elements always appear stiff. Almost all the investigations state the following findings:

- (1) No evidence shows that importation from other countries or regions have impaired relevant domestic industries (despite of the fact that the imported products under investigation may or may not constitute a considerable portion of the total importation);
- (2) The domestic demands of the products at issue keep going upward;
- (3) The consuming model of the products at issue did not change during the period of investigation, and there are no substitutable products;
- (4) The domestic products at issue are circulated in a completely competitive market, and no trade policies aimed at constraining the products or industries during the period of investigation;
- (5) The domestic products are of good quality, and the techniques possessed by the industries are at least as good as those of the products under investigation;
- (6) All the domestic enterprises and industries at issue are in good status with regard to operations and management, and all the institutions of these enterprises and industries are stable, strict, and advanced;
- (7) Exportation of similar products from China does not impair the domestic industries (either considerable exportation or small exportation can lead to this conclusion); and
- (8) No force majeure that may impair the industries happened.

In other words, as long as dumping practices, injuries to domestic industries, and the causation between them are established, there is little likelihood that the MOC will exclude any influence that might be attributable to factors other than the dumped goods. The above practice demonstrates, to some extent, the insufficient proficiency of Chinese administrative agencies in applying pertinent trade rules. Such insufficient proficiency can be easily misunderstood as a manifestation of arbitrary.

At the end of this subsection, it is safe to summarize that, China has undertaken corresponding reforms to implement its commitments to the WTO. At the same time both

administrative enforcement and judicial procedures have exhibit some Chinese characteristics, such as classifying trade disputes as administrative cases, narrowing the scope of applicable laws, entrusting jurisdiction to general (not specialized) courts, limiting types of judgments the courts can make, and modeling the administration of trade regulations. The following paragraphs try to find some roots of these features in the Chinese legal tradition and culture.

### **C. Legal Tradition and Culture**

As in our earlier examinations, we can trace some accounts for Chinese approaches to domestic adjudication of trade issues on the grounds of the country's legal history and contemporary legal system.

#### **1. Judicial review on administrative activities**

##### **a. In dynastic China**

In the thousands of years of dynastic China, there was one fact that never changed – that is, the adjudicative system was never separated completely from the administrative system, despite the fact that some efforts in this regard were taken in the very late Qing Dynasty but did not succeed. In other words, in dynastic China, judicial bodies were administrative agencies at the same time, and judges were administrative officials at same time, especially at the local level. An administrative system emerged in the Xia Dynasty. The supreme ruler of the Xia Dynasty was called “king.”<sup>253</sup> There were two layers of adjudication within the Xia Dynasty – local and central. Adjudicative officials in the Xia Dynasty were titled “*shi*” or “*li*,” who was a local adjudicative official that took charge of criminal and civil trials. *Da li* was a adjudicative official at the central level that took charge of trials having nationally-wide influence. The kings functioned as supreme judges within the country.<sup>254</sup>

When it entered the Western Zhou era, a relatively complete system on administration was established. In the Western Zhou era, the clan system and administrative power integrated closely. The Zhou kings, based on kindred relationships, infeudated lands to his relatives. A

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<sup>253</sup> Pu, *supra note* 207, at 96-98.

<sup>254</sup> *Id.* at 117.

system of administration took shape in both central and local regions. The central administrative regime set three official positions – *Tai Fu*, *Tai Bao*, and *Tai Shi* – to assist the Zhou kings to manage significant military and political affairs. In local areas, the persons who were infeudated lands by the kings carried the administrative functions in effect.<sup>255</sup> In the Western Zhou era, judicial bodies were set in the central region to charge adjudication within the country. In local regions or kingdoms, disputes were handled by administrative officials.<sup>256</sup>

Before the Han Dynasty, administrative law regulated mainly (1) the organization of administrative agencies, (2) official positions, and (3) the selection, appointment, evaluation, and welfare of governmental officials. In the Han Dynasty, a mature system of administrative supervision, which is similar to today's administrative reconsideration, took shape:

Generally speaking, every level of administrative organs enjoyed legitimate authorization of administrative supervision – the authorization to supervise the legitimacy and credibility of all officials within their administrative functions. At central level, the position of Yu Shi Da Fu exercised specialized function of administrative function. The position of Cheng Xiang Si Zhi was set within the administrative regime and supposed to exercise the function of supervision within the administrative regime. At local level, the position of Ci Shi exercised vertical supervision over local administration. In addition, the position of Du You exercised horizontal supervision over local administration, since this position was established within the local administrative regime.<sup>257</sup>

Since the Han Dynasty, the contents of administrative law were inherited from one dynasty to another, which mainly consisted of two parts: general administrative provisions and administrative supervision.<sup>258</sup> In addition, despite the fact that judicial authorities were established at the central level, local administrative authorities still functioned as judicial bodies.<sup>259</sup>

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<sup>255</sup> For elaborations, see *id.* at 198-210.

<sup>256</sup> For elaborations, see *id.* at 329-331.

<sup>257</sup> For elaborations, see Xu, *supra note* 209, at 328-337.

<sup>258</sup> For elaborations on administrative law in dynastic China, see Pu, *supra note* 207, at 90-100, 137-146, 198-217; Xu, *supra note* 209, at 67-92, 302-409; Chen-History, *supra note* 222, at 270-330; Zhang & Guo, *supra note* 222, at 84-118; Han, *supra note* 222, at 43-199; Zhang & Huai, *supra note* 222, at 43-161; and Zhang-Qing, *supra note* 222, at 83-127, 345-387, 685-704.

<sup>259</sup> For elaborations on judiciary mechanisms in dynastic China, see Pu, *supra note* 207, at 117-118, 170-173, 329-342; Xu, *supra note* 209, at 172-186, 512-658; Chen-History, *supra note* 222, at 64-82, 615-682; Zhang & Guo, *supra note* 222, at 547-714; Han, *supra note* 222, at 719-786; Zhang & Huai, *supra note* 222, at 500-546; and Zhang-Qing, *supra note* 222, at 317-345, 637-685, 802-819.



b. In contemporary China

In contemporary China, significant progress with regard to judicial review of administrative activities came with the promulgation of the Administrative Procedure Law (APL) in 1989. However, this law is criticized as a product with many controversial and compromised solutions that have hounded the implementation of the law.<sup>260</sup>

One of the main flaws in the system created by the 1989 law relates to the narrow scope of court jurisdiction over administrative activities. Jianfu Chen offers these observations:

In principle, a court is only empowered to inquire into the legality (not the merits or appropriateness) of specific (concrete) administrative acts, which include the examination of the following: (1) sufficiency of evidence in decision-making; (2) proper application of laws and regulations; (3) proper observance of statutory procedures; (4) acting within power; and (5) proper use of official power. ...

Four categories of administrative actions are specifically excluded from court jurisdiction [by Article 12 of the Administrative Procedural Law], namely, state acts involving national defence and foreign affairs, decisions concerning rewards, punishments, appointments, and removals concerning their working staff, the legality of administrative laws and regulations or decisions and orders having universal binding force, and all decisions for which the law provides that final adjudication is to be conducted by administrative authorities. Further, it is doubtful whether specific administrative activities infringing upon the political rights of citizens, legal entities, or other organisations, such as freedom of the press, are reviewable when the court is not specifically empowered to do so by clear legal provisions.<sup>261</sup>

For some scholars, both administrative procedure and administrative litigation are even regarded as constituting a mechanism for political control in contemporary China.<sup>262</sup> Another flaw of the pertinent system of judicial review lies in the limited jurisdiction enjoyed by the courts with regard to the types of judgments they can make. According to Article 54 of the APL, a court can only uphold, quash or partially quash an administrative decision. There is, however, an exception. Under Article 54(4), a court may alter an administrative decision on administrative

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<sup>260</sup> Jianfu Chen, CHINESE LAW: CONTEXT AND TRANSFORMATION 247 (2008) [hereinafter Chen-Transformation].

<sup>261</sup> *Id.* at 248-249.

<sup>262</sup> For example, see Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme, Michael W. Dowdle ed.) 143 (2009). (In this essay, He argues that the recent development of administrative law in China has much to do with the changing socioeconomic conditions of the late 1990s. These changing conditions have caused administrative law to become an effective mechanism of political control.)

penalty if such a penalty is manifestly unfair.

Chinese legal culture reflected in the field of administrative law has inevitable influence on trade cases. Especially, all the restrictions imposed on judicial review of administrative actions will be applied to trade issues. Specifically, on the one hand, the courts are only empowered to review specific administrative activities regarding (1) whether the major evidence is true and adequate; (2) whether the application of law is correct; (3) whether there is any violation of legal procedures; (4) whether there is any *ultra virus*; (5) whether there is any misuse of authority; (6) whether the administrative punishment is obviously unjust; and (7) whether there is any failure to perform or delay in performing the legal duties. On the other hand, the courts can only make judgments to uphold, quash, or partially quash an administrative determination on antidumping or countervailing cases. These restrictions will impair the rights of a complainant in trade cases to receive full protection from the mechanism of judicial review.

## 2. The direct application of WTO law

The direct application of WTO law has invited heated discussion among Chinese scholars.<sup>263</sup> Although the Rules of the SPC on International Trade Cases has in effect excluded the application of foreign law and international law in administrative cases of international trade, it is still too early to deny the hope of direct application of the WTO agreements in the Chinese courts, at least taking into account civil cases involving international trade.

After all, some Chinese legal provisions do acknowledge the legal significance of

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<sup>263</sup> For example, Quan Yuan, *Certain Legal Problems on Internal Application of the Rules of the WTO*, 7 HEBEI LAW JOURNAL (2004); Jiping Xu, *Legal Application of Judicial Review in International Trade under the WTO Framework*, 5 STUDY ON SOCIAL SCIENCE (2006); Youxian Xiao, *Application of WTO Agreements in China: From the Perspective of Legal Theories of Treaty Law*, 5 HEBEI LAW JOURNAL (2002); Jing Tang, *Application of WTO Law in China*, 6 JOURNAL OF CENTRAL CHINA NORMAL UNIVERSITY (Social Science) (2004); Wei Jiang & Jingqi Wang, *WTO Agreements and the Perfection of Civil Litigation in China*, 1 CHINA LEGAL SCIENCE (2001); Maohua Li & Dan Chen, *Application of WTO Law in China*, 1 JOURNAL OF HUNAN UNIVERSITY OF FINANCE AND ECONOMICS (2002); Manli Tian, *Application of WTO Agreements in the Chinese Courts*, 5 JOURNAL OF TONGJI UNIVERSITY (2002); Guohua Zhu & Yuan Yao, *Issues on Applicable Law in Administrative Cases on International Trade*, 3 JOURNAL OF SHANXI UNIVERSITY OF FINANCE AND ECONOMICS (2004); Xuefei Shi, *Application of WTO Agreements in China*, 3 JOURNAL OF UNIVERSITY OF SHANGHAI FOR SCIENCE AND TECHNOLOGY (SOCIAL SCIENCE) (2002); Xiaoqi Li, *Issues on Application of WTO Agreements in China*, 6 ECONOMIC OUTLOOK THE BOHAI SEA (2001); Guangxi Liu, "Adjusted Application" of WTO Agreements and the Chinese Law, 1 LEGAL FORUM (2002); Xiaoyong He, *Application of WTO Agreements in the Chinese Courts*, 1 JOURNAL OF INTERNATIONAL TRADE (2001); and LuLi Zhang & Jianzhong Huang, *Application of WTO Agreements in China*, 1 JOURNAL OF SOUTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW (2004).

international rules for domestic application. For instance, Article 142 of the General Principles of the Civil Law, Article 126 of the Contract Law, and Article 238 of the Civil Procedural Law,<sup>264</sup> all give prevailing effect of international treaties concluded or acceded to by China over domestic law. These provisions do offer grounds for the possibility of direct application of the WTO agreements in Chinese courts, especially with regard to civil litigations.

As for administrative litigation, Article 72 of the Administrative Procedural Law states that:

If an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

At first glance, it seems that international treaties also have prevailing effect over domestic law in administrative litigations. A scrutiny of this article, however, shows that only if the provisions in the APL are inconsistent with WTO agreements, WTO agreements can prevail over the APL. The reality is that, there is no such inconsistency has been found so far. Therefore, Article 72 of the Administrative Procedural Law still cannot resolve the issue of the direct application of WTO law in administrative litigations.

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<sup>264</sup> Article 142 of the General Principles of the Civil Law states that:

The application of law in civil relations with foreigners shall be determined by the provisions in this chapter.

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

Article 126 of the Contract Law state that:

The parties to a foreign-related contract may choose those laws applicable to the settlement of contract disputes, unless stipulated otherwise by law. If the parties to a foreign-related contract fail to make such choice, the State laws most closely related to the contract shall apply.

For the contracts to be fulfilled in the territory of the People's Republic of China on Chinese-foreign equity joint ventures, on Chinese-foreign contractual joint ventures and on Chinese-foreign cooperation in exploring and exploiting natural resources, the laws of the People's Republic of China shall apply.

Article 238 of the Civil Procedure Law states that:

If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations.

Furthermore, the direct application of WTO agreements is subject to one general prerequisite of applying international treaties in Chinese courts – that is, the involvement of foreign elements. In other words, the WTO agreements will by no means be directly applied to cases that do not involve foreign elements.

### **3. Administrative litigation as a legal remedy**

#### **a. In dynastic China**

As indicated above, administrative litigation did not formally exist in dynastic China. Instead, administrative supervision – which was similar to administrative reconsideration of today’s regime – can be of some significance for our analysis. As mentioned above, in dynastic China, administrative organs functioned as judicial bodies at the same time; and judicial judgments were in effect administrative determinations. Moreover, in dynastic China, there was no clear distinction between civil and administrative litigations. The following excerpt explains the difficulties for common people to initiate administrative reconsideration at that time:

In the Sui Dynasty, cases must be tried by competent authorities having jurisdiction. Parties could not appeal freely. Based on the levels of jurisdiction, a case should be tried for the first time the Xian administration. If the Xian administration refused to try it, the Zhou or Jun administrations (*i.e.*, higher level of administrations) should try it. In turn, if Zhou or Jun administrations refused to try it, the Ministry of Penalty should do it; otherwise, the case would be allowed to be submitted to the emperors. Therefore, the prerequisite of appeal was ignorance of cases not refusals from competent authorities rather inappropriate decisions made by them. It could be imagined how hard for a party to appeal a case.<sup>265</sup>

In the Tang Dynasty, the system of appeal developed to some extent. A party who did not satisfy with the judgment he received could bring an appeal, up until to emperors. A system of “direct appeal” also emerged in the Tang Dynasty, which meant that a complaining party could appeal to the emperor directly. However, the party must strictly comply with certain requirements of this system; otherwise, he would be severely punished. For example, what the party narrated must be the truth; otherwise, he would be imposed 80 flogs with a stick. The party must strictly comply with the procedure pertinent to “direct appeal”; otherwise, he would be

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<sup>265</sup> Chen-History, *supra* note 222, at 78-79.

imposed 60 flogs with a stick. In addition, if an adjudicative official was found by the emperor that he did not notify the direct appeal, which constituted violation of his duties, he, the official, would be imposed 60 to 100 flogs with a stick.<sup>266</sup> The similar system of review was inherited for thousands of years until the end of the Qing Dynasty.

b. In contemporary China

The statistics released by the Supreme People's Court shows that, in China, administrative litigation is resorted to much less by the people than is civil litigation or criminal prosecution. For example, in 2008, all Chinese courts received 6,288,831 cases in total for first-instance trial, among which 108,398 were administrative cases, 767,842 were criminal cases, and 5,412,591 were civil cases.<sup>267</sup> For second-instance trial, the courts received 654,044 cases in total, of which only 32,920 were administrative cases.<sup>268</sup>

The same trend is evident in other recent years as well. In 2009, the courts received 6,688,963 cases in total for first-instance trial, of which only 120,312 were administrative cases.<sup>269</sup> For second-instance trial, there were a mere 32,643 administrative cases among (fewer than in 2008) 731,950 cases in total.<sup>270</sup> In 2010, the courts received 6,999,350 cases in total for first-instance trial, of which only 129,133 were administrative cases. For second-instance trial, there were 720,976 in total, and 4.90% of them (just over 35,000) were administrative cases.<sup>271</sup>

Furthermore, administrative cases relating directly to international trade, if any, do not constitute a considerable portion of the total administrative cases. According to the classification of the Supreme People's Court in 2008 and 2009, the administrative cases are categorized into

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<sup>266</sup> *Id.* at 560-562.

<sup>267</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201002/t20100221\\_1403.htm](http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1403.htm), last visited on September 7, 2011.

<sup>268</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201002/t20100221\\_1402.htm](http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1402.htm), last visited on September 7, 2011.

<sup>269</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201004/t20100408\\_3856.htm](http://www.court.gov.cn/qwfb/sfsj/201004/t20100408_3856.htm), last visited on September 7, 2011.

<sup>270</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201004/t20100408\\_3847.htm](http://www.court.gov.cn/qwfb/sfsj/201004/t20100408_3847.htm), last visited on September 7, 2011.

<sup>271</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201103/t20110324\\_19084.htm](http://www.court.gov.cn/qwfb/sfsj/201103/t20110324_19084.htm), last visited on September 3, 2011.

ten groups: public security (police), recourses, urban construction, business and commercial, technical supervision, environmental protection, traffic, labor and social security, county (*xiang*) government, and others.<sup>272</sup> Obviously, trade cases can not constitute a major group compared with other cases included in that classification.

Because we are limited to publicly-disclosed information, we have no idea of the specific number of cases regarding international trade that are heard involving administrative reconsideration and litigation. However, according to the information released by the MOC, the fact that no trade remedy measures were revoked based on an administrative-reconsideration decision or an administrative-litigation judgment so far strongly suggests that the protection offered by this kind of legal remedy is insufficient.

Moreover, the reasons that administrative litigation as a legal remedy in China is less resorted to by Chinese people than civil or criminal litigation probably can be found in the inherent flaws of the institutions and the operations relating to judicial review, as identified above.

#### **4. Competence of intermediate courts to exercise jurisdiction over trade cases**

As indicated above, the intermediate or higher people's courts have the jurisdiction over trade cases. Some scholars have expressed concerns on the competence of intermediate courts in trying trade cases, considering both the complexity of trade cases and the unlikelihood for an intermediate court to overrule determinations made by administrative agencies at central-government level. One expert offers some comments on this issue:

The Supreme People's Court designates Beijing Municipal City Superior People's Court or its designated Beijing Municipal City Interim People's Court to hear AD judicial review cases. Many people are concerned as to whether the local district court [(i.e., intermediate people's courts)] is capable of hearing such complicated cases. For example, to hear AD administrative case, judges must understand complicated calculations of export prices, normal value and other values.

Furthermore, many people are also concerned about whether the level of local district courts is sufficient to hear AD administrative cases. The AD determinations are made by the

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<sup>272</sup> Available at [http://www.court.gov.cn/qwfb/sfsj/201002/t20100221\\_1412.htm](http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1412.htm) and [http://www.court.gov.cn/qwfb/sfsj/201004/t20100408\\_3851.htm](http://www.court.gov.cn/qwfb/sfsj/201004/t20100408_3851.htm), last visited on September 3, 2011.

central-government ministry-level MOFCOM [(i.e., the Ministry of Commerce of the PRC)] or the Tariff Commission under the State Council, but the Beijing Local Court is just a local district court. It is doubtful whether a local court can make a judgment overruling a central-government decision.<sup>273</sup>

Actually, the jurisdiction of intermediate people's courts over administrative cases of international trade has its foundation in the APL of 1989. Article 14 of the APL prescribes that:

The intermediate people's courts shall have jurisdiction as courts of first instance over the following administrative cases:

- (1) cases of confirming patent rights of invention and cases handled by the Customs;
- (2) suits against specific administrative acts undertaken by departments under the State Council or by the people's governments of provinces, autonomous regions or municipalities directly under the Central Government; and
- (3) grave and complicated cases in areas under their jurisdiction.

In most administrative cases relating to international trade, the *specific* administrative activities are conducted by the MOC. Therefore, according to the above article, it is legitimate and appropriate for intermediate people's courts to try these cases, since the MOC is one of the departments under the State Council as specified in Article 14 (2).

To sum up, four features of domestic adjudication of trade issues have been examined in this dissertation. They are judicial review of administrative activities, direct application of WTO law, administrative litigation as a legal remedy, and competence of intermediate courts to exercise jurisdiction over trade cases. Each feature has, in turn, been explained in the context of the Chinese legal tradition and culture.

## Summary

The process of legal indigenization of WTO law in China can be explored in four aspects – the conduct of international trade negotiations, the handling of international trade disputes, domestic legislation on trade, and domestic adjudication of cases involving trade.

In international trade negotiations, the proposals submitted by China to the WTO have

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<sup>273</sup> Xiaochen Wu, *ANTI-DUMPING LAW AND PRACTICE OF CHINA* 287 (2009).

exhibited some common characteristics. First of all, China expresses extreme enthusiasm about the principle of S&D treatment, as shown by the fact that most proposals it submits contain relevant S&D recommendations. Second, China also identifies some substantive provisions as needing further negotiations, concerning issues such as subsidies, anti-dumping, market access, and environmental obligations. The suggestions made on substantive provisions are vague, in that they just point out the terms or provisions that need improvement, without providing further specific proposals on how to improve the formulation of those provisions. As for procedural matters, China calls for advancing (1) the WTO institutions relating to dispute settlement, (2) transparency mechanisms relating to distribution of domestic laws, policies, and practices, and (3) procedural issues relating to trade remedies. In doing so, China has proposed specific textual changes in some cases.

The characteristics exhibited in China's trade negotiations have their roots in the legal tradition and culture of the country. Since late dynastic China, its attitude towards international law has not deviated much from one of "dismissal" and "instrumentalism," which makes China, on the one hand, take sovereign equality very seriously in the international community, and on the other hand, give more emphasis to general principles of international mechanisms than to specific rules. This fact can partially explain why China attaches particular importance attention to the S&D treatment principle but makes only vague recommendations as to substantive provisions. Its lack of confidence in the international community also contributes to China's cautious approach in proposing suggestions in front of the WTO's western members. On the other hand, the long history of addressing the management facet of legal procedure in dynastic China explains the Chinese proposals with specific recommendations regarding the management facet of certain procedural issues.

International trade disputes in which China is respondent, especially the DS 362 and DS 363 cases, challenged the country's approach and attitude toward IPR protection and monopoly over the importing and distributing of publications and audiovisual products in China. These disputes reflect the discrepancies between China and its trading partners with regard to certain ideologies rooted in their legal traditions and cultures. The conflicting ideologies behind these



disputes relate mainly to the legal status of subjects involving illegality, the role of publications in protecting public morals, state control of trading rights, and cautiousness in employing criminal penalties to IPR and other kinds of individual rights.

The Chinese legal tradition and culture serve as one of the determinants of the challenged ideologies. First of all, subjects involving illegal aspects were totally deprived of legal protection in dynastic China, considering that they were regarded as threats to the supremacy of rulers and social order. Second, both in dynastic and contemporary China, the control of the contents of publications and other similar products have been regarded for certain as a first choice of the state to protect public morals. Third, trading rights had been concentrated in the hands of the Chinese government from the earliest dynasty through 2004. Therefore, it is a painful process for China to completely release control over trading rights, although legal reforms have taken place in the trade legal regime in order to implement China's promises regarding trading rights as it entered the WTO. Fourth, in addition to the principle of "prudence" in imposing criminal penalties in dynastic China, it was rare for the rulers to employ criminal penalties to protect individual civil rights unless the offences severely threatened their reign or social order. Despite that historical approach, the Chinese government has in recent years given emphasis to IPR infringement by using criminal punishments – and, significantly, it seems clear that this emphasis is fully appropriate in weight and effect, if we evaluate the relevant provisions within the general context of criminal punishments imposed on economic crimes.

Laws (in a narrow sense), administrative regulations and departmental rules constitute the main body of China's domestic legal regime governing trade. The higher the legal status is, the more general and non-specific its contents are. The Foreign Trade Law of 2004 only offers general principles and overall guidance as to trade practice. Several administrative regulations enacted by the State Council lay the foundation of the trade remedy system. The most detailed provisions and specific topics appear in the departmental rules formulated mainly by the Ministry of Commerce and its predecessors. Among these administrative regulations and departmental rules, many of them are characterized as "temporary" ones, and focus on "management."

Similar legal regimes can be observed in both dynastic and contemporary China. China's dynastic empires publicized various forms of legal documents with differential legal effects. China's contemporary legal regime, including its set of rules on foreign trade, provides a similar model of legal structure. Furthermore, the concept of trade remedies is new to China. This newness has counterbalancing effects: on one hand, it urges China to enact a large number of rules for the purpose of keeping pace with its trading partners regarding legislation on trade remedies; on the other hand, China has to enact temporary rules which may subject to frequent adjustments easily, considering that the procedure to enact or amend administrative regulations or departmental rules is simpler than that of laws (in a narrow sense). In addition, the traditional ideology of state control in trade makes China still place heavy emphasis on the power of the management function of trade regulations.

Domestic adjudication provides China some discretion with regard to applying the WTO obligations and domestic law. The legal system provides the interested parties who are not satisfied with administrative determinations two kinds of remedies: administrative reconsideration and judicial review. However, to some scholars, inherent flaws exist in both remedies, such as the limited coverage of administrative cases, the exclusion of direct application of the WTO agreements, incompetence of the courts exercising jurisdiction over trade cases, and constraints in the types of judgments the courts can make.

Putting these concerns in the context of China's legal tradition and culture, we might find that they have both their historical roots and their contemporary causes. First, there did not exist judicial review of administrative activities in dynastic China. A mechanism similar to administrative reconsideration in dynastic China also placed some difficulties for common people to get their complaints appealed. In contemporary China, the flaws of the mechanisms of administrative reconsideration and judicial review with respect to trade cases result from the inherent flaws of the fundamental regime governing these two areas. Although direct application of WTO law is not totally denied in the Chinese courts theoretically, especially with respect to civil litigation, the actual possibility of such application is still slim in administrative proceedings. Third, the fact should be taken into account that administrative litigation as a legal

remedy is resorted to by Chinese people much less than civil or criminal litigation. Lastly, the competence of intermediate and higher people's courts in trying trade cases can be traced in the Administrative Procedural Law enacted more than twenty years ago. In other words, it is legitimate and appropriate within the Chinese judicial system for these courts to exercise jurisdiction over trade cases.

## Appendix 3.1

(Pertinent passages in main text are found largely in subsection IB3 of Chapter 3)

### China-TN/DS/W/51

#### Specific Amendments to the Dispute Settlement Understanding

##### – Drafting inputs from China

##### Communication from China

The following communication, dated 3 March 2003, has been received from the Permanent Mission of the People's Republic of China.

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Further to its communication, dated 6 January 2003, China would like to propose the following amendments to the DSU:

#### **1. Consultation**

1. In paragraph 7 of Article 4, the numeral "60" shall be replaced by the numeral "30" wherever it appears.
2. The following footnote shall be inserted at the end of this paragraph:

*Where one or more of the parties is a developing-country Member, the time period established in paragraph 7 of Article 4 shall, if the developing-country Member request, be extended by up to 30 days.*

#### **2. Panel**

1. Paragraph 1 of Article 6 shall be amended as follows:

*If the complaining party so requests, the DSB shall establish a panel at the meeting at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel.*

The existing footnote to Article 6.1 shall be retained at the end of paragraph 1.

2. The following new footnote shall be added to Article 6.1 after the word "requests":

*In a case involving a complaint against a developing-country Member, if the developing-country Member request, the establishment of a panel shall be postponed at the DSB meeting following that at which the request first appears as an item on the DSB's agenda.*

### **3. Third party**

1. In paragraph 2 of Article 10, the sentence "within 10 days after the date of establishment of the panel" shall be inserted after "to the DSB".

2. Paragraph 6 of Appendix 3 "Working Procedures" shall be amended as follows:

*All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to be present of all substantive meetings of the panel. The third parties shall be invited by the panel to present their views and may response to the questions raised by the panel and parties to the dispute during the first substantive meeting.*

3. Paragraph 7 of Appendix 3 "Working Procedures" shall be amended as follows:

*Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel. The third party shall have the right to observe the meeting without opportunities to take the floor at the second substantive meeting of the panel.*

### **4. S&D Treatment**

1. The following provision on horizontal S&D treatment to developing-country Members, including LDCs, shall be added in an appropriate place in the DSU.

#### **Article xx**

##### *Special and Differential Treatments to Developing Countries*

*1. Developed-country Members shall exercise due restraint in cases against developing-country Members. Developed-country Members shall not bring more than two cases to the WTO Dispute Settlement Body against a particular developing-country Member in one calendar year.*

2. *Where a developed-country Member brings a case against a developing-country Member, if the final rulings of a panel or the Appellate Body show that the developing-country Member does not violate its obligations under the WTO Agreements, the legal costs of the developing-country Member shall be borne by the developed-country Member initiating the dispute settlement proceedings.*

2. The following provision on shortened timeframe for safeguard and anti-dumping cases in the DSU shall be added in an appropriate place in the DSU.

#### **Article xx**

##### *Shortened Time-Frame for Disputes Involving Safeguard and Anti-Dumping Measures*

1. *Time-periods applicable under the DSU for the conduct of disputes involving safeguard and anti-dumping measures shall be half of the normal time-frame.*

2. *If the defending party is a developing-country Member, the shortened time-frame shall not apply to the defending party.*

Relevant provisions in the Agreement on Safeguards and Agreement on Anti-Dumping should be revised accordingly.

#### **5. Reasonable period of Time**

1. The following paragraphs shall be inserted at the end of paragraph 6 of Article 21:

*Upon compliance with the recommendations or rulings of the DSB, the Member concerned shall submit to the DSB a written notification on compliance.*

*If the Member concerned has not submitted the above-mentioned notification by the date that is 20 days before the date of expiry of the reasonable period of time, then not later than that date the Member concerned shall submit to the DSB a written notification on compliance including the measures that it has taken, or the measures that it expects to have taken by the expiry of the reasonable period of time*

#### **6. Amendment to Working Procedures**

1. Subparagraph 12(a) shall be revised as follows:

(a) *Receipt of first written submissions of the parties:*

(1) *Complaining Party:* \_\_\_\_\_ 3-4 weeks

(2) *Party complained against:* \_\_\_\_\_ 4-5 weeks

Such revision is to balance the current time-period for parties to a dispute to prepare written submissions.

2. In order to address special situations of developing-country Members, the following sentence shall be added to subparagraph 12(a):

*For developing-country Members to a dispute, the following time-frame shall apply:*

(1) *Complaining Party:* \_\_\_\_\_ 4-6 weeks

(2) *Party complained against:* \_\_\_\_\_ 6-7 weeks

## Appendix 3.2

(Pertinent passages in main text are found largely in subsection IC3 of Chapter 3)

### Dynasties in Chinese History

Xia Dynasty	2070-1600 BCE
Shang Dynasty	1600-1029 BCE
Western Zhou Dynasty	1029-771 BCE
Eastern Zhou Dynasty	770-256 BCE
Spring and Autumn Period	722-476 BCE
Warring States Period	475-221 BCE
Qin Dynasty	221-206 BCE
Western Han Dynasty	206 BCE-9 CE
Xin Dynasty	9-23
Eastern Han Dynasty	25-220
Three Kingdoms	220-265
Western Jin Dynasty	265-317
Eastern Jin Dynasty	317-420
Southern and Northern Dynasties	420-589
Sui Dynasty	581-618
Tang Dynasty	618-907
Five Dynasties and Ten Kingdoms	907-960
Northern Song Dynasty	960-1127
Southern Song Dynasty	1127-1279
Liao Dynasty	916-1125
Jin Dynasty	1115-1234
Yuan Dynasty	1271-1368
Ming Dynasty	1368-1644
Qing Dynasty	1644-1911



## **Appendix 3.3**

(Pertinent passages in main text are found largely in subsection IIC4 of Chapter 3)

### **Sentences Requiring Thresholds Prescribed in Chapter III of the Criminal Law of the PRC**

A person will be imposed penalties if he:

- (1) mixes impurities into or adulterates the products, or passes a fake product off as a genuine one, a defective product as a high-quality one, or a substandard product as a standard one, if the amount of earnings from sales is more than 50,000 yuan (Art. 140);
- (2) in violation of the provisions of the Company Law, makes a false capital contribution by failing to pay the promised cash or tangible assets or to transfer property rights, or surreptitiously withdraws the contributed capital after the incorporation of the company, if the amount involved is huge, and the consequences are serious, or if there are other serious circumstances (Art. 159);
- (3) alters currencies if the amount involved is relatively large (Art. 173);
- (4) for the purpose of illegal possession, unlawfully raises funds by means of fraud if the amount involved is relatively large (Art. 192);
- (5) does not pay the taxes due and adopts means of transferring or concealing his property so that the tax authorities cannot pursue the amount of taxes in arrears if the amount involved is over 10,000 yuan (Art. 203); or
- (6) fabricates stories and spreads them to damage another person's business credit or commodity reputation, if heavy losses are caused to the person, or if there are other serious circumstances (Art. 221).

## **Appendix 3.4**

(Pertinent passages in main text are found largely in subsection IIC4 of Chapter 3)

### **Sentences not Requiring Thresholds Prescribed in Chapter III of the Criminal Law of the PRC**

A person will be imposed penalties if he:

- (1) produces or sells fake medicines (Art. 141);
- (2) smuggles weapons, ammunition, nuclear materials or counterfeit currency (Art. 151);
- (3) for the purpose of making profits or dissemination, smuggles pornographic movies, videotapes, magnetic tapes, pictures, books or periodicals or other pornographic materials (Art. 152);
- (4) counterfeits currencies (Art. 170);
- (5) refuses to pay taxes by means of violence or threat (Art. 202); and
- (6) illegally sells special invoices for value-added tax (Art. 207). According to these provisions, criminal penalties without thresholds are imposed on the crimes that severely threaten the social stability and the people's health.

## Appendix 3.5

(Pertinent passages in main text are found largely in subsection IIC4 of Chapter 3)

### **Sentences of Fixed-term Imprisonment of Not More than Three Years or Criminal Detention Prescribed in Chapter III of the Criminal Law of the PRC**

A person will be imposed penalties of fixed-term imprisonment of not more than three years or criminal detention if he:

- (1) produces or sells fake medicines (Art. 140);
- (2) produces or sells food that is not up to hygiene standards, thus causing an accident of serious food poisoning or resulting in any serious disease caused by food-borne bacteria (Art. 143);
- (3) produces fake pesticides, fake animal pharmaceuticals or fake chemical fertilizers or sells pesticides, animal pharmaceuticals, chemical fertilizers or seeds while clearly knowing that they are fake or no longer effective, or any producer or seller who passes substandard pesticides, animal pharmaceuticals, chemical fertilizers or seeds off as up-to-standard ones, thus causing relatively heavy losses to production (Art. 147);
- (4) produces cosmetics that are not up to hygiene standards or knowingly sells such cosmetics, thus causing serious consequences (Art. 148);
- (5) for the purpose of making profits or dissemination, smuggles pornographic movies, videotapes, magnetic tapes, pictures, books or periodicals or other pornographic materials, if the circumstances are minor (Art. 152);
- (6) smuggles goods or articles and evades or dodges payable duties if the amount of gains is relatively large or receives administrative penalties twice within one year for smuggling (Art. 153);
- (7) when applying for company registration, obtains the registration by deceiving the competent company registration authority through falsely declaring the capital to be registered with falsified certificates or by other deceptive means, if the amount of the falsely registered capital is huge, and the consequences are serious or if there are other serious circumstances (Art. 158);
- (8) is directly in charge and the other persons who are directly responsible for the crime where a company submits to shareholders and the general public false financial and accounting reports, or reports concealing important facts, thus causing serious harm to the interests of shareholders or others (Art. 161);

- (9) for the purpose of seeking illegitimate benefits, gives money or property to any employee of a company, enterprise or entity, if the amount involved is relatively large (Art. 164);
- (10) is a director or manager of a State-owned company or enterprise who, taking advantage of his office, operates for himself or for another the same business as that of the company or enterprise in which he holds the office and obtains illegal interests, if the amount involved is huge (Art. 165);
- (11) is an employee of a State-owned company, enterprise or institution who, taking advantage of his office, commits any of the following acts and thus causes heavy losses to the interests of the State: (1) turning management of the profitable business of his unit over to his relatives or friends; (2) purchasing commodities from the unit managed by his relatives or friends at a price obviously higher than the market price, or selling commodities to such unit at a price obviously lower than the market price; or (3) purchasing from the unit managed by his relatives or friends commodities that are not up to standards (Art. 166);
- (12) is directly in charge of a State-owned company, enterprise or institution, when signing or fulfilling a contract, is defrauded due to serious neglect of responsibility and thus causes heavy losses to the interests of the State (Art. 167);
- (13) is directly in charge of a State-owned company or enterprise, practises irregularities for selfish ends and causes bankruptcy or heavy losses to the said company or enterprise, thus resulting in heavy losses of the interests of the State (Art. 168);
- (14) is directly in charge of a State-owned company or enterprise or the competent department at a higher level and practises irregularities for selfish ends by converting State-owned assets to shares at a low price or selling them at a low price and thus causes heavy losses to the interests of the State (Art. 169);
- (15) sells or buys counterfeit currencies or knowingly transports such currencies, if the amount involved is relatively large (Art. 171);
- (16) is an employee of a bank or of any other banking institution who buys counterfeit currencies or, taking advantage of his position, exchanges such currencies for genuine ones, if the circumstances are minor (Art. 171);
- (17) knowingly holds or uses counterfeit currencies shall, if the amount involved is relatively large (Art. 172);
- (18) alters currencies shall, if the amount involved is relatively large (Art. 173);
- (19) establishes a commercial bank or any other banking institution without the approval of the People's Bank of China (Art. 174);
- (20) for the purpose of making profits through transferring loans, fraudulently obtains credit funds from a banking institution and transfers the funds to another at usury, if the amount of illegal gains is relatively large (Art. 175);

- (21) illegally takes in deposits from the general public or does so in disguised form, thus disrupting the financial order (Art. 176);
- (22) forges or alters treasury certificates or any other negotiable securities issued by the State, if the amount involved is relatively large (Art. 178);
- (23) forges or alters stocks or corporate or enterprise bonds, if the amount involved is relatively large (Art. 178);
- (24) fails to pay or underpays the amount of taxes payable by means of forging, altering, concealing or destroying without authorization account books or vouchers for the accounts, or overstating expenses or omitting or understating incomes in account books, or refusing to file his tax returns after the tax authorities have notified him to do so or filing false tax returns, if the amount of tax evaded accounts for over 10 percent but under 30 percent of the total of taxes payable and over 10,000 yuan but under 100,000 yuan, or if he commits tax evasion again after having been twice subjected to administrative sanctions by the tax authorities for tax evasion (Art. 201);
- (25) refuses to pay taxes by means of violence or threat (Art. 202);
- (26) does not pay the taxes due and adopts the means of transferring or concealing his property so that the tax authorities cannot pursue the amount of taxes in arrears, if the amount involved is over 10,000 yuan but under 100,000 yuan (Art. 203);
- (27) falsely makes out special invoices for value-added tax or any other invoices to defraud a tax refund for exports or to offset tax money (Art. 205);
- (28) forges or sells forged special invoices for value-added tax (Art. 206);
- (29) illegally sells special invoices for value-added tax (Art. 207);
- (30) forges or makes without authorization any other invoices, which can be used to defraud a tax refund for exports or to offset tax money, or sells such invoices (Art. 209);
- (31) is a bidder who acts in collusion with each other in offering bidding prices and thus jeopardize the interests of bid-inviter or of other bidders, if the circumstances are serious (Art. 223);
- (32) during the course of signing or fulfilling a contract, commits any of the following acts to defraud money or property of the other party for the purpose of illegal possession, if the amount involved is relatively large: (1) signing a contract in the name of a fictitious unit or in the name of another person; (2) offering as guaranty forged, altered or invalidated negotiable instruments or any other false property right certificates; (3) while having no ability to fulfil a contract, cajoling the other party into continuing to sign and fulfil a contract by way of fulfilling a contract that involves a small amount of money or fulfilling part of the contract; (4) going into hiding after receiving the other party's goods, payment for goods, cash paid in advance or property for guaranty; or (5) any other acts (Art. 224);

- (33) commits any of the following acts by violence or intimidation, if the circumstances are serious: (1) buying or selling commodities by violence or intimidation, (2) compelling another person to provide or receive a service, (3) compelling another person to participate in or withdraw from bidding or auction, (4) compelling another person to transfer or purchase shares, bonds, or other assets of a company or enterprise, or (5) compelling another person to participate in or withdraw from particular operating activities (Art. 226);
- (34) scalps train or ship tickets, if the circumstances are serious (Art. 227);
- (35) in violation of the rules and regulations on land administration, illegally transfers or scalps land-use right to make profits, if the circumstances are serious (Art. 228); or
- (36) in violation of the provisions in the Law on Import and Export Commodity Inspection, evades commodity inspection and markets or uses import commodities that are subject to inspection by the commodity inspection authorities but are not declared for such inspection, or exports commodities that are subject to inspection by the commodity inspection authorities but are not proved up to standard through declaration for such inspection, if the circumstances are serious (Art. 230).

## Appendix 3.6

(Pertinent passages in main text are found largely in subsection IIC4 of Chapter 3)

### **Sentences of Fixed-term Imprisonment of Not Less than Three Years but Not More than Seven Years**

A person will be imposed penalties of fixed-term imprisonment of not less than three years but not more than seven years if he:

- (1) produces or sells food that is not up to hygiene standards, if serious harm is done to human health (Art. 143);
- (2) produces fake pesticides, fake animal pharmaceuticals or fake chemical fertilizers or sells pesticides, animal pharmaceuticals, chemical fertilizers or seeds while clearly knowing that they are fake or no longer effective, or any producer or seller who passes substandard pesticides, animal pharmaceuticals, chemical fertilizers or seeds off as up-to-standard ones, if heavy losses are caused to production (Art. 147);
- (3) smuggles weapons, ammunition, nuclear materials or counterfeit currency, if the circumstances are minor (Art. 151);
- (4) is a director or manager of a State-owned company or enterprise who, taking advantage of his office, operates for himself or for another the same business as that of the company or enterprise in which he holds the office and obtains illegal interests, if the amount is especially huge (Art. 165);
- (5) is an employee of a State-owned company, enterprise or institution who, taking advantage of his office, commits any of the following acts, if especially heavy losses are caused to the interests of the State: (1) turning management of the profitable business of his unit over to his relatives or friends; (2) purchasing commodities from the unit managed by his relatives or friends at a price obviously higher than the market price, or selling commodities to such unit at a price obviously lower than the market price; or (3) purchasing from the unit managed by his relatives or friends commodities that are not up to standards (Art. 166);
- (6) is directly in charge of a State-owned company, enterprise or institution, when signing or fulfilling a contract, is defrauded due to serious neglect of responsibility, if especially heavy losses are caused to the interests of the State (Art. 167);
- (7) is directly in charge of a State-owned company or enterprise or the competent department at a higher level practises irregularities for selfish ends by converting

State-owned assets to shares at a low price or selling them at a low price, if especially heavy losses are caused to the interests of the State (Art. 169);

- (8) for the purpose of making profits through transferring loans, fraudulently obtains credit funds from a banking institution and transfers the funds to another at usury, if the amount involved is huge (Art. 175);
- (9) fails to pay or underpays the amount of taxes payable by means of forging, altering, concealing or destroying without authorization account books or vouchers for the accounts, or overstating expenses or omitting or understating incomes in account books, or refusing to file his tax returns after the tax authorities have notified him to do so or filing false tax returns, if the amount of tax evaded accounts for over 30 percent of the total of taxes payable or is over 100,000 yuan (Art. 201);
- (10) refuses to pay taxes by means of violence or threat, if the circumstances are serious (Art. 202);
- (11) does not pay the taxes due and adopts the means of transferring or concealing his property so that the tax authorities cannot pursue the amount of taxes in arrears, if the amount involved is over 100,000 yuan (Art. 203);
- (12) forges or makes without authorization any other invoices, which can be used to defraud a tax refund for exports or to offset tax money, or sells such invoice, if the number involved is large (Art. 209);
- (13) commits any of the following acts by violence or intimidation, if the circumstances are especially serious: (1) buying or selling commodities by violence or intimidation, (2) compelling another person to provide or receive a service, (3) compelling another person to participate in or withdraw from bidding or auction, (4) compelling another person to transfer or purchase shares, bonds, or other assets of a company or enterprise, or (5) compelling another person to participate in or withdraw from particular operating activities (Art. 226); or
- (14) in violation of the rules and regulations on land administration, illegally transfers or scalps land-use right to make profits, if the circumstances are especially serious (Art. 228).



## **Appendix 3.7**

(Pertinent passages in main text are found largely in subsection IIIB2 of Chapter 3)

### **A list of MOC departmental rules on Antidumping Issues**

- (1) the Temporary Rules on Hearings of Anti-dumping Investigation;
- (2) the Temporary Rules on Filing of Antidumping Investigation;
- (3) the Temporary Rules on Field Investigation on Anti-dumping;
- (4) the Temporary Rules on Questionnaire Survey in Anti-dumping Investigation;
- (5) the Temporary Rules on Sampling in Anti-dumping Investigation;
- (6) the Temporary Rules on Information Disclosure in Anti-dumping Investigation;
- (7) the Temporary Rules on Consulting Public Information in Anti-dumping Investigation;
- (8) the Temporary Rules on Prince Undertaking in Anti-dumping;
- (9) the Temporary Rules on Review of New Exporters in Anti-dumping;
- (10) the Temporary Rules on Duty Reimbursement in Anti-dumping;
- (11) the Temporary Rules on Interim Review of Dumping and Dumping Margin;
- (12) the Temporary Rules on Procedures of Adjusting the Scope of Dumped Goods;
- (13) the Rules on Hearings of Industrial Damages Investigation;
- (14) the Rules on Investigation on Industrial Damages in Anti-Dumping;
- (15) the Rules on Appearance in Foreign Anti-dumping Cases involving Exported Goods;  
and
- (16) the Rules on Consulting and Disclosing Information in Investigation of Industrial Damages.

## **CHAPTER 4. LEGAL INDIGENIZATION OF WTO LAW IN THE UNITED STATES**

No one can study the WTO without considering the role of the United States. Being one of the WTO's sponsors and most important members, the United States has provided us with abundant materials to study in respect of legal indigenization of WTO law. In this chapter, I explore the process of legal indigenization in the United States from the same four perspectives as were at issue in Chapter 3: international trade negotiations, international trade disputes, domestic legislation on trade, and domestic adjudication of trade issues. Based on a brief review of U.S. documents and practices in the four areas, I characterize how the United States indigenizes these documents or practices with its own legal tradition and culture.

### **I. International Trade Rule-making**

Both global and regional systems give the United States a wide playing field on which to exercise its trade negotiating power, skill, and policy. The United States actively participates in multilateral trade negotiations and also initiates regional (and bilateral) trade negotiations. The following paragraphs explore the characteristics of U.S. trade negotiations, both substantive and procedural, and how they reflect U.S. legal tradition and culture.

#### **A. Overview**

On the one hand, to examine the participation of the United States in multilateral trade negotiations after the establishment of the WTO, we may look into the proposals submitted by that country to the WTO. On the other hand, to explore U.S. practices in regional and bilateral trade negotiations, we can look into the contents of various U.S. Free Trade Agreements (FTAs).

##### **1. Multilateral trade negotiations**

Like other members, the main path for the United States to convey its views and preferences in multilateral trade negotiations is to submit proposals to the WTO. Generally speaking, the American proposals can be categorized into two groups – those on substantive

provisions and those on procedural issues. Following the analysis of those two groups of proposals, particular attention is given below to the American attitude towards the S&D treatment principle.

a. On substantive provisions

A wide range of substantive provisions in the WTO agreements, including those on trade remedies, market access, environmental goods, and customs and border measures, have received suggestions for improvement and further negotiations from the United States.

Take the proposals on trade remedies as an example. The USA has made recommendations on the topics of circumvention,<sup>274</sup> fisheries subsidies,<sup>275</sup> antidumping and countervailing issues,<sup>276</sup> exchange rates issues in the ADA,<sup>277</sup> allocation of subsidy benefits over time,<sup>278</sup> new shipper reviews in the ADA,<sup>279</sup> all other rates,<sup>280</sup> accrual of interest,<sup>281</sup> expanding the prohibited “red light” subsidy category,<sup>282</sup> definition of domestic industry for perishable, seasonal agricultural products in the ADA and ASCM,<sup>283</sup> and causation in the ADA and

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<sup>274</sup> The United States, *Circumvention*, TN/RL/W/50, February 4, 2003 [hereinafter USA-TN/RL/W/50]; *Circumvention*, TN/RL/GEN/29, February 8, 2005 [hereinafter USA-TN/RL/GEN/29]; and, *Circumvention*, TN/RL/GEN/106, March 6, 2006 [hereinafter USA-TN/RL/GEN/106].

<sup>275</sup> The United States, *Possible Approaches to Improved Disciplines on Fisheries Subsidies*, TN/RL/W/77, March 19, 2003 [hereinafter USA-TN/RL/W/77].

<sup>276</sup> The United States, *Identification of Additional Issues under The Anti-Dumping and Subsidies Agreements*, TN/RL/W/98, May 6, 2003 [hereinafter USA-TN/RL/W/98].

<sup>277</sup> The United States, *Exchange Rates (Anti-Dumping Agreement Article 2.4.1)*, TN/RL/W/149, April 22, 2004 [hereinafter USA-TN/RL/W/149]; *Exchange Rates (Anti-Dumping Agreement Article 2.4.1)*, TN/RL/GEN/5, July 14, 2004 [hereinafter USA-TN/RL/GEN/5].

<sup>278</sup> The United States, *Allocation of Subsidy Benefits over Time*, TN/RL/W/148, April 22, 2004 [hereinafter USA-TN/RL/W/148]; *Allocation Periods for Subsidy Benefits*, TN/RL/W/157, June 4, 2004 [hereinafter USA-TN/RL/W/157]; and, *Expensing versus Allocating Subsidy Benefits*, TN/RL/GEN/17, September 15, 2004 [hereinafter USA-TN/RL/GEN/17].

<sup>279</sup> The United States, *New Shipper Reviews (ADA Article 9.5)*, TN/RL/W/156, June 4, 2004 [hereinafter USA-TN/RL/W/156]; and, *New Shipper Reviews (ADA Article 9.5)*, TN/RL/GEN/11, TN/RL/W/156/Rev.1, July 14, 2004 [hereinafter USA-TN/RL/GEN/11].

<sup>280</sup> The United States, *All-others Rate (Article 9.4.4 ADA)*, TN/RL/GEN/16, September 17, 2004 [hereinafter USA-TN/RL/GEN/16].

<sup>281</sup> The United States, *Accrual of Interest (ADA Articles 9.3.1 & 9.3.2)*, TN/RL/W/168, December 10, 2004 [hereinafter USA-TN/RL/W/168].

<sup>282</sup> The United States, *Expanding the Prohibited “Red Light” Subsidy Category*, TN/RL/GEN/94, January 16, 2006 [hereinafter USA-TN/RL/GEN/94]; and, *Expanding the Prohibited “Red Light” Subsidy Category: Draft Text*, TN/RL/GEN/146, June 5, 2007 [hereinafter USA-TN/RL/GEN/146].

<sup>283</sup> The United States, *Definition of Domestic Industry for Perishable, Seasonal Agricultural Products*, TN/RL/GEN/129, April 24, 2006 [hereinafter USA-TN/RL/GEN/129].

ASCM.<sup>284</sup> Another example of recommendations on a comprehensive issue can be found in the proposals on environmental goods, in which the United States expresses its opinion on paragraph 31 of the Doha Declaration<sup>285</sup> and an initial list of environmental goods.<sup>286</sup> Details on these proposals, and the general characteristics they reveal, will be discussed below in subsection IB of this chapter.

b. On procedural provisions

In addition to substantive provisions, the United States has given much attention to procedural issues such as transparency of DSB operations, the DSB procedures, and those on trade remedies. As to the DSB procedures in particular, the United States suggests addressing transparency issues<sup>287</sup> and practices for open meetings.<sup>288</sup> As to the procedures in trade remedies, the USA recommends changes in regard to prompt access to non-confidential information in the ADA,<sup>289</sup> conduct of verifications,<sup>290</sup> preliminary determinations in the Antidumping Agreement (ADA),<sup>291</sup> disclosure of calculations in preliminary and final determinations,<sup>292</sup> and collection of domestic antidumping (AD) duties under the ADA Article

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<sup>284</sup> The United States, *Causation (ADA Article 3.5; ASCM Article 15.5)*, TN/RL/GEN/128, April 24, 2006 [hereinafter USA-TN/RL/GEN/128].

<sup>285</sup> The United States, *Sub-paragraph 31(I) of The Doha Declaration*, TN/TE/W/40, June 21, 2004 [hereinafter USA-TN/TE/W/40]; and *Continued Work under Paragraph 31(II) of The Doha Ministerial Declaration*, TN/TE/W/70, February 20, 2007 [hereinafter USA-TN/TE/W/70].

<sup>286</sup> The United States, *Initial List of Environmental Goods*, TN/TE/W/52, TN/MA/W/18/Add.7, July 4, 2005 [hereinafter USA-TN/TE/W/52].

<sup>287</sup> The United States, *Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO related to Transparency*, TN/DS/W/46, February 11, 2003 [hereinafter USA-TN/DS/W/46].

<sup>288</sup> The United States, *Contribution of the United States on Some Practical Considerations in Improving the Dispute Settlement Understanding of the WTO related to Transparency and Open Meetings*, TN/DS/W/79, July 13, 2005 [hereinafter USA-TN/DS/W/79].

<sup>289</sup> The United States, *Prompt Access to Non-Confidential Information (Articles 6.4 Agreement on Anti-Dumping Practices and 12.3 Agreement on Subsidies and Countervailing Measures)*, TN/RL/W/162, June 29, 2004 [hereinafter USA-TN/RL/W/162].

<sup>290</sup> The United States, *Conduct of Verifications (ADA Article 6.7 & Annex I and ASCM Article 12.6 & Annex VI)*, TN/RL/GEN/15, September 15, 2004 [hereinafter USA-TN/RL/GEN/15].

<sup>291</sup> The United States, *Preliminary Determinations (Article 6 ADA & Article 12 ASCM)*, TN/RL/GEN/25, October 20, 2004 [hereinafter USA-TN/RL/GEN/25].

<sup>292</sup> The United States, *Disclosure of Calculations in Preliminary and Final Determinations*, TN/RL/GEN/133, April 24, 2006 [hereinafter USA-TN/RL/GEN/133].

9.3.<sup>293</sup> The USA also suggests changes on procedural issues of express shipment,<sup>294</sup> transparency and publication,<sup>295</sup> and internet publication.<sup>296</sup>

c. On S&D treatment

The United States has also given attention to the WTO S&D treatment principle. It submitted elaborations on whether the current S&D provisions need improvement in the Agreement on Subsidies and Countervailing Measures (ASCM).<sup>297</sup> In some other proposals such as those on market access for non-agricultural products,<sup>298</sup> express shipment,<sup>299</sup> fees charged,<sup>300</sup> advanced binding rules,<sup>301</sup> and internet publication,<sup>302</sup> the United States has recommended considering the possibility and the necessity of incorporating the S&D treatment principle into relevant provisions.

## 2. FTA negotiations

The United States has initiated and concluded regional or bilateral free trade agreements with Australia, Bahrain, Chile, Columbia, Israel, Jordan, Korea, Canada, Mexico, Oman, Panama, Peru, Singapore, the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua). The coverage of these FTAs varies in each case. Generally speaking, the FTAs have a wide range of coverage – trade in goods, operations in the services sector, liberalized investment policy, IP protection, environmental

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<sup>293</sup> The United States, *Collection of Anti-Dumping Duties under Article 9.3*, TN/RL/GEN/131, April 24, 2006 [hereinafter USA-TN/RL/GEN/131].

<sup>294</sup> The United States, *Express Shipments*, TN/TF/W/15, February 4, 2005 [hereinafter USA-TN/TF/W/15]; and, *Draft Text on Expedited Shipments*, TN/TF/W/144, May 21, 2007 [hereinafter USA-TN/TF/W/144].

<sup>295</sup> The United States, *Proposal on Transparency and Publication*, TN/TF/W/13, February 4, 2005 [hereinafter USA-TN/TF/W/13].

<sup>296</sup> The United States, *Draft Text on Internet Publication*, TN/TF/W/145, May 21, 2007 [hereinafter USA-TN/TF/W/145].

<sup>297</sup> The United States, *Special and Differential Treatment and the Subsidies Agreement*, TN/RL/W/33, December 2, 2002 [hereinafter USA-TN/RL/W/33].

<sup>298</sup> The United States, *Market Access for Non-Agricultural Products*, TN/MA/W/18, December 5, 2002 [hereinafter USA-TN/MA/W/18].

<sup>299</sup> USA-TN/TF/W/15, *supra note 294*.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> USA-TN/TF/W/145, *supra note 296*.

protection, and governmental procurement. A trend of the U.S. FTAs to go far beyond the traditional FTA coverage prompts us to explore the roots in U.S. legal tradition and culture.

## **B. Characteristics**

The U.S. proposals to the WTO, as well as the terms of various FTAs, have exhibited some noteworthy characteristics. The following paragraphs examine several main characteristics.

### **1. Series of proposals**

Generally, compared to the proposals made by China, there is one impression the U.S. proposals – that it, its proposals are well planned and organized in series. This different attitude and approaches promote me to explore whether it is one of the manifestations of U.S. legal culture, especially those aspects relates to the WTO. In this subsection, I will explore this perceived characteristic.

For an issue that the United States has conveyed concerns about – whether substantive or procedural – the country typically takes a series of steps to formulate its specific proposals. In some cases, the process can be observed to follow these steps: in the first place, it identifies the issue that needs improvement or further negotiations; in the second place, it further elaborates on the significance of the issue and particular challenges involved in addressing it; and eventually, it puts forward drafts as the basis of multilateral discussion.

Let us look at examples that are found in U.S. proposals on allocation of subsidy benefits, circumvention, DSB transparency, and fisheries subsidies.

The first example is a set of proposals on the allocation of subsidy benefits. The United States identified the issue of how to allocate subsidy benefits and provided a formula it adopted in a proposal dated April 22, 2004.<sup>303</sup> In a proposal of June 4, 2004, the USA elaborated the allocation periods for subsidy benefits by introducing its own practices.<sup>304</sup> In a proposal dated July 14, 2004, it discussed how to determine appropriate allocation period.<sup>305</sup> In the paper of

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<sup>303</sup> USA-TN/RL/W/148, *supra note 278*.

<sup>304</sup> USA-TN/RL/W/157, *supra note 278*.

<sup>305</sup> The United States, *Allocation Periods for Subsidy Benefits*, TN/RL/GEN/12, TN/RL/W/157/Rev.1, July 14,

September 15, 2004, it addressed the threshold matter of when such a methodology of allocating subsidy benefits should be invoked.<sup>306</sup>

The second example is about circumvention – a measure taken by exporters to evade an antidumping or countervailing duty.<sup>307</sup> On February 4, 2003, the United States submitted a proposal which suggested discussing further the uniform procedures as to circumvention.<sup>308</sup> In a proposal of February 8, 2005, it elaborated the forms of circumvention and procedures for circumvention enquiries and suggested making specific rules.<sup>309</sup> On March 6, 2006, it submitted the proposed text.<sup>310</sup>

The third example relates to the DSB transparency. In a proposal dated February 11, 2003, the United States identified some issues concerning DSB transparency that it said needed improvement – public attendance, access to submissions (written versions of oral statement are public), access to final panel report, and amicus curiae submission.<sup>311</sup> On July 13, 2005, it submitted a proposal, underscoring some U.S. proposals regarding conceptual issues and raising practical considerations.<sup>312</sup> On April 21, 2006, it submitted a legal draft.<sup>313</sup>

The fourth example has to do with fisheries subsidies. On March 19, 2003, the United States, in its proposal, pointed out distinctive feature of how fisheries subsidies are handled.<sup>314</sup> In a proposal of December 13, 2004, it provided additional views on the structure of the fisheries subsidies negotiations.<sup>315</sup> On May 13, 2005, it put forward a piece of specific suggestion on

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2004 [hereinafter USA-TN/RL/GEN/12].

<sup>306</sup> USA-TN/RL/GEN/17, *supra* note 278.

<sup>307</sup> Bhala-Dictionary, *supra* note 15, at 78.

<sup>308</sup> USA-TN/RL/W/50, *supra* note 274.

<sup>309</sup> USA-TN/RL/GEN/29, *supra* note 274.

<sup>310</sup> USA-TN/RL/GEN/106, *supra* note 274.

<sup>311</sup> USA-TN/DS/W/46, *supra* note 287.

<sup>312</sup> USA-TN/DS/W/79, *supra* note 288.

<sup>313</sup> The United States, *Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO related to Transparency – Revised Legal Drafting*, TN/DS/W/86, April 21, 2006 [hereinafter USA-TN/DS/W/86].

<sup>314</sup> USA-TN/RL/W/77, *supra* note 275.

<sup>315</sup> The United States, *Additional Views on the Structure of the Fisheries Subsidies Negotiations Additional Views on the Structure of the Fisheries Subsidies Negotiations*, TN/RL/W/169, December 13, 2004 [hereinafter USA-TN/RL/W/169].

relevant definition.<sup>316</sup> On April 24, 2006, it proposed actual text on fisheries subsidies in three areas – (1) appropriate conditions to attach to vessel capacity reduction (buyback) programs, which have been proposed as a potential exception to a broad prohibition; (2) provisions for the Committee’s periodic review of the effectiveness of new disciplines on fisheries subsidies, including a role for intergovernmental organizations with fisheries expertise; and (3) provisions for appropriate involvement of fisheries experts in addressing technical and scientific questions that may arise in dispute settlement proceedings under new fisheries subsidies disciplines.<sup>317</sup>

Examples containing similar three-step sequences can also be found in the proposals on on-the-spot investigation<sup>318</sup>, preliminary legal and factual considerations<sup>319</sup>, and the “red light” subsidy category<sup>320</sup>.

## 2. Cautiousness toward S&D treatment

Generally, the attitude of the United States toward strengthening S&D treatment can be characterized as cautiousness. The United States regards the system of S&D treatment as a transitional mechanism as well as an exception to general rules instead of a fundamental principle of the WTO, as verified by its following arguments in the proposals.

In asserting that the provision of S&D treatment in the context of the ASCM is only a temporary or transitional measure, the United States emphasizes that the aim of the mechanism is not to establish a permanent group of second-class members. Besides, the current S&D provisions in the ASCM are, in the U.S. view, good enough.<sup>321</sup> In some other proposals, the

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<sup>316</sup> The United States, *Fisheries Subsidies: Programmes for Decommissioning of Vessels and License Retirement*, TN/RL/GEN/41, May 13, 2005 [hereinafter USA-TN/RL/GEN/41].

<sup>317</sup> The United States, *Fisheries Subsidies*, TN/RL/GEN/127, April 24, 2006 [hereinafter USA-TN/RL/GEN/127].

<sup>318</sup> USA-TN/RL/GEN/15. The United States, *Conduct of On-The-Spot Investigations (ADA Annex I And ASCM Annex VI)*, TN/RL/GEN/132, April 24, 2006 [hereinafter USA-TN/RL/GEN/132].

<sup>319</sup> USA- TN/RL/GEN/25. The United States, *Disclosure of Essential Preliminary Legal and Factual Considerations (Mandatory Preliminary Determinations) (ADA Article 6, ASCM Article 12)*, TN/RL/GEN/108, March 6, 2006 [hereinafter USA-TN/RL/GEN/108].

<sup>320</sup> USA-TN/RL/GEN/94, *supra note 282*. USA-TN/RL/GEN/146, *supra note 282*.

<sup>321</sup> USA-TN/RL/W/33, *supra note 297*.



United States has emphasized repeatedly that further negotiations on the pertinent S&D provisions are needed only if there is a necessity to design such a transitional mechanism. In some proposals, the method of multilateral negotiations recommended by the USA is to work out a general set of rules in the first place, and then turn to the exceptional S&D treatment if necessary.<sup>322</sup> On December 15, 2009, the USA proposed a draft titled “Transition Provisions for Developing and Least-Developed Country Members,” which reflected American opinion on the transitional nature of S&D treatment.<sup>323</sup>

### 3. Institutional reform

The American proposals to the WTO are not limited to “repairing” current minor shortcomings in its operational or institutional aspects. They also focus on some important reforms of the institution. For instance, the United States calls for expanding the scope of “red light” subsidies, permitting public attendance, and admitting amicus curiae submissions in the Dispute Settlement Body (DSB).

On June 5, 2007, the USA proposed a draft on expanding the prohibited “red light” subsidy category, as well as on some conforming changes in pertinent provisions. The scope of the “prohibited” (“red light”) subsidies is recommended to include several other types.<sup>324</sup> A complete proposed draft of a new Article 3 of the ASCM appears in Appendix 4.1. Compared to the current provision, cited as follows, the U.S. proposal would greatly expand the scope of the “prohibited” subsidies, which would in turn impose more obligations on the WTO Members if adopted.

On April 21, 2006, the USA proposed some recommendations as to the transparency of

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<sup>322</sup> USA-TN/MA/W/18, *supra note* 298. USA-TN/TF/W/15, *supra note* 294.

<sup>323</sup> The United States, *Transition Provisions for Developing and Least-Developed Country Members*, TN/TF/W/166, December 15, 2009 [hereinafter USA-TN/TF/W/166].

<sup>324</sup> These five types include: (a) the direct transfer of funds to cover operating losses sustained by an enterprise or industry; (b) forgiveness of debt, i.e., forgiveness of government-held loans or other instruments of indebtedness, and grants to cover repayment of government-held loans or other instruments of indebtedness; (c) loans and other instruments of indebtedness provided directly to enterprises that are uncreditworthy; (d) provision of equity capital where the investment decision is inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member; and (e) other financing (i.e., “royalty-based” or “sales-contingent” financing or other similar financing) to an enterprise or project that otherwise would be unlikely to receive such financing from commercial sources. USA-TN/RL/GEN/94, *supra note* 282.

DSB operations – specifically, open meetings, access to submissions, access to final reports, and amicus curiae submissions. In addition to modifying Article 18 of the DSU, the USA proposal has tried to reform the existing DSU (*i.e.*, the Dispute Settlement Understanding) regime, in the aspects of opening meetings, timely access to submissions, timely access to final reports, and amicus curiae submissions. Appendix 4.2 contains the full content of that proposal.<sup>325</sup>

For the United States, the recommendations regarding the improvement of the operational or institutional aspects of the WTO mechanisms are not restricted to clarifying certain terms or provisions, or to resolving some problems arising from practice. Instead, the United States is working on further disciplining the multilateral mechanism through institutional reform.

#### **4. International rule of law**

Emphasis on procedural justice and international rule of law has been reflected in some proposals submitted by the USA. As noted by Peter-Tobias Stoll, “[i]n the negotiations [of the Uruguay Round], the United States and developing States, albeit for different reasons, came together to push for a strong multilateral rule of law to govern the new WTO, including an effective dispute settlement mechanism.”<sup>326</sup> In a proposal of December 2, 2002, the United States, when examining the relationship between S&D treatment and subsidies, emphasized that the rule of law is more effective than subsidies in boosting productivity and performance.<sup>327</sup> Moreover, in a proposal on investigatory procedures under the ADA and the ASCM, the United States explained that the significance of procedural fairness lies in that it is “central to the rule of law.”<sup>328</sup>

#### **5. Procedural justice**

As indicated in the preceding paragraphs, in pursuing international rule of law, the United States has put the procedural justice center stage. On the grounds of the significance of

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<sup>325</sup> USA-TN/DS/W/86, *supra note* 313.

<sup>326</sup> Peter-Tobias Stoll, *Compliance: Multilateral Achievements and Predominant Powers*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Micheal Byers & Georg Nolte ed.) 456, 462 (2003).

<sup>327</sup> USA-TN/RL/W/33, *supra note* 297.

<sup>328</sup> The United States, *Investigatory Procedures under the Anti-Dumping and Subsidies Agreements*, TN/RL/W/35, December 3, 2002 [hereinafter USA-TN/RL/W/35].

procedural justice to international rule of law, the United States has in particular specified the importance of improving the ADA procedures, as appearing in the following excerpt:

To better ensure transparency and procedural fairness in such reviews, Members also should incorporate by reference in Article 9.3 [of the ADA] the rules on evidence and procedure in Article 6 and the public notice and explanation requirements in Article 12.<sup>329</sup>

Furthermore, the issues of procedural fairness in trade remedies have also been given special emphasis in the American proposals. By analyzing the significance of preliminary decisions, the United States has pointed out that preliminary decisions in trade remedy investigations “provide a vital contribution to procedural fairness:”

By informing parties of how the authorities weigh the facts on the record at a particular time and apply the law to those facts [in preliminary decisions], interested parties may assess where, in their view, the authority requires additional facts, may have misinterpreted the facts, or possibly misapplied the law. The interested parties may also deduce which issues had the greatest impact on their interests. In this way, interested parties are presented with a framework that can be the basis for the defence of their interests in the phase of the investigation prior to the final determination.

This procedural fairness function of preliminary determinations is implicitly recognized by Article 12.2 of the ADA and Article 22.3 of the ASCM. Both Agreements require a public notice providing an explanation of the findings in sufficient detail, which set forth all relevant facts and analysis, that may inform the interested parties’ future participation in the investigation.<sup>330</sup>

In short, the United States has taken the procedural justice as one of the breakthrough points to improve the multilateral trade regulations.

## **6. U.S. practices and experiences**

In making this proposal, the United States is generous in sharing its own practices and experiences in trade areas to support its arguments. For example, the USA gives the formula it uses to allocate the benefit from a grant (*i.e.*, a subsidy), which is known as the declining balance formula because the allocated benefits are highest in the first year and decline over the allocation period.<sup>331</sup> Moreover, it shares its own experiences with other members regarding fisheries

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<sup>329</sup> USA- TN/RL/GEN/131, *supra note* 293.

<sup>330</sup> USA-TN/RL/GEN/25, *supra note* 291.

<sup>331</sup> USA-TN/RL/W/148, *supra note* 278.

subsidies, especially some federal buyback programs pertinent to fishery.<sup>332</sup>

The reason for the United States to share these practices and experiences is, as expressed in a document it submitted, that “the United States has a well-developed practice ... which ... can serve as a good basis for [multilateral] discussion.”<sup>333</sup>

## 7. Selective FTA partners

The USA has trade interests all over the world. However, the list of its FTA partners is relatively short and highly selective, based on political and security interests more than economic interests. To date, the United States’ FTA partners are located mainly in Latin America, Middle East, Asia, and Oceania. The excerpt below denotes the general strategy adopted by the USA to select FTA partners:

[P]icking FTA partners primarily involves US relations with developing countries and is affected by the myriad US political, economic, and security interests with those countries. On the economic front, this means advancing US trade and investment interests abroad by improving access to growing markets and “leveling the playing field” for US firms, workers, farmers in competition with foreign suppliers, as well as by building alliances in support of US objectives in WTO talks. On the foreign policy front, this means using free trade to promote economic growth and the rule of law, to strengthen the foundations of democratic governance, and to secure support for global efforts against terrorism.<sup>334</sup>

To sum up, it is more political and security interests than economic interests that drive U.S. FTA strategy. More uniquely, the possibility as well as necessity to promote the rule of law in another country has been used as a criteria by the United States to select its FTA partners. Any of the U.S. FTAs can illustrate this strategy. In the U.S.-Australia FTA, what the USA was concerned about was the trade relationship between Australia and the Asian countries. The document prepared by the Office of the United States Trade Representative (USTR) described the significance of the U.S.-Australia FTA in tightening the strategic relationship between the United States and Australia in both bilateral and regional contexts:

The FTA will strengthen links between the U.S. and Australian economies at a time when Australia

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<sup>332</sup> USA-TN/RL/GEN/41, *supra note* 316.

<sup>333</sup> USA-TN/RL/GEN/17, *supra note* 278.

<sup>334</sup> Jeffrey J. Schott, *Assessing US FTA Policy*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* (Jeffrey J. Schott ed.) 359, 363 (2004).

is increasing its economic ties to Asian markets. The United States-Australia FTA will also serve as a catalyst for expanded regional trade, as both the U.S. and Australia have completed FTAs with Singapore, and the United States is also about to begin negotiations with Thailand. Australia has recently completed an FTA with Thailand and entered into preliminary discussions with China and Japan.

Finally, the FTA supports the economy of a steadfast ally, further cementing the longstanding U.S.-Australia strategic relationship, while simultaneously benefiting U.S. commerce.<sup>335</sup>

In some FTAs with Latin American countries, the United States expressed its intent to improve democracy in these countries. For instance, one aspect of the significance of the U.S.-Colombia FTA is to “strengthen peace, democracy, freedom and reform,” as appearing in a USTR report.<sup>336</sup>

Through the FTAs with Middle-East countries, the United States wants to strengthen democracy in its trading partners and to balance the power in the Gulf area. For example, the U.S.-Oman FTA serves to “support economic reform, regional integration, and democracy” in Oman, as evaluated by the USTR as follows:

Oman is a regional leader in economic reform. ...Oman’s emphasis on economic diversification has opened the country to foreign participation in the economy, particularly in the form of joint ventures. This FTA is the most recent and important step in Oman’s efforts to reform its economy, create jobs, and move away from dependence on revenues generated from oil exports.

This Agreement also helps the advancement of economic and political freedom in the region. For decades, Oman and the United States have shared a desire for peace, stability and economic opportunity in the Middle East. Free trade agreements in the Middle East carry out the recommendation in the “The 9/11 Commission Report” urging the United States to “encourage development, more open societies and opportunities for people to improve the lives of their families,” by strengthening trade relations with the region.<sup>337</sup>

It is even evident that, to the U.S. decision-makers, economic benefit brought about by concluding FTAs does not prevail over other considerations such as political or security interests.

Article XXIV of GATT 1994 provides the possibility for the United States to accomplish the

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<sup>335</sup> USTR, *Statement of Why the United States-Australia Free Trade Agreement Is in the Interests of U.S. Commerce 2*, available at [http://www.ustr.gov/webfm\\_send/2627](http://www.ustr.gov/webfm_send/2627), last visited on January 7, 2012 [hereinafter USTR-Australia].

<sup>336</sup> USTR, *The Case for the U.S. – Colombia Free Trade Agreement 1-2*, available at [http://www.ustr.gov/webfm\\_send/1027](http://www.ustr.gov/webfm_send/1027), last visited on January 7, 2012 [hereinafter USTR-Colombia].

<sup>337</sup> USTR, *Statement of Why the United States – Oman Free Trade Agreement Is in the Interest of U.S. Commerce 2*, available at [http://www.ustr.gov/webfm\\_send/2650](http://www.ustr.gov/webfm_send/2650), last visited on January 7, 2012 [hereinafter USTR-Oman].

tasks of its FTAs.

As an exception to the MFN principle, Article XXIV permits the formation of free trade areas (FTAs) and customs unions (CUs), whereby two or more WTO members eliminate trade barriers among themselves in a preferential way, with respect to other WTO members. Under an FTAs, such as the North American Free Trade Agreement (NAFTA), each member retains its own external tariffs, while under a customs union, such as the European Union (EU), the members adopt a common external tariff on each product. These arrangements naturally introduce WTO-allowed discrimination between union members and outside countries.<sup>338</sup>

## 8. Out-reform

One more feature of regional trade negotiations participated in by the United States is U.S. efforts on “out-reform” – reforms taking place in its trading partners. As analyzed by Jeffrey J. Schott, “FTAs offer opportunities not just to bolster exports but also to reinforce and secure domestic reforms crucial for economic development [in its trading partners].”<sup>339</sup>

In addition to general reforms in economic and political areas, the United States targets environmental, labor, and IPR issues as well. The U.S.-Jordan trade agreement was the first to include specific provisions on labor and the environment.<sup>340</sup> Howard Rosen applauds the significance of this FTA regarding its contribution to environmental and labor concerns as follows:

The great precedent in the US-Jordan FTA was the inclusion, in the text of the agreement itself, of specific (and parallel) provisions concerning environmental and labor issues.

At the core of the environmental provision is the recognition that “it is inappropriate to encourage trade by relaxing domestic environmental laws.” At the same time, the U.S.-Jordan FTA acknowledges the right of each country to establish its own environmental laws and policies. It goes on to state that “a Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties” ....<sup>341</sup>

The progress made by the U.S.-Jordan FTA, compared to the side agreement on

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<sup>338</sup> Shanker Singham, *A GENERAL THEORY OF TRADE AND COMPETITION: TRADE LIBERALIZATION AND COMPETITIVE MARKETS* 142 (2007).

<sup>339</sup> Schott, *supra note* 334, at 363.

<sup>340</sup> Howard Rosen, *Free Trade Agreements as Foreign Policy Tools: The US-Israel and US-Jordan FTAs*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* (Jeffrey J. Schott ed.) 51, 73 (2004).

<sup>341</sup> *Id.* at 66-67.

environment of the North American Free Trade Agreement (NAFTA), is further pointed out by Rosen as follows:

The substance of the environmental provision in the US-Jordan FTA is almost identical to that included in NAFTA. The primary difference is that the US-Jordan FTA places it in the actual body of the agreement, thereby making it subject to the general dispute settlement mechanism set out in the agreement. By contrast, under NAFTA, the environment provision is relegated to a side agreement, where it must rely on its own dispute settlement mechanism.<sup>342</sup>

As for labor issues, the U.S.-Jordan FTA sets out three requirements, as summarized below:

- Each country must enforce its own labor laws in manners that affect trade, and those labor laws must reflect both “internationally recognized labor rights” as defined by the Trade Act of 1974, as amended, and core labor standards as defined by the International Labor Organization.
- The parties agree not to relax their own labor laws in order to encourage trade with the other party.
- What counts as effective enforcement of labor laws allows for a “reasonable exercise of ... discretion” and “bona fide decision[s] regarding the allocation of resources” ...<sup>343</sup>

Rosen then concludes that “[t]he provision ... is very similar to that dealing with the environment. It, too, is included in the text of the U.S.-Jordan FTA and is subject to the dispute settlement procedures set forth in the agreement.”<sup>344</sup>

IPR protection is another weighty issue that has been addressed by the U.S. FTAs. The features of IPR protection in the U.S.-Chile FTA, as identified below, can be described as an expansion of NAFTA or TRIPs obligations in general:

The US-Chile FTA contains several interesting features. It extends IP protection into new areas not included in North-South trade agreements currently in effect, enforced by a strong dispute settlement mechanism. The text mandates that the two countries will adhere to certain international IP conventions in specified time frames and that they will make efforts to conform to others. The text develops further the obligations existing in TRIPs and NAFTA regarding transparency and cooperation; it also provides protection in cutting-edge areas such as domain names on the Web and limitations on liability for Internet service providers. The US-Chile agreement expands many of the obligations existing in NAFTA or TRIPs related to patents, trademarks, well-known marks, copyrights and related rights, satellite signals, and border measures. Many of these provisions can be found in US law and in World Intellectual Property Organization treaties and recommendations,

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<sup>342</sup> *Id.* at 67.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

but not under trade agreements subject to strong dispute settlement provisions.<sup>345</sup>

To sum up, FTAs have also been employed by the United States to propel domestic reforms in its trading partners, especially regarding the issues of environment, labor standards, and IPR protection.

## **C. Legal Tradition and Culture**

The characteristics of both international and regional trade negotiations of the USA have their roots in the country's legal tradition and culture. As explained in the following paragraphs, some key pertinent elements of that tradition and culture are an emphasis on procedural fairness, an expectation of leadership, an insistence on reciprocity, a belief (at least rhetorical) in the rule of law, and a division of governmental powers.

### **1. Procedural fairness in the common law tradition**

The pursuance of and emphasis on procedural fairness find their roots, with little doubt, in the common law tradition that so heavily influences U.S. law. Indeed, “[t]he procedure was, and is, unique in the world and today may be the most distinctive feature of the common law.”<sup>346</sup> An expert explains the emphasis on procedure as one of the most important features of the common law tradition describes the roots of procedural fairness in the common law as follows:

In the long period in which the common law was developing, and indeed up to the 19<sup>th</sup> century, when dramatic legislative reforms were undertaken, the principal focus of English lawyers and commentators ... was on procedure, not on substance or principle. ... A lawyer's attention was focused on issues of procedure because the overall aim was to formulate question of fact in a way to ensure getting them before a jury. In that setting, the substance of the law, "... appears to be have been 'secreted in the interstices of procedure' ...”<sup>347</sup>

In the United States, in addition to specific procedural doctrines, such as the right to jury trial and the right to counsel, procedural due process even has a constitutional basis. The Fifth and Fourteenth

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<sup>345</sup> Jose M. Salazar-Xirinachs & Jaime Granados, *The US-Central America Free Trade Agreement: Opportunities and Challenges*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* (Jeffrey J. Schott ed.) 225, 252 (2004).

<sup>346</sup> Glenn, *supra note 6*, at 243.

<sup>347</sup> Head, *supra note 6*, at 349.



Amendments provide a general principle of due process of law.<sup>348</sup>

The principle of “due process” that derives from the ideology of procedural fairness leads the USA to focus not only on court procedures – on the DSB procedures in the case of the WTO – but also on procedural fairness contained in substantive issues, such as trade remedies available in the WTO regime.

## 2. Leadership in the WTO

The leadership of the USA in the organization can also account for some U.S. practices in making international trade rules. It is open to little dispute that “the United States and the European Union had dominated GATT.”<sup>349</sup> “American-led Western leadership championed trade liberalization (particularly in tariff reductions) as a way of guaranteeing that economic collapse would not recur in the post-war era. Because economic prosperity was produced in the period of American dominance after the war, the assumption persisted that trade liberalization linked to American hegemony was the foundation of this prosperity.”<sup>350</sup> In this leadership, American events and initiatives played an essential role.<sup>351</sup>

Although the leadership of the USA as well as European countries has been challenged by some developing countries,<sup>352</sup> the consistent and active Western participation in the multilateral trade negotiations shows that U.S. determination to lead this organization has not been shaken much. Consequently, the influence of U.S. legal tradition and culture on international rule-making (i.e., the outward indigenization) has not been impaired much. The continuous

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<sup>348</sup> See András Sajó, WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 12-3 (1996).

Elaborations on constitution review of due process can also be found in Michele Taruffo, ABUSE OF PROCEDURAL RIGHTS: COMPARATIVE STANDARDS OF PROCEDURAL FAIRNESS 37-9 (1999).

<sup>349</sup> Anne O. Krueger & Chonira Aturupane, THE WTO AS AN INTERNATIONAL ORGANIZATION 112 (2000).

<sup>350</sup> Kevin Buterbaugh & Richard M. Fulton, THE WTO PRIMER: TRACING TRADE’S VISIBLE HAND THROUGH CASE STUDIES 6 (2008).

<sup>351</sup> WTO-Millennium, *supra note* 16, at 53. “The final key variable in the successful management of the GATT regime was leadership, usually exercised most visibly by the United States. ... American events and initiatives played a central role in the launch of all three GATT rounds (and most of the smaller negotiations as well, including the recent sectoral talks).” *Id.*

<sup>352</sup> Their first triumph came in 2002 when the developing countries challenged the United States and Europeans on the selection of a new director general. Traditionally, the head of GATT had been a European, but in 1999 members deadlocked and decided to share the six-year term between Mike Moore, a former prime minister of New Zealand, and Supachai Panitchpakdi of Thailand. Krueger & Aturupane, *supra note* 349, at 112.

leadership possessed by the United States and its consequential confidence in directing international rule-making has resulted in its overwhelming enthusiasm in submitting series proposals and providing its own practices as the basis of multilateral discussion.

Byers and Nolte address the sources of the U.S. sense of responsibility in international affairs as a superpower in the world – mainly, (1) the expectations from the rest of the international community, (2) the expectations within the United States, and (3) a feeling of insecurity on extreme sensitivity to external context.<sup>353</sup> These three sources of the U.S. sense of responsibility in international affairs will consolidate its determination and efforts with regard to indigenizing the multilateral rules in a way that appeals to its own interests.

### 3. Reciprocity and S&D treatment

The apparent indifference of the United States to prioritizing S&D treatment in future negotiations partially rests on its firm belief in reciprocity. In the pre-GATT era, the United States and European countries “had suffered through the depression and the war that followed and were determined not to repeat what they saw as their protectionist roots.”<sup>354</sup> Therefore, one of the fundamental pillars of the GATT underscored by its founders is to fight against protectionism by the leverage of reciprocity, and instead to help the developing countries, despite the fact that modern theories may have found consistency between them.<sup>355</sup> It was the

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<sup>353</sup> Michael Byers & Georg Nolte, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 35-37 (2003). “US National Security Adviser Condoleezza Rice makes the point clearly when she suggests that ‘Great powers do not just mind their own business,’ and that the power that a superpower such as the United States wields ‘is usually accompanied by a sense of entitlement to play a decisive role in international policies.’ Another corollary of being the single superpower may very well be a feeling of insecurity or extreme sensitivity to even the most remote sign of external threats, resulting in a foreign policy that seeks to ensure, among other things, absolute security.” *Id.*

<sup>354</sup> Buterbaugh & Fulton, *supra note* 350, at 6.

<sup>355</sup> The following excerpts illustrate some further elaborations on this point:

Apparently, ASEAN countries, like many other developing countries, have been receiving concessions without giving any. ... Reciprocity, an ASEAN’s view, need not necessarily amount to a one-to-one relationship between concessions and counter-concessions. ASEAN countries will probably insist that differences in the levels of economic development among contracting countries ought to be taken into account in any negotiation process. Unequal treatment of unequals is seen not only as prudent and fair, but also consistent with the basic principles of equal treatment of equals. Mohamed Ariff & Loong-Hoe Tan, ASEAN TRADE POLICY OPTIONS: THE URUGUAY ROUND 28 (1988).

The S and D principle became part of the global trading system in 1979. It was formally introduced in what is called the ‘Enabling Clause’ by section 1 of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries. This section enables derogation from the MFN principle in favour of preferential access to markets by developing countries. The S and D

expansion of GATT parties (due to the decolonization since the 1950s, as discussed earlier in subsection ID1 of Chapter 2 that led to the rise of S&D treatment.

A brief history of the emergence of the S&D provisions in the multilateral trading system may help us understand the American attitude toward S&D treatment. In short, when drafting the Charter of the International Trade Organization (ITO), developing countries strongly criticized “the U.S. proposals and the suggested draft ITO Charter, as merely fulfilling the interests of developed countries and deteriorating the development prospects of developing countries.”<sup>356</sup>

Thanks to the insistence from developing countries, “[t]he Havana Charter accommodated the development interests in a provision titled, “Government Assistance to Economic Development and Reconstruction.”<sup>357</sup>

Despite that the development provision contained in the Havana Charter was introduced in the GATT 1947, there was no evolution in development issues in the GATT, partially due to the indifference from the leading parties. As explained by the following excerpt, on the one hand, for most parties, preferential treatment would lead to inefficiency and distortion of multilateral trade rules; on the other hand, developing parties believed that their interests would be sufficiently safeguarded by the provision mentioned above:

... The contracting parties entered into the GATT with the common perception that multilateral trading system would benefit all participating parties, should they have comparative advantages. It was assumed that preferential treatment for particular parties was inappropriate, since it would lead to inefficiency and distortion of trade, and, therefore, non-discrimination rules were a necessity. ...

[It appears] that developing countries, becoming original members of the GATT, did not initially disfavor of the basic paradigm of the GATT, namely liberalism. They might have believed that their development interests would still be maintained, because the provision of the stillborn Havana Charter, especially which titled “Government Assistance to Economic Development and Reconstruction,” was introduced as Art. XVIII into the GATT by amendment in 1948. ...

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principle limits the principle of reciprocity in trade arrangements to levels ‘consistent with development needs’, and this has allowed developed countries in Europe to provide market access to developing countries in Africa in preference to other developed countries. Laurence Boule, *THE LAW OF GLOBALIZATION: AN INTRODUCTION* 191 (2009).

<sup>356</sup> Nandang Sutrisno, *USING WORLD TRADE LAW TO PROMOTE THE INTERESTS OF GLOBAL SOUTH: A STUDY ON THE EFFECTIVENESS OF SPECIAL AND DIFFERENTIAL TREATMENTS* 43 (2009).

<sup>357</sup> *Id.* at 43.

“Parallel with the increasing membership of several newly-independent developing countries of the GATT in 1950s, the demand for the accommodation of the development interests of the developing countries in the GATT rules became stronger.”<sup>358</sup> Responding to such demands from the developing countries, the GATT, with the consent, of course, of the United States, started working on a modification of Article XVIII of the GATT, which gradually developed into the current S&D mechanism.

The history of incorporating S&D treatment into the multilateral trading system has showed us the resistance or indifference of the United States to addressing such provisions since the preparation of the ITO. The inconsistency between the S&D treatment principle supported by the developing countries and the reciprocity principle supported by the developed countries can partially account for the American attitude of resistance or indifference toward S&D treatment. This explains why the United States accepts the S&D approach as a transitional system and gives it less priority than the negotiation of general rules.

#### **4. International rule of law**

The role of the “rule of law” as a feature of the common law tradition – and more specifically the U.S. efforts to promote or impose the “rule of law” outside its own territory – has been widely discussed. In short, the United States has tried to promote rule of law in both foreign countries and international affairs. It “engaged in strenuous efforts to create an international order based on legal principles”, which resulted in “the proliferation of law-based international institutions.”<sup>359</sup> Furthermore, in supporting the rule of law in international affairs, tried to ensure that international law would develop in a way “acceptable to it and that the interpretation and application of international law would be compatible with U.S. interests.”<sup>360</sup>

As noted by David Gantz, “[b]oth the WTO and the NAFTA mechanisms are at least nominally legalistic or ‘rule oriented’ systems[.]”<sup>361</sup> It is little surprise, then, that the United

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<sup>358</sup> For elaborations on the history of the S&D treatment, see *id.* at 43-7.

<sup>359</sup> John Francis Murphy, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 1 (2004).

<sup>360</sup> *Id.* at 3.

<sup>361</sup> *Id.* at 56.

States urges an adherence to the “rule of law” in the international community, especially, if we are acquainted with firm belief of the American people in the rule of law.<sup>362</sup> To sum up, U.S. advocacy within the WTO for the international rule of law largely originated the American belief and practice of domestic rule of law.

## 5. Segmentation of power and environmental, labor, and IPR issues

The United States is often described as the pioneer in promoting environmental protection, labor standards, and IPR protection within the trade regime. On the one hand, I acknowledge that it is public support rather institutional structure that drives policy-making in many cases. On the other hand, however, I have observed the significance of political structure in the U.S. policy-making, especially relating to foreign and international affairs. The promotion of environmental protection, labor standards, and IPR protection in its FTAs is an example of the segmentation of power, which finds its roots in the common law tradition.<sup>363</sup>

The Administration – that is, the executive branch – takes charge of negotiating trade agreements as well as enforcing trade statutes, and yet these powers are exercised under the scrutiny of the Congress, the judicial branch of government, and even the public.

A good example of the influence of segmentation of power on trade relates to environmental issues. The failure of the first Bush Administration to incorporate environmental and labor provisions into the NAFTA original documents led to the establishment of a mechanism of “environmental assessment” of FTAs which could reflect the Congress’ concerns about pertinent issues.

Due to the absence of environmental and labor protections in the NAFTA, the Clinton Administration was denied the “fast-track”<sup>364</sup> trade negotiating authority by the Congress. This

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<sup>362</sup> For elaborations on the belief of American people in the rule of law, see Ronald W. Eades, *FIGHTS FOR RIGHTS* 55 (2000) and Gary Althen & Janet Bennett, *AMERICAN WAYS: A CULTURAL GUIDE TO THE UNITED STATES* 67-8 (2011). Althen and Bennett go on to explain that the “The belief in the rule of law goes beyond the realm of politics to other areas of life that are governed by formal rules and procedures,” so that getting a job with a government agency, for example, or getting a government grant for a research project entails following published procedures and demonstrating that one meets the published requirements. Theoretically, personal connections do not matter under the rule of law. *Id.* at 68.

<sup>363</sup> Head, *supra note* 6, at 380.

<sup>364</sup> Sean D. Murphy, *UNITED STATES PRACTICE IN INTERNATIONAL LAW* (Volume 1: 1999-2001) 220 (2002). For

move reflected the Congress' dissatisfaction with the Administration's alleged indifference to environmental and labor concerns in the NAFTA.<sup>365</sup> Pressure from the Congress led ultimately to the environmental assessment of FTAs:

On November 16, 1999, President Clinton signed an executive order committing the United States to "a policy of careful assessment and consideration of the environmental impacts of trade agreements ... through a process of ongoing assessment and evaluation, and, in certain instances, written environmental reviews."<sup>366</sup>

The above analysis can provide us with another perspective to understand the FTA provisions relating to environmental protection and labor standards. Some scholars have criticized these provisions as an arbitrary exercise by the United States of its advantageous status in the FTA negotiations, by availing itself of the WTO RTA mechanism.<sup>367</sup> The above analysis shows that such imposition of pertinent provisions partially resulting from the pressure imposed on the Administration by the Congress rather the Administration's eagerness.

In sum, the approach taken by the United States to international trade negotiations, whether multilateral or regional (or bilateral), reveals certain characteristics such as cautiousness toward S&D treatment, emphasis on institutional reform, boosting the international rule of law, addressing procedural justice, strategic selection of FTA partners, and promoting out-reform, which in turn reflect fundamental American values, including an emphasis on procedural

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elaborations on the US environmental assessment of trade agreements, see *id.*, at 219-220. "The U.S. Constitution grants Congress the exclusive authority to establish tariffs and enact other legislation governing international trade. At the same time, the Constitution grants to the president the authority to negotiate international agreements. If the president negotiates an agreement that requires changes in U.S. tariffs, implementing legislation must be approved by Congress. Beginning in the 1970s, Congress enacted "fast-track" legislation that provided an expedited procedure for congressional consideration of trade agreements. Under fast-track legislation, the president engages in extensive consultations and coordination with Congress during the course of the negotiating process and, in exchange, Congress votes on the required implementing legislation within a fixed time after the negotiation is completed, with a simple "up or down vote" (i.e., without any amendments). The purpose of the fast-track process was to provide the president with credibility when negotiating difficult trade agreements by drawing Congress into the process and by making it unlikely that the agreement, once concluded, would fall victim to legislative haggling." *Id.*

<sup>365</sup> David L. Markell & John H. Knox, GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 7 (2003). The authors explain that when the NAFTA was negotiated, "the environmental community was, on the whole, dissatisfied with the result. Their objections spilled into the broader debate over whether to approve NAFTA, which became one of the chief points of contention among the candidates in the 1992 U.S. presidential campaign." *Id.*

<sup>366</sup> Murphy-Practice, *supra* note 364, at 220. For elaborations on the US environmental assessment of trade agreements, see *id.*, at 220-221.

<sup>367</sup> For example, see Bashar Hikmet Malkawi, JORDAN AND THE WORLD TRADING SYSTEM: A CASE STUDY FOR ARAB COUNTRIES 30 (2006).

fairness, an expectation of global leadership, the principle of reciprocity, and segmentation of power within the political regime.

## **II. International Trade Disputes**

Multilateral trade disputes involving the United States provide us with another valuable source of information to figure out how the United States indigenizes its WTO obligations to reflect its own ideologies. The method used above in Chapter 3 – that is, analyzing “completed” cases in which the country at issue (there, China) is respondent – is used in this section.

### **A. Overview of International Trade Disputes Featuring the United States as Respondent**

Since the establishment of the WTO, the United States has been involved in 97 cases as complainant and 113 cases as respondent. Among the 113 cases, 46 cases have resulted in DSB reports. These 46 cases can be classified into three groups according to the issues challenged – the cases of “as such,” “as applied,” and “as such and as applied.” “As such” challenges are specific U.S. legislation, such as Section 301 of Trade Act of 1974 and the so-called Byrd Amendment, that was the subject of complaints by other WTO members.<sup>368</sup> “As applied” disputes involve the U.S. application or enforcement of trade laws and agreements, such as imposition of countervailing duties on certain steel products and safeguard measure on imports of lamb, that was challenged.<sup>369</sup> “As such and as applied” challenges are a mixture of the former

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<sup>368</sup> The list of “as such” cases includes these: DS2/4 [the Case of “United States – Standards for Reformulated and Conventional Gasoline” (or “US – Gasoline”)], 108 [the Case of “United States – Tax Treatment for ‘Foreign Sales Corporations’” (or “US – FSC”)], 136/162 [the Case of “United States – Anti-Dumping Act of 1916” (or “US – 1916 Act”)], 152 [the Case of “United States – Sections 301–310 of the Trade Act 1974” (or “US – Section 301 Trade Act”)], 160 [the Case of “United States – Section 110(5) of US Copyright Act” (or “US – Section 110(5) Copyright Act”)], 176 [the Case of “United States – Section 211 Omnibus Appropriations Act of 1998” (or “US – Section 211 Appropriations Act”)], 217/234 [the Case of “United States – Continued Dumping and Subsidy Offset Act of 2000” (or “US – Offset Act (Byrd Amendment)”)], 221 [the Case of “United States – Section 129(c)(1) of the Uruguay Round Agreements Act” (or “US – Section 129(c)(1) URAA”)], 243 [the Case of “United States – Rules of Origin for Textiles and Apparel Products” (or “US – Textiles Rules of Origin”)], 276 [the Case of “United States – Subsidies on Upland Cotton” (or “US – Upland Cotton”)], 285 [the Case of “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services” (or “US – Gambling”)], 343/345 [the Case of “United States – Measures Relating to Shrimp from Thailand” and “United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties” (or “US – Shrimp (Thailand), US – Customs Bond Directive”)], and 392 [the Case of “United States – Certain Measures Affecting Imports of Poultry from China”].

<sup>369</sup> The list of “as applied” cases includes these: DS 24 [the Case of “United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear” (or “US – Underwear”)], 33 [the Case of “United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India” (or “US – Wool Shirts and Blouses”)], 58 [the

two types, such as the laws, regulations and methodology for calculating dumping margins and their application by the United States.<sup>370</sup>

## B. Ideologies Challenged by the Disputes

The U.S. ideologies heightened by pertinent WTO disputes mainly refer to the so-called “unilateralism” and extra-territorial application of American law.

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Case of “United States – Import Prohibition of Certain Shrimp and Shrimp Products” (or “US – Shrimp”), 138 [the Case of “United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom” (or “US – Lead and Bismuth II”), 165 [the Case of “United States – Import Measures on Certain Products from the European Communities” (or “US – Certain EC products”). EC is the complainant], 166 [the Case of “United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities” (or “US – Wheat Gluten”), 177/178 [the Case of “United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand” (or “US – Lamb”), 179 [the Case of “United States – Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea” (or “US – Stainless Steel”), 184 [the Case of “United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan” (or “US – Hot-rolled Steel”), 192 [the Case of “United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan” (or “US – Cotton Yarn”), 202 [the Case of “United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea” (or “US – Line Pipe”), 206 [the Case of “United States – Anti-Dumping and Countervailing Measures on Steel Plate from India” (or “US – Steel Plate”), 236 [the Case of “United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada” (or “US – Softwood Lumber III”), 248/249/251/252/253/254/258/259 [the Case of “United States – Definitive Safeguard Measures on Imports of Certain Steel Products” (or “US – Steel Safeguards”), 257 [the Case of “United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada” (or “US – Softwood Lumber IV”), 264 [the Case of “United States – Final Dumping Determination on Softwood Lumber from Canada” (or “US – Softwood Lumber V”). Canada complained], 277 [the Case of “United States – Investigation of the International Trade Commission in Softwood Lumber from Canada” (or “US – Softwood Lumber VI”), 296 [the Case of “United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea” (or “US – Countervailing Duty Investigation on DRAMs”), 320/321 [the Case of “United States/Canada – Continued Suspension of Obligations in the EC – Hormones Dispute” (or “US – Continued Suspension; Canada – Continued Suspension”), 335 [the Case of “United States – Anti-Dumping Measure on Shrimp from Ecuador” (or “US – Shrimp (Ecuador))], 379 [the Case of “United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China”), and 383 [the Case of “United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand”].

<sup>370</sup> The list of “as such and as applied” cases includes these: DS99 [the Case of “United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea” (or “US – Drams”), 194 [the Case of “United States – Measures Treating Export Restraints as Subsidies” (or “US – Export Restraints”), 212 [the Case of “United States – Countervailing Measures Concerning Certain Products from the European Communities” (or “US – Countervailing Measures on Certain EC Products”), 213 [the Case of “United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany” (or “US – Carbon Steel”), 244 [the Case of “United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan” (or “US – Corrosion Resistant Steel Sunset Review”), 268 [the Case of “United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina” (or “US – Oil Country Tubular Goods Sunset Reviews”), 282 [the Case of “United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico” (or “US – Anti -Dumping Measures on Oil Country Tubular Goods”), 294 [the Case of “United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)” (or “US – Zeroing (EC))], 322 [the Case of “United States – Measures Relating to Zeroing and Sunset Reviews” (or “US – Zeroing (Japan))], 350 [the Case of “United States – Continued Existence and Application of Zeroing Methodology” (or “US – Continued Zeroing”), and 402 [the Case of “United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea”].



## 1. Sovereignty or unilateralism

Some disputes – both “as such” (*e.g.*, the DS 152 case [the Case of US – Section 301 Trade Act]) and “as applied” (*e.g.*, the DS 248/249/251/252/254/258/259 case [the Case of US – Steel Safeguards]) – were cited by other WTO members as evidence on which they criticized “unilateralism” they claim has been adopted by the United States.

However, to the United States, it is national sovereignty that was challenged in these and other complaints over alleged unilateralism. In the DS 152 dispute (the Case of US – Section 301 Trade Act) – which revolved around the U.S. legislation (*i.e.*, Sections 301-310 of the Trade Act of 1974) authorizing certain actions by the Office of the United States Trade Representative (“USTR”), including the suspension or withdrawal of concessions or the imposition of duties or other important restrictions, in response to trade barriers imposed by other countries – the U.S. argument turned in part on the distinction between mandatory legislative provisions (requiring certain enforcement action) and permissive legislative provisions (allowing the exercise of sovereign powers). The U.S. argument was summarized by the Panel as follows. In short, to the United States, Sections 301-310 of the Trade Act of 1974 fall within the category of discretionary legislation which results from exercising sovereign powers:

The United States indicates that to put [it] another way, international agreements are made between contracting parties. The actions of those parties towards one another may or may not violate the obligations they have undertaken vis-à-vis one another. However, the actions taken towards non-parties are not relevant to this analysis. It is one thing to conclude that a contracting party may challenge legislation mandating action towards all if that action violates an obligation with respect to contracting parties. However, if legislation permitting such action could also be challenged, contracting parties would effectively be precluded from exercising sovereign powers with regard to non-parties, except by establishing parallel sets of laws applicable to parties and non-parties, or by explicitly providing for limits in their domestic laws as to how discretion may be exercised towards parties. There is absolutely no indication in the WTO Agreement or its annexes that Members agreed to this degree of interference with the exercise of national sovereignty.<sup>371</sup>

The United States argues that the EC’s proposed construction of [GATT] Article XVI:4, even if it had so much as an ambiguous textual basis, would run afoul of the *in dubio mitius* principle,<sup>[372]</sup>

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<sup>371</sup> WTO, *Panel Report*, WT/DS152/R, ¶4.248, December 22, 1999 [hereinafter WTO-WT/DS152/R].

<sup>372</sup> The interpretative principle of *in dubio mitius*, widely recognized in international law as a ‘supplementary means of interpretation,’ “applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligations, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon

since that construction would interfere with a Member's sovereign right to choose the form by which it implements its obligations in domestic law, and require each and every Member to re-examine and potentially revise the form of various pieces of legislation they quite correctly assumed in 1995 to be consistent with their WTO obligations based on the consistent application of the doctrine of the non-actionability of discretionary legislation.<sup>373</sup>

In the DS 217/234 dispute (the Case of US – Byrd Amendment) – which revolved around the U.S. Continued Dumping and Subsidy Act of 2000 under which anti-dumping and countervailing duties assessed on or after October 1, 2000 were to be distributed to the affected domestic producers for qualifying expenditures. The United States argued that the Byrd Amendment falls within its national sovereignty.

Under the WTO Agreement, Members retain the right to control their treasury, allocate their resources, and disburse funds for a wide range of purposes. A Member's sovereign right to appropriate lawfully assessed and collected duties cannot be restricted by this Panel *ex aequo et bono*.<sup>374</sup>

Moreover, the United States recognises that “WTO Members have agreed to exercise their sovereignty according to their WTO Agreement commitments”, and “Members are free to pursue their own domestic goals through spending so long as they do not do so in a way that violate[s] commitments made in the WTO Agreement”. ...<sup>375</sup>

Also in the DS 217/234 dispute (the Case of US – Byrd amendment), the United States argued on the ground of national sovereignty in the appeal (having lost the case at the first instance):

...the Panel should have interpreted Articles 18.1 and 32.1 [of the ADA] in a manner so as to: (1) give meaning to the footnotes' express permission to take “actions” authorized under other relevant provisions of the WTO Agreement; and (2) avoid the creation of any limitations on the sovereign power [of states] over fiscal matters not otherwise specifically proscribed by the WTO agreements.<sup>376</sup>

The United States addressed, in addition, the sovereign right to distribute government revenues – the core ground of its argument in the DS 217/234 dispute – in its proposal of April

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the parties.” WTO, WTO APPELLATE BODY REPERTORY OF REPORTS AND AWARDS: 1995-2006 337 (2007) [hereinafter WTO-AB].

<sup>373</sup> WTO-WT/DS152/R, *supra note* 371.

<sup>374</sup> This term means in equity and good conscience.

<sup>375</sup> WTO, *Panel Report*, WT/DS217/R, ¶4.232 & 4.844, September 16, 2002 [hereinafter WTO-WT/DS217/R].

<sup>376</sup> WTO, *Appellate Body Report*, WT/DS217/AB/R, WT/DS234/AB/R, ¶18, January 16, 2003 [hereinafter WTO-WT/DS217/AB/R].

24, 2004 on the issue of distributing monies collected from antidumping duty and countervailing duty after the settlement of the DS 217/234 case in front of the Appellate Body.<sup>377</sup>

## **2. Extra-territorial application of American law**

The other U.S. ideology regarding the relationship between domestic law and the international community that has been challenged in WTO cases is the extra-territorial application of American law, especially environmental law. In the DS 58 case (the Case of US – Shrimp), the United States prohibited the importation of certain shrimp and shrimp products on the ground of protecting turtles in the exporting countries. In response to the complaints, the United States argued on the grounds of its Endangered Species Act of 1973 (“ESA”) and related legislation, which aim to protect turtle within both the United States and foreign countries. Some may also classify such cases into those involving “unilateralism.”<sup>378</sup> In order to differentiate these cases from those mainly involving the sovereignty argument, however, it is more appropriate to discuss them separately. Here also, U.S. legal tradition and culture (in particular the international facet thereof) helps explain the actions being challenged in WTO cases involving the United States as respondent.

## **C. Legal Tradition and Culture**

Both the ideologies challenged by the United States’ trading partners – namely, unilateralism and extra-territorial application of American – and U.S. arguments seem to have roots in the country’s legal history and culture. The so-called U.S. “unilateralism” can be understood from the perspectives of its emphasis on (1) the capacity to retaliate, (2) the belief in reciprocity, and (3) the sensitivity to sovereignty. The characteristic of extra-territorial application has its roots in the long-term pertinent practices of American adjudication.

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<sup>377</sup> The United States, *Three Issues Identified for Discussion by the Negotiating Group on Rules*, TN/RL/W/153, April 24, 2004 [hereinafter USA-TN/RL/W/153].

<sup>378</sup> For example, see Walden Bello, *The Shrimp-Turtle Controversy and the Rise of Green Unilateralism*, in *THE FUTURE IN THE BALANCE: ESSAYS ON GLOBALIZATION AND RESISTANCE* (Walden Bello & Anuradha Mittal) 170 (2001); and Nathalie Bernasconi-Osterwalder, *ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE* 83 (2006). Of course, some scholars express disagreement on relating this case to “unilateralism.” For example, see generally Robert Howse & D Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy* 11 EJIL 249 (2000).

## 1. Origins of “unilateralism”

The leverage of so-called “unilateralism” has developed from the history of the United States and its trade policies. In U.S. history and foreign trade relations, that history has resulted in the erection of three pillars that support the country’s peculiar approach to international trade rules – which is usually labeled as “unilateralism” by its trading partners. These pillars are: (a) a belief in the capacity to retaliate against a trade blockade, (b) reciprocity in trade activities, and (c) supremacy of national sovereignty.

### a. Capacity to retaliate: drawn from U.S. history

In the early days of American independence, unlike the experience of its European counterparts, “the founders [of the United States] reluctantly acquiesced to the elements of mercantilism.”<sup>379</sup> Out of national security concerns, “[r]ecognizing, as Adam Smith had, that ‘defense ... is of much more importance than opulence,’ they experimented with retaliation and then adopted a policy of economic nationalism.”<sup>380</sup> In response to the suppression and blocking from European countries, especially Great Britain, and in order “to compel respect for commercial rights, [the founders] concluded that the U.S. government must demonstrate its resolve and capacity to *retaliate* unilaterally against foreign restrictions.”<sup>381</sup>

### b. Belief in reciprocity: drawn from the history of U.S. trade policy

The development of the principle of reciprocity in U.S. trade relations started formally from the Reciprocal Trade Program initiated by Cordell Hull in the years after the enactment of the Tariff Act of 1930. This principle of reciprocity was established by the Reciprocal Trade Agreements Act of 1934 initiated by the Secretary Cordell Hull, in order to launch a reciprocal trade program.<sup>382</sup> Hull emphasized that the “entire policy of this bill would rest upon trade relationships which would be *mutually and equally profitable* both to our own and other

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<sup>379</sup> Alfred E. Eckes, Jr., *OPENING AMERICA’S MARKET 2* (1995).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> See *id.* at 141-2.

countries.”<sup>383</sup> President Roosevelt further strengthened Hull’s assertion in his transmittal message: “[t]he successful building up of trade without injury to American producers depends upon a cautious and gradual evolution of plans ... [under which] *no sound and important American interest will be injuriously disturbed.*”<sup>384</sup>

“Reciprocity is itself an ambiguous term that finds expression across a range of scholarly disciplines. ... In spite of its ambiguity, reciprocity is at its root a principle of exchange.”<sup>385</sup> A writer has accounted for how the criticized “aggressive unilateralism” is consistent with “diffuse reciprocity.” Before turning to substantial examination of his analysis, we may acquaint ourselves with the term “diffuse reciprocity” – expectations that participants in such arrangements will yield a rough equivalent of benefits in the aggregate and over time.<sup>386</sup> According to this writer, Section 301 serves as “the principal statute empowering the Executive to advance claims for a diffuse reciprocity against [its] trading partners,”<sup>387</sup> considering the following facts. First, the first iteration of Section 301 – the Trade Act of 1974 – authorized the President a broad authority to eliminate the transgressions of the U.S. interests by its trading partners prescribed by the law. Second, the Trade Agreements Act of 1979 authorizes the President to be far more aggressive in rectifying the perceived defaults of its trading partners. Third, in addition to authorize the withdrawal or suspension of trade benefits in the case of a foreign national whose acts or policies were “unjustifiable” or “unreasonable,” the statute added a new provision tying this authority to U.S. trade agreements. The President was expressly authorized to withdraw benefits or restrict imports for the purpose of enforcing “the rights of the United States under ... trade agreement[s]” or for the purpose of responding to any foreign

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<sup>383</sup> Hull testimony before the Senate Finance Committee, April 26, 1934, SNFN, *Hearings on H.R.8687*, at 7. (emphasis added)

<sup>384</sup> Edgar B. Nixon, *Roosevelt and Foreign Affairs*, 2:1-3. (emphasis added)

<sup>385</sup> Rorden Wilkinson, *MULTILATERALISM AND THE WORLD TRADE ORGANIZATION: THE ARCHITECTURE AND EXTENSION OF INTERNATIONAL TRADE REGULATION* 41 (2000) [hereinafter *Wilkinson-Multilateralism*].

<sup>386</sup> *Id.* “[There are] two types of reciprocity...: specific and diffuse. Each type of reciprocity relates to a particular way in which the action of exchange is ordered. In instances of specific reciprocity, the action of exchange takes place between actors in a limited sequence. Here, each partner is known to the other or others; the initial part of the transaction is known to all; and the value of that which is returned is gauged accordingly. Conversely, diffuse reciprocity is less precise.” *Id.*

<sup>387</sup> Alan C. Swan, “Fairness” and “Reciprocity” in *international Trade Section 301 and the Rule of Law*, 16 *Ariz. J. Int’l & Comp. L.* 37, 47 (1999).

country practice or policy “inconsistent with” or a “denial of U.S. benefits under a trade agreement.”

The history of Section 301 from the Trade Act 1974 to the Omnibus Trade and Competitiveness Act of 1988<sup>388</sup> shows that this section targets at protecting the U.S. interests that can be “justifiably” or “unreasonably” expected from its trade relationships with its trading partners.

In this view, the so-called “aggressive unilateralism” as reflected by Section 301 is actually the right to “diffuse reciprocity.” With the development and transformation of Section 301, diffuse reciprocity has transformed into adherence to rule of law. In short, Section 301 is justifiable when viewed in the context of U.S. legal tradition and culture.

The history of Section 301 in the above excerpt demonstrates, on the one hand, how “aggressive unilateralism” derived from “diffusive reciprocity,” and explains to us, on the other hand, how the unilateral actions taken by the U.S. Administration under Section 301 were compelled by the Congress.

### c. Sovereignty

It seems a long way to calm down the debates or conflicts between national sovereignty and multilateralism within the United States. According to An Chen, as of 2003, such conflicts underwent three big rounds and arrived at their climax in the great 1994 sovereignty debate, the section 301 dispute (the DS 152 case ) and the section 201 dispute (the DS 248/249/251/252/254/258/259 case).

The first round took place before the establishment of the WTO, regarding whether the United States should accept and implement the Uruguay Round Results. The second was reflected in the Section 301 Dispute. The third round has been incarnated in the Section 201 Disputes. An Chen observes that each round has the same core: defending the United States’ sovereignty.<sup>389</sup> At the same time, he also regards that the argument of “defending sovereignty”

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<sup>388</sup> Since the 1988 Act, Section 301 has been changed with only minor technical amendments.

<sup>389</sup> An Chen, *The Three Big Rounds of U.S. Unilateralism versus WTO Multilateralism during the Last Decade:*

is actually a disguise of the U.S. “unilateralism.” In other words, the argument of sovereignty originates from its unilateralism. On the grounds that conflicts between national sovereignty and multilateralism reflect the frictions between unilateralism and multilateralism, An Chen concludes that the United States “has not been ready to concede to the WTO multilateralism voluntarily.”<sup>390</sup>

However, I would like to interpret this relationship between national sovereignty and unilateralism from a reverse direction – that is, the unilateralism originates from sovereignty. In other words, it is the sensitivity to sovereignty in the United States that leads to the “unilateral” behavior. In the debate, the American scholars have expressed genuine concerns out of sovereignty.<sup>391</sup>

Then, how sensitive the United States is to sovereignty compared with other countries in the world? The answer can be found in the concept of “the sovereignty of the people” posited by Alexis de Tocqueville.

In America the principle of the sovereignty of the people is neither barren nor concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there is a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and advantages may be judged, that country is assuredly America.<sup>392</sup>

According to Alexis de Tocqueville, the principle of the sovereignty of the people in the United States extended its influence to the people’s habits, religion, and family life, and even had a profound impact on their notions of popular governance. “In the United States the sovereignty of the people is not an isolated doctrine, bearing no relation to the prevailing habits and ideas of the people; it may, on the contrary, be regarded as the last link of a chain of opinions which binds

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*A Combined Analysis of the Great 1994 Sovereignty Debate, Section 301 Disputes (1998-2000), and Section 201 Disputes (2002-Present)*, 17 Temp. Int’l & Comp. L.J. 409, 464-5 (2003) [hereinafter Chen-Unilateralism].

<sup>390</sup> *Id.* at 409.

<sup>391</sup> For example, John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 Colum. J. Transnat’l L. 157 (1997) [hereinafter Jackson-Debate]; and Kal Raustiala, *Sovereignty and Multilateralism*, 1 Chi. J. Int’l L. 401(2000).

<sup>392</sup> Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 57 & 60 (vol.1, 1945).

the whole Anglo-American world.”<sup>393</sup>

## 2. Extra-territorial application of American law

For the purpose of this work, the extra-territorial application of American law basically refers to enforcement of American law outside the geographical scope of the United States.<sup>394</sup> It includes *de facto* influence of American laws on another country’s legal standards and pertinent practices.

The Constitution does not forbid either Congressional or state enactment of laws which apply outside the United States. Nor does it prohibit either the federal government or the states from enforcing American law abroad. Several passages suggest that the Constitution contemplates the application of American law beyond the geographical confines of the United States.<sup>395</sup>

The extra-territorial application of domestic law has a long history in the United States, starting from the application of U.S. law to Americans outside the United States. As articulated below, anti-corruption, anti-discrimination, and anti-trust constituted the main areas that firstly involved the extra-territorial application of domestic U.S. law:

[T]he Foreign Corrupt Practices Act of 1977, which was enacted after several highly publicized incidents involving bribery of foreign officials in the airplane manufacturing industry, imposes criminal and civil penalties on US corporate officers and employees working or travelling abroad if they make payments or offer anything of value to a foreign official in an attempt to influence the official to act, decide or use his influence with his government in a way that helps the US company to obtain or retain business in the foreign country. The Civil Rights Act of 1991 also has a specific extraterritorial reach; it extends the anti-discrimination provisions of the 1964 Civil Rights Act to US corporations that employ US citizens abroad. Another, more striking example of the application of US laws to American companies engaged in international business transactions is provided by *Trasnor (Bermuda) Ltd. v BP North American Petroleum*. The defendants were major oil companies accused of having violated both the Sherman Antitrust Act and the Commodities Exchange Act (CEA) by engaging in forward trades in Brent (North Sea) crude oil. The court refused to dismiss the suit even though the plaintiff was a foreign corporation that did not engage in business in the United States and whose financial injury was entirely the result of trading in an international market.<sup>396</sup>

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<sup>393</sup> *Id.* at 435-436.

<sup>394</sup> For elaborations on different understanding of “extra-territorial” application of American law, see John H. Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187 (2000).

<sup>395</sup> Charles Doyle, *Extraterritorial Application of American Criminal Law 1* (report to the Congress) (2010).

<sup>396</sup> Zhiguo Gao, ENVIRONMENTAL REGULATION OF OIL AND GAS 233-234 (1998).



The extra-territorial application of environmental laws, consequently, can find its roots in this long history of the practices of applying U.S. law extra-territorially. However, the progress of extra-territorial application of environmental law is not easy to make, because the prerequisite of such application – that is, the nationality link between the U.S. law and the objects it tries to regulate outside the United States – is problematic. In most cases, this nationality link is hard to establish in environmental cases. Moreover, the justification of extra-territorial application of environmental law depends on the relief of other two concerns from the U.S. domestic judiciary. One is that “whether [the] Congress has also prescribed environmental standards of conduct for U.S. companies operating abroad.”<sup>397</sup> The other concern is whether the Congress has prescribed environmental standards of conduct for foreign companies.

To sum up, we can provide a relatively objective assessment of the criticized U.S. “unilateralism” and extra-application of American law by examining its legal history and culture, which explains the United States’ strong belief in capacity to retaliate, the principle of reciprocity, and national sovereignty. This examination also shows that the disputed extra-application of U.S. environmental law, is, to a large extent, an inheritance or extension of a long-term legal practice of its own.

### **III. Domestic Legislation on Trade**

Having explored how the involvement of the United States in international trade negotiations and international trade disputes reflect deeply rooted U.S. attitudes and values, we turn now to another area: U.S. trade legislation. The trade-oriented aspect of the U.S. legal system is one of the most comprehensive and complex ones in the world. The enactment of trade laws in the United States also illustrates how WTO law has been indigenized by domestic legislation. The U.S. domestic trade law has exhibited some features, including wide coverage and codification, embargo policy, and dualism regarding the relationship between international law and domestic law. These features have their roots in the U.S. legal tradition and culture, such as a merger of the common law and civil law traditions, a reflection of fluctuated trade policy

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<sup>397</sup> *Id.* at 234.

and legislation, and a skeptical attitude toward international law.

## **A. WTO Law in Domestic Context and Characteristics of Domestic Legislation**

According to the Overview and Compilation of U.S. Trade Statutes<sup>398</sup>, the U.S. trade statutes are classified into seven groups: (1) tariff and customs laws; (2) trade remedy laws; (3) other laws regulating imports; (4) laws regulating export activities; (5) authorities relating to political or economic security; (6) reciprocal trade agreements; and (7) organization of trade policy functions. In addition, the trade statutes can be classified into two groups – trade-focused and trade-related laws; the first group regulates trade issues such as antidumping, tariff, export administration, and trade sanctions, while the second group handles such issues as merchant marine, defense production, foreign assistance, food security, and tax reform.

Three types of characteristics can be identified to describe U.S. trade legislation: (1) it forms a remarkably comprehensive and complex regime, which has largely been codified; (2) it includes numerous country-specific elements designed to serve national security interests; and (3) it reflects to some degree the treaty commitments of the United States.

### **1. WTO law in domestic context**

The Uruguay Round Agreement Act serves to incorporate WTO law into the U.S. legal system. The following excerpt from the Overview and Compilation of U.S. Trade Statutes of 2010 elaborates on this point:

The Uruguay Round Agreement Act approves the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) entered into by the President on April 15, 1994. The legislation and the Statement of Administrative Action (SAA) proposed to implement the Agreements were submitted to the Congress on September 27, 1994.

The legislation contained general provisions on: (1) approval and entry into force of the Uruguay Round Agreements, and the relationship of the Agreements to U.S. laws (section 101 of the Act); (2) authorities to implement the results of tariff negotiations (section 111 of the Act); (3) procedures regarding implementation of dispute settlement proceedings affecting the United States and

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<sup>398</sup> This resource, prepared and published by Committee on Ways and Means U.S. House of Representatives in 2010, offers a summary of international trade-related rules and regimes for the United States.

oversight of activities of the World Trade Organization (WTO) (sections 121-130 of the Act); and (4) objectives regarding extended Uruguay Round negotiations and other related provisions (sections 131, 135 and 315 of the Act).<sup>399</sup>

## 2. Characteristics

### a. Comprehensive contents, complicated constituents, and codification

The contents of U.S. trade law have a very wide range of coverage, and they comprise almost every aspect of trade and every topic in each aspect. Moreover, they are complicated. As indicated by the Overview and Compilation of the US Trade Statutes, there are at least 28 trade-focused statutes<sup>400</sup> and 38 trade-related statutes<sup>401</sup> at the federal level. Despite their volume and complexity, all the trade statutes have been codified into the U.S. Code. Most of them are codified in Title 19 of the U.S. Code.

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<sup>399</sup> Committee on Ways and Means U.S. House of Representatives , THE OVERVIEW AND COMPILATION OF US TRADE STATUTES 306-307 (2010) [hereinafter USHR-Compilation].

<sup>400</sup> Trade-focused laws include: Antidumping Act of 1916; Tariff Act of 1930, as amended; Trade Expansion Act of 1962, as amended; Trade Act of 1974, as amended; Trade Agreement Act of 1979; Export Administration Act of 1979, as amended; Trade and Tariff Act of 1984; Omnibus Trade and Competitive Act of 1988; Telecommunications Trade Act of 1988; Export Enhancement Act of 1988, as amended; Caribbean Basin Economic Recovery Expansion Act of 1990; Customs and Trade Act of 1990; Trade and Development Act of 2000; Tariff Suspension and Trade Act of 2000; Trade Sanctions Reform and Export Enhancement Act of 2000; Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2002; Trade Act of 2002; Softwood Lumber Act of 2008; Customs Modernization Act ; U.S.-Caribbean Basin Trade Partnership Act; Andean Trade Preference Act, as amended; Andean Trade Promotion and Drug Eradication Act; African Growth and Opportunity Act, as amended; AGOA Acceleration Act; Uruguay Round Agreement Act; Trading with the Enemy Act, as amended; Narcotics Control Trade Act; Arms Export Control Act; and Clean Diamond Trade Act.

<sup>401</sup> Trade-related laws include: Merchant Marine Act of 1920; Agricultural Adjustment Act of 1933; Buy American Act of 1933, as amended; Defense Production Act of 1950, as amended; Agricultural Adjustment Act of 1956, as amended; Federal Aviation Act of 1958, as amended; Foreign Assistance Act of 1961, as amended; Fishermen's Protective Act of 1967, as amended; Marine Mammal Protection Act of 1972, as amended; Endangered Species Act of 1973, as amended; International Air Transportation Fair Competitiveness Act of 1974; Atlantic Tunas Convention Act of 1975; Consolidated Budget Reconciliation Act of 1985; Food Security Act of 1985; International Security and Development cooperation Act of 1985; Tax Reform Act of 1986; Omnibus Budget Reconciliation Act of 1987; Foreign Shipping Practices Act of 1988; Iraq Sanctions Act of 1990; Chemical and Biological Weapons Control and Warfare Elimination Act of 1991; Iran-Iraq Arms Non-Proliferation Act of 1992; Wild Bird Conservation Act of 1992; Cuban Democracy Act of 1992; United States – Hong Kong Policy Act of 1992; Rhinoceros and Tiger Conservation Act of 1994, as amended; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996; Iran Sanctions Act of 1996; Foreign Relations Authorization Act of 2003; Burmese Freedom and Democracy Act of 2003; Syria Accountability and Lebanese Sovereignty Restoration Act of 2003; Belarus Democracy Act of 2004; American Jobs Creation Act of 2004; Comprehensive Peace in Sudan Act of 2004; Emergency protection for Iraqi cultural antiquities Act of 2004; Darfur Peace and Accountability Act of 2006; Federal Meat Inspection Act; Animal Health Protection Act; African Elephant Conservation Act; High Seas Driftnet Fisheries Enforcement Act; National Emergencies Act; International Emergency Economic Powers Act, as amended; and Sudan Peace Act.

b. Country specification and trade sanctions

Some trade provisions or statutes – such as section 406 of the Trade Act of 1974 (market disruption by imports from Communist countries) and section 421-423 of the Trade Act of 1974, as amended (market disruption by imports from the People’s Republic of China.) – are targeted at certain countries explicitly, such as China and other communist or “terrorist” countries.

The main motives of the United States for retaining the policy of embargo are (1) to address concerns about national security, (2) to serve national economic interests, and (3) to promote domestic politics.<sup>402</sup> The countries that are the subject of an embargo policy or trade sanctions include Cuba, Libya, Iran, Iraq, Sudan, Burma, and Belarus.<sup>403</sup>

The United States differentiates embargo measures against different countries. For example, according to the *2012 Report on Foreign Policy-Based Export Controls* released by the U.S. Department of Commerce Bureau of Industry and Security, the Department of Commerce requires a license for export or reexport to Cuba of virtually all commodities, technology, and software subject to the Export Administration Regulations (EAR), with a few narrow exceptions for items generally authorized by a License Exception.<sup>404</sup> On July 1, 2010, the President signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). CISADA Title I expands sanctions on Iran predominantly through amendments to the Iran Sanctions Act of 1996 (ISA).<sup>405</sup> The Department of Commerce requires a license for the export or reexport to Iraq, or transfer within Iraq, of certain types of goods.<sup>406</sup> North Korea is subject to sanctions based on its nuclear and ballistic missile tests, engagement in proliferation and other illicit activities and human rights violations.<sup>407</sup> The U.S. Government requires a license for the

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<sup>402</sup> Helen Osieja, *ECONOMIC SANCTIONS AS AN INSTRUMENT OF U.S. FOREIGN POLICY: THE CASE OF THE U.S. EMBARGO AGAINST CUBA* 5 (2006). According to this observer, “[w]hen one or more of these interests is at stake, the US intervenes in the affairs of other countries.” *Id.*

<sup>403</sup> This embargo list is summarized by Lijuan Xing based on USHR-Compilation, *supra note* 399.

<sup>404</sup> The U.S. Department of Commerce Bureau of Industry and Security, *2012 Report on Foreign Policy-Based Export Controls* 44, available at the website of the Department of Commerce <http://www.commerce.gov/>, last visited January 7, 2012 [hereinafter *2012 Report on Export Control*]

<sup>405</sup> *Id.* at 46.

<sup>406</sup> *Id.* at 47.

<sup>407</sup> *Id.* at 48.

export and reexport of nearly all items on the Commerce Control List (CCL) to Sudan. Many items controlled on the CCL to Sudan may require a license from both the Departments of Commerce and the Treasury. License applications may be submitted to both agencies concurrently.<sup>408</sup>

In order to implement the embargo policy against a country, the United States would enact various regulations covering every aspect of bilateral trade relationship. For example, the Export Control Act of 1949 establishes a general authority “to establish and maintain a total embargo upon all trade between the United States and Cuba.” Specific authority for a total trade embargo on Cuba was contained in Section 620(a) of the Foreign Assistance Act of 1961. The Cuban Import Regulations added an additional ban on imports from Cuba, placing all transactions under the authority of the Trading With the Enemy Act (TWEA), based on the specific addition of TWEA to the statutory authority for the regulations. The embargo on transactions with Cuba is implemented at present for exports by the Export Administration Regulations (15 U.S.C. 768-799.2), particularly sections 770, 785.1, and 799.1, and for imports and other transactions by the Cuban Assets Control Regulations (15 CFR 515).<sup>409</sup>

c. Incorporation of international agreements

The regional and multilateral agreements in which the United States participates have been incorporated into U.S. domestic law by way of secondary (that is, implementing) legislation. For example, the United States has promulgated the Uruguay Round Agreements Act (URAA), the North American Free Trade Agreement Implementation Act, the United States-Israel Free Trade Area Implementation Act, the United States-Canada Free-Trade Agreement Implementation Act, the United States-Jordan Free Trade Area Implementation Act, and other implementation acts based on U.S. FTAs. As indicated in this explanation, common mode of acts incorporating FTAs into the U.S. legal regime provides that U.S. law will prevail over the FTA in the case of conflict.<sup>410</sup>

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<sup>408</sup> *Id.* at 49.

<sup>409</sup> USHR-Compilation, *supra note* 399, at 267-268.

<sup>410</sup> For example, see *id.* at 321 & 327.

## B. Legal Tradition and Culture

### 1. Civil law and common law traditions

The U.S. trade legislation reflects a blending of the common law and civil law traditions within its legal system. The large volume, comprehensiveness, and thoroughness of U.S. legislation relating to international trade issues, as well as the codification of such legislation, are reflections of some key features of the civil law tradition, especially the typical one that this legal tradition “regard[s] legislation as the principal and paradigm form of law[.]”<sup>411</sup> which has been partially incorporated into the common law of the country. The U.S. preference has been “given to more affirmative ideas clearly derived from civil law.”<sup>412</sup> For example, the practice of codification – which is an obvious feature of the civil law tradition – is common in the U.S. legal system.<sup>413</sup>

Indeed, one authority has cast doubt on the purity and completeness with regard to the purported “inheritance” of common law culture from Great Britain by the United States, dating back to its colonial era. According to him, “the central theme of the colonial period has been to emphasize the transfer and transformation of common law in its American setting.”<sup>414</sup> Because that American setting differed in so many ways from the English setting, however, big changes were necessary. Consequently, the common law in this new continent was often whatever the early lawyers said it to be. In effect, what they said the common law was had been adapted intentionally to the new needs of settlement in this continent.<sup>415</sup>

Generally, however, “[d]uring the nineteenth century, the American legal system was almost wholly dominated by the judicially administered common law”<sup>416</sup> – that is, caselaw as opposed to legislation. When the legal system entered the period between 1908 and 1940 that Jackson

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<sup>411</sup> Head, *supra note 6*, at 161.

<sup>412</sup> Glenn, *supra note 6*, at 263.

<sup>413</sup> *Id.* at 263.

<sup>414</sup> Warren M. Billings, *Law in Colonial America: the Reassessment of Early American Legal History*, 81 Mich. L. Rev. 953, 953-954 (1983).

<sup>415</sup> See *id.* at 953-954.

<sup>416</sup> Jackson, *supra note 6*, at 10.

explores, judges relied on three approaches of legal interpretation: (1) applying precedents in common law or equity (*i.e.*, common law construction), (2) construing the meaning of a statute as it affects the case at bar (*i.e.*, statutory construction), and (3) finding guidance in a constitutional provision to help decide the case (*i.e.*, constitutional construction).<sup>417</sup> Jackson's observation shows that, between 1920s and 1970s, statutes and the Constitution became two sources of law that are as important as common law in the American courts.

In short, U.S. trade law may be seen as reflecting a blend of both common law tradition and civil law tradition. While the heavy emphasis on developing rules through sophisticated judicial decisions obviously derives from the common law tradition, the reliance of U.S. trade law on statutory enactments and codification as well as the increasing importance of statutes in American judicial system demonstrate the influence of the civil law tradition in this common law country.

## 2. Fluctuation of trade policies

Despite the fluctuation in U.S. trade policies; there are some universal principles that, according to at least one expert, lie at the foundation of the overall policies adopted by the United States in its history. These universal principles include “free trade, equality (either national or most-favored-nation treatment), and reciprocity.”<sup>418</sup>

The United States regards trade law as an indispensable part of diplomacy rather than merely a matter of state administration. This attitude partially finds its roots in the history of the early American trade law that was used by the nation's founders to fight for its independence. The legislative purpose of the first trade legislation in the United States in 1789 was to provide

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<sup>417</sup> *Id.* at 52-53. Jackson explains the development in this way:

In the late 1920s, common law construction was found to be the principal form of legal interpretation ...; in the 1960s, the frequency of cases decided by full opinion that had a primary common law bent ... The decline in the relative status of common law litigation in the Supreme Court from the 1920s to the late 1960s was a product of the changing nature of the Court's business. Statutory-oriented litigation, which by the late 1920s already accounted for two-thirds of the Court's full-dress cases, remained at a high level as late as the 1960s. But it was the dramatic growth of litigation involving primarily constitutional issues that supplanted common law-oriented appellate cases. ... The decline of common law litigation and the rise of constitutionally oriented cases between 1925 and 1970 have been far from regular. Nevertheless, a marked change has occurred in the frequency of the types of legal construction in cases decided by the High Court. *Id.*

<sup>418</sup> Eckes, *supra* note 379, at 1.

financial support for the newborn state, by collecting duties in “support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures.”<sup>419</sup>

The fluctuation of U.S. trade policies has been summarized by an expert as following this progression: (1) free trade and economic security from 1776 to 1860,<sup>420</sup> (2) the argument between Republicans and Democrats as to protectionism and liberalism between the time of the Civil War and the Great Depression,<sup>421</sup> (3) the fluctuation from then until about 1960 between unreciprocal and reciprocal trade,<sup>422</sup> (4) the opening of America’s market between 1960 and 1974,<sup>423</sup> (5) illusive safeguards,<sup>424</sup> and (6) the curbing of executive discretion in unfair trade cases.<sup>425</sup>

The retention of Section 301 of the Trade Act of 1974 after the Congress passed the Uruguay Round Agreements Act (URAA) – which would, on its face, seem inconsistent with the unilateralism of Section 301 – is an example of the compromise between advocates of hegemony and multilateralism, as pointed out by An Chen:

In fact and in essence, what WTO opponents and proponents argue over is not the economic

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<sup>419</sup> Bryan A. Edens, *Substantial Evidence in the Law of International Trade: Meaningful Judicial Review of Antidumping Actions or Perpetuation of the Yo-Yo Effect*, 6 *Cardozo Pub. L. Pol’y & Ethics J.* 431, 438 (2008). “Though it enumerated specific tariff provisions on goods ranging from Madeira wine to teas imported from China and India, pickled fish, and snuff, the rates were low enough that fiscal considerations were satisfied, but there was little discouragement of imports. The stage was set for a debate revolving around trade.” *Id.*

<sup>420</sup> Until after the Civil War, the United States sought equal access to the markets of major European competitors, and strove for a more aggressive policy, seeking special privileges and offering special concessions for raw materials from Asia and agricultural products in the U.S. market. For more elaborations on this point, see Eckes, *supra note 379*, at 27.

<sup>421</sup> “In the great tariff debates between the time of the Civil War and the Great Depression, Republicans proudly defended the American protective system, while Democrats favored freer trade.” *Id.* at 57.

<sup>422</sup> “The Great Depression, the successful attack on Smoot-Hawley, and the election of Franklin Roosevelt in 1932 gave Democrats a third opportunity to implement their low-tariff agenda.” *Id.* at 99.

<sup>423</sup> “The Kennedy Round of multilateral tariff negotiations thus marked a milestone in American economic history. American officials saw the Kennedy Round as an opportunity to accommodate the European Common Market.” *Id.* at 218.

<sup>424</sup> “Since the mid-1960s, the forces of global competition have restructured the domestic market America’s leaders identified the broad national interests” and relied heavily on safeguard measures to protect these interests. For more elaborations on this point, see *id.* at 255-256.

<sup>425</sup> “The 1979 Trade Agreements Act initiated a dramatic change in U.S. unfair trade enforcement. Establishing a quasi-judicial procedure for resolving trade disputes outside the policy process, it sharply reduced the opportunity for the executive branch to subordinate trade enforcement to other policy considerations or ideological caprice.” *Id.* at 277.



sovereignty of the United States, but the economic hegemony of the United States. An obvious example of this aspect is the implementing practice of Section 301 of the U.S. Trade Act and the decision made by the U.S. Congress after the Great Debate that Section 301 should continue to be implemented.<sup>426</sup>

### 3. Subordination of international law to domestic law

The dualism adopted by the United States –that is, enacting domestic implementing statutes in order to enforce international agreements – reflects a general attitude of the United States towards the relationship between international law and domestic law, which gives a subordinate effect to international law. For example, “when the US congress enacted domestic legislation to implement the Uruguay Round Final Act setting up the World Trade Organization, it made sure to provide that no provision of the WTO agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any United States law shall have effect.”<sup>427</sup>

There are ... instances in which the United States has been actively involved in international law making, but subsequently sought, in applying that law, to subordinate it to domestic US law. To cite only one example,

Although this observation was made eight years ago, the relevant legislation – the URAA – has not changed much since its enactment. The attitude of the United States toward international law is also elaborated by another scholar, focusing on the negative role of the Congress in conferring the full legal effect of international law:

Despite the fact that the United States was able to achieve many of its negotiating objectives, securing approval by Congress turned out to be difficult. The Senate, in particular, remained skeptical and, in the end, lengthy implementing legislation was enacted. It contains, inter alia, language regarding the follow-up of dispute settlement procedures that result in findings that the United States has violated WTO law. The follow-up provisions, which involve the US Trade Representative, the Federal Trade Commission and other parts of the administration, are drafted in a way which might cast a shadow on the preparedness of the United States fully to honor its membership and resulting obligations under the WTO Agreement. The same holds true for lengthy provisions that detail “congressional disapproval” of US participation in the WTO.<sup>428</sup>

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<sup>426</sup> Chen-Unilateralism, *supra note* 389, at 424.

<sup>427</sup> Edwardd Kwakwa, *The International Community, International Law, and the United States: Three in One, Two against One, or One and the Same?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte ed.) 25, 48 (2003). “The legislation also precluded private parties from using the WTO agreements as a basis for challenging any federal, state or local action in a United States court.” *Id.* For more elaborations on the UARR, see USHR-Compilation, *supra note* 399, at 237-239.

<sup>428</sup> Stoll, *supra note* 326, at 464.

The degree of importance attached to international law by the United States rests, in part, in the factors diagnosed below – mainly (1) federalism, (2) separation of powers, and (3) relationship between treaty law and domestic law:

... [N]orm internationalization – the process by which States incorporate or internalize international law domestically – is a critical factor in ascertaining why States obey international law. In the case of the United States, its unique system of federalism, in particular, ... the separation of powers ... [and the] relationship between treaty law and United States domestic law, arguably introduce certain important factors or impediments to multilateral cooperation that do not exist in other countries.<sup>429</sup>

In addition to the factors identified above, sovereignty is another influential one contributing to the Congress' attitude toward international law. As discussed in subsection C1c of this chapter, sovereignty is usually the ultimate cause of the unique attitude of the Americans. Hence, it is natural for the Congress to subordinate international law to domestic law in order to address the country's sovereignty.

Another authority points out that the high regard in which domestic law is held by the American people derives from their belief that it is because American law is developed by good and moral people that this law is superior:

... [I]f we enlarge this idea somewhat with respect to domestic American culture more generally, going beyond professional legal culture, it seems that Americans always spontaneously make an implicit distinction between "good" law and "bad" law according to inherent conceptions of justice and goodness. We find here the idea, still too often a caricature, according to which all Americans think that the American conception of law is necessarily "good" or "just" because it is the product of a good and moral people.<sup>430</sup>

To sum up, the U.S. domestic trade law has exhibited some features, including wide coverage and codification, keeping of embargo policy, and adoption of dualism to give effect to international agreements. These features have their roots in the U.S. legal tradition and culture, such as a mixture of common law and civil law traditions, a tendency toward fluctuation of trade policy and trade law, and the skeptical attitude that the United States takes toward international law.

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<sup>429</sup> Kwakwa, *supra note 427*, at 48-49.

<sup>430</sup> Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 Me. L. Rev. 292, 320 (2006).

## **IV. Domestic Adjudication of Trade Issues**

Lastly, let us turn to a fourth aspect of the indigenization of WTO law in the United States. Domestic trade-related adjudication in the United States – like international trade negotiations, international trade disputes, and domestic trade legislation – can show us how the United States sets its WTO obligations into its own judicial system and culture.

### **A. Overview: the Main Agencies, Courts, and Statutory Provisions**

The administrative regime that governs the enforcement of U.S. trade statutes revolves mainly around the Customs Border and Protection (CBP) division of the Department of Homeland Security, the International Trade Commission (ITC), the Department of Commerce (DOC), the Department of Agriculture (DOA), and the Office of the United States Trade Representative (USTR).

The courts that have jurisdiction over trade cases include the Court of International Trade (CIT), the Court of Appeals for the Federal Circuit (CAFC), and the United States Supreme Court.

According to the Annual Reports released by the ITC since 1997, the main types of trade investigations and cases arise from the enforcement of four key provisions: Section 731 of the Tariff Act of 1930 (antidumping), Section 701 of the Tariff Act of 1930 (anti-subsidy), Section 337 of the Tariff Act of 1930 (IP protection), and Section 201 of the Trade Act of 1974 (safeguards). Antidumping cases are especially important. Such cases dominate all the trade investigations in every year from 1997 to 2010. Other provisions that have been frequently involved in trade administration and investigation actions include Section 332 of the Tariff Act of 1930 (general issues), Section 421 of the Trade Act of 1974 (special safeguards against China), and Section 751 of the Tariff Act of 1930 (sunset review of countervailing duty or antidumping duty orders).

## **B. Characteristics**

### **1. Administrative segmentation**

Consistent with the fundamental ideology of state governance – that is, separation of power, within the U.S. system – trade administrative power is vested in five separate agencies: the CBP, the ITC, DOC, DOA, and the USTR. Briefly, the CBP handles mainly the function of the former US Customs Service.<sup>431</sup> Determinations of injury or threat of injury are made by the ITC in countervailing duty and antidumping cases and in safeguards cases under Section 201.<sup>432</sup> The USTR is primarily responsible for developing, implementing, and coordinating US international trade policy.<sup>433</sup> The DOC regulates non-agricultural trade activities, including implementation of the Multinational Trade Negotiations (MTN) and the administration of import regulating statutes. The DOA plays an important role in implementing most major agricultural legislation and regulations.<sup>434</sup>

The significance of such segmentation of power among different administrative organs may lie in the fact that nearly every aspect of foreign trade has been taken care of by administrative agencies specializing in certain aspects. In addition, the different facets or purposes of trade can be addressed by different organs. For example, trade preferences arrangement given to important trading partners – through FTA negotiations – are handled by the Administrative branch which is good at targeting the countries that need domestic reforms – either political or economic. The agriculture trade is administered by the DOA, which is competent in addressing domestic subsidies and sustainable development.

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<sup>431</sup> The CBP also assumes the duties of the former US Border Patrol and the Immigration and Naturalization Service (INS) of the US Department of Justice as well as the import/export inspection duties of the Animal Plant Health Inspection Service (APHIS) of the US Department of Agriculture (USDA).

<sup>432</sup> The ITC is also responsible for the preparation and publication of the harmonized tariff schedules of the US.

<sup>433</sup> The US Trade Representative is also the chief negotiator for the US on bi-lateral and multilateral tariff and non-tariff barriers and on issues relating to the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). He or she administers the Generalized System of Preferences (GSP) program as well.

<sup>434</sup> For elaborations on the functions of these five agencies, see Leslie Alan Glick, *GUIDE TO UNITED STATES CUSTOMS AND TRADE LAWS AFTER THE CUSTOMS MODERNIZATION ACT 9-18 (2008)*.

## 2. Judicial review

The United States provides judicial review to administrative determinations on antidumping and countervailing duty issues (and many other trade issues), but with some limitation on the types of cases. On the one hand, only “final” decision – which have exhausted administrative remedies regarding antidumping and countervailing duties – are subject to judicial review; on the other hand, the U.S. law does not explicitly provide for judicial review of safeguard cases.<sup>435</sup>

In addition to the limited types of trade cases that can receive judicial review, judgments that can be made by the courts also have limitations. The courts can affirm, remand, or partially remand the determinations made by administrative agencies. On the grounds of this narrow authority of the judiciary, a scholar has urged expanding the power of the courts to “remand agency decisions with specific instructions to reach a judicially determined result.”<sup>436</sup>

Some concerns arising from judicial review relate to the efficacy of certain judicial procedures in protecting the interest of petitioners, such as the preliminary injunction issued by the courts:

In an appeal of an antidumping (AD) or countervailing duty (CVD) determination, the issuance of a preliminary injunction is essential to ensure that the plaintiff is not deprived of a remedy with respect to the particular entries of foreign merchandise affected by its appeal and, more generally, its right to judicial review....<sup>437</sup>

The credibility of a preliminary injunction is especially important in appeals of AD and CVD determinations:

Parties to an AD/CVD proceeding have a statutory right to appeal a determination issued by the DOC or the ITC to the CIT. If the CIT finds on appeal that the determination is not supported by substantial evidence or is not in accordance with law, it may remand the matter to the agency for disposition consistent with its findings. In turn, this could result in a change to the AD/CVDs that are ultimately applied to the entries of foreign merchandise at issue in the appeal when such entries are liquidated. To prevent the entries of foreign merchandise from being prematurely liquidated while the appeal is still pending before the CIT, the statute authorizes the CIT to enjoin liquidation

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<sup>435</sup> Gregory W. Bowman, Nick Covelli, David A. Gantz & Ihn Ho Uhm, *TRADE REMEDIES IN NORTH AMERICA* 169, 395-396 (2010).

<sup>436</sup> Edens, *supra note* 419, at 432.

<sup>437</sup> Jeffrey D. Gerrish & Luke A. Meisner, *Protecting the Right to Judicial Reviews in Trade Remedy Cases: Preliminary Injunctions and the Impact of Recent Court Decisions*, 19 *Tul. J. Int'l & Comp. L.* 469, 469-470 (2011).

of the entries.

The CIT rules specifically provide for parties to an appeal of an AD/CVD determination to file a motion for a preliminary injunction to enjoin liquidation of the entries subject to the appeal.<sup>438</sup>

However, it has been emphasized that the role of preliminary injunctions is very limited in protecting the interest of petitioners because the protection of their interest can only be realized if such injunctions have been issued before the U.S. Customs and Border Protection (CBP) actually imposes certain measures based on administrative determinations on the products at issue. Explaining that “if a party aggrieved by an erroneous AD/CVD determination wants to receive the benefit of a favorable court decision in its appeal, it is essential that the party obtain a preliminary injunction before liquidation takes place,”<sup>439</sup> one authority urges that “a carefully crafted legislative fix [of the rules on preliminary injunctions] may be necessary.”<sup>440</sup>

### **3. Specialized courts and judicial segmentation**

The judicial structure that exercises jurisdiction over trade cases comprises the CIT, the CAFC, and the Supreme Court, as summarized in this way:

The court of first instance in US trade law cases is the CIT, which is headquartered in New York City. The CIT is an ‘Article III’ court, meaning that it is a fully independent court pursuant to Article III of the US Constitution. ... This sort of judicial independence goes to the heart of US constitutional separation of powers. Unlike other US federal district courts, the CIT’s jurisdiction is based on subject matter and extends nation-wide (as opposed to jurisdiction over federal law matters in a specific geographic region). ... Upon appeal from the CIT, trade law cases are heard by the CAFC. Like the CIT, the CAFC is an Article III court, and its jurisdiction is also nation-wide. Requests for review of CAFC decisions may be accepted by the US Supreme Court, but there is no appeal as of right. Rather, a party to a CAFC judgment may seek discretionary US Supreme Court review by filing a writ of certiorari with the Supreme Court, although typically, the Supreme Court denies such petitions in trade-law cases.<sup>441</sup>

Among the three courts, the CIT is a specialized court focusing on trade cases. Despite the fact that the CAFC does not exclusively try trade cases, its competence in dealing with these complex cases is highly regarded. Although, as indicated in the above excerpt, the CIT is usually

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<sup>438</sup> *Id.* at 471.

<sup>439</sup> *Id.* at 471-472.

<sup>440</sup> *Id.* at 469.

<sup>441</sup> Bowman, Covelli, Gantz & Uhm, *supra note* 435, at 170.

the court of first instance, this is not always the case. Complaints arising from administrative determinations based on Section 337 of the Tariff Act of 1930 (IPR protection) fall within the jurisdiction of the CAFA with regard to first instance.<sup>442</sup> In other words, the jurisdiction over trade cases of first instance is shared by the CIT and the CAFC.

### **C. Legal Tradition and Culture**

The U.S. approach to the domestic adjudication of disputes over international trade law issues – including the alleged violating or distorting of WTO obligations through domestic adjudication - finds its roots in several aspects of the American legal tradition and culture. These include the subordination of international law to domestic law and the competition between unilateralism and multilateralism, as elaborated in the above section. Therefore, the remainder of this chapter focuses mainly on the aspects that have not already been discussed.

#### **1. “Expertise” deference**

In subsection IC4, I elaborated on the belief of the American people in rule of law that supports the United States’ pursuance of international rule of law. The U.S. reputation as a country emphasizing the “rule of law” rests partly on the assumption that the independence of courts will guarantee the full protection of the interests of complainants, whether domestic or international. The rights of the complainants might be impaired by two kinds of deference within the judicial system. One is the deference given to specialized courts by the Supreme Court (“expertise” deference); the other is the administrative deference given to administrative organs by the specialized courts (administrative deference). As pointed out in the preceding excerpt, although complainants may seek Supreme Court review if they are not satisfied with a CAFA judgment, the Supreme Court enjoys the discretion to deny such petition, as it usually does. The following excerpt offers two primary reasons for the Supreme Court’s denial:

There are likely two primary reasons for denial: first, trade-law decisions tend to be quite technical and typically do not raise the sort of constitutional issues that are often addressed by the Supreme Court; and second, because of the CIT’s and the CAFC’s exclusive jurisdiction over

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<sup>442</sup> ITC, UNITED STATES INTERNATIONAL TRADE COMMISSION: YEAR IN REVIEW – FISCAL YEAR OF 2005 15, available at [http://www.usitc.gov/publications/year\\_in\\_review/pub3869.pdf](http://www.usitc.gov/publications/year_in_review/pub3869.pdf), last visited on September 27, 2011[hereinafter ITC-Review].

trade-law matters, there is typically no need for the Supreme Court to reconcile differing judicial interpretations of federal law among different federal courts.<sup>443</sup>

## 2. Administrative deference

Juridical review is “an integrative solution for concerns about delegation and its negative pressures on both constitutional structures and on private rights.”<sup>444</sup> In other words, the fundamental assignment of judicial review is to avoid abuse of administrative powers. Bearing this background in mind, we can now turn to the doctrine of administrative deference in the judicial review of trade cases.

In the mid-1980s, the Supreme Court established the doctrine of administrative deference in the leading *Chevron* case, as well as the steps to apply this doctrine. Under “Chevron doctrine,” there is a two-step analysis: step 1 is to explore the intent of the Congress regarding pertinent statute (if such intent is clear, then no deference is given to administrative interpretation); if such intent is not clear, step 2 is for the court to examine whether the agency’s interpretation is based on a permissible construction of the statute.<sup>445</sup> Generally speaking, the efficiency of judicial review regarding trade administration is likely to be undermined by the doctrine of administrative deference, consequently. In the cases involving the Commerce and the USITC, a determinations made by them at issue will be upheld by the courts as long as it is “based on a permissible construction of the pertinent statute.”<sup>446</sup>

In the trade context in 2006, “[i]n general, the courts continued to reinforce the strong rule of deference to the agency’s determinations.”<sup>447</sup> Another pair of scholars drew the same

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<sup>443</sup> Bowman, Covelli, Gantz & Uhm, *supra note* 435, at 170-171.

<sup>444</sup> Edens, *supra note* 419, at 445-446.

<sup>445</sup> Bowman, Covelli, Gantz & Uhm, *supra note* 435, at 174-175. “In 1984, in the leading case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court stated as follows:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

<sup>446</sup> *Id.* at 174-175.

<sup>447</sup> Valerie A. Slater & Lisa W. Ross, *Judicial Review of the International Trade Commission’s Determinations*



conclusion about trade determinations in 2005.<sup>448</sup> The likelihood of the courts remanding administrative determinations has decreased due to their respect for the doctrine of administrative deference.

The influence of the doctrine of administrative deference in judicial review is reflected not only in the unlikelihood that courts will remand administrative determinations, but also in the narrow scope of review in these cases. This narrow scope of review originates partially from the specialized courts' views that (1) agencies and courts are collaborative instrumentalities of justice, and (2) therefore, a specialized court would not be allowed to displace agency responsibility. Furthermore, the unique position of the law of international trade determines that it should not be entirely subject to judicial review.

The CAFC described the scope of judicial review..., saying that “agencies and courts together constitute a ‘partnership’ in furtherance of the public interest, and are ‘collaborative instrumentalities of justice.’” In such a partnership, division of responsibility is opaque in practice. A court’s function in exercising judicial review is often described as “control[ing] the lawfulness of agency action” and “permitting the court to control the lawfulness of agency action without allowing it to displace agency responsibility.”...

The law of international trade ... is necessarily colored by its unique position in the framework of the larger administrative system and is not entirely elucidated by traditional administrative law concepts.<sup>449</sup>

The decisions made by the trade courts to support the adoption of “zeroing” methodology – which refers to treating all non-dumped sales as having a dumping margin of zero, and thereby preventing non-dumped sales from offsetting dumped sales<sup>450</sup> – adopted by the administrative organs are perfect examples of the implementation of the doctrine of administrative deference by the trade courts, considering that most of the zeroing cases brought in front of the DSB involving the United States had exhausted judicial remedies within the United States.

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*in Antidumping and Countervailing Duty Proceedings: An Overview of Decision in 2006*, 39 Geo. J. Int'l L. 69, 69 (2007).

<sup>448</sup> Andrea C. Casson & Neal J. Reynolds, *Judicial Review of the International Trade Commission's Injury Determinations in Antidumping and Countervailing Duty Proceedings: An Overview and Analysis of Federal Court Decisions in 2005*, 38 Geo. J. Int'l L. 89, 121 (2006).

<sup>449</sup> Edens, *supra note* 419, at 436.

<sup>450</sup> Bhala-Dictionary, *supra note* 15, at 529.

### 3. Extra-territorial application

As noted above in subsection IIB2 of this chapter, the U.S. practice of extraterritorial application of domestic laws has triggered complaints from other WTO members. What is the attitude of U.S. courts toward such extra-territorial application? According to Zhiguo Gao, in determining whether a statute applies extraterritorially, an American court must address at least four issues – statutory intent, actual or intended effects within the United States of the conduct at issue, conflicts with another state’s domestic law or policy, and other barriers to extraterritoriality.<sup>451</sup>

As to the possibility for the U.S. courts to actually rely on these four criteria, Gao offers these further observations:

Even if these issues are resolved favourably to an environmental claimant [seeking extraterritorial application of US environmental laws], the court may still conclude that there are statutory, judicial or constitutional barriers to the claimant’s suit. Courts do not, of course, necessarily raise all of these issues in every case or in the order indicated. A court might well conclude that there is no Congressional intent to give a statute extraterritorial scope because such an application would conflict with another country’s own policies. Nonetheless, the suggested approach provides a helpful analytical framework for assessing whether US environmental statutes have extraterritorial application. It may also help explain why, although virtually every US environmental statute has been alleged to have extraterritorial effect, very few have been held to do so.<sup>452</sup>

Obviously, the four criteria for consideration do not set a high threshold for extra-territorial application. In other words, it is not difficult for a U.S. court to conclude that all four factors are met in favor of extraterritorial application. Even if the current practices of the courts have not demonstrated a trend of positive application, it is still not difficult for the courts to make a shift in attitude, taking into account that they have been granted sufficient discretion to do so.

## Summary

The participation and practices of the United States in international trade rule-making, international trade disputes, domestic trade legislation and domestic adjudication of trade issues

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<sup>451</sup> Gao, *supra note* 396, at 234-247.

<sup>452</sup> *Id.* at 235.

have presented us with another significant example of legal indigenization of WTO law.

The United States has submitted various proposals to the WTO with regard to substantive and procedural issues. The U.S. enthusiasm for international rule of law and procedural fairness is rooted in the country's common law tradition which places procedure at the center. The wide range of the proposals, the series of steps taken to complete a proposal, and the sharing of its own practices in trade areas demonstrate the capacity, willingness, and confidence of the United States in its leadership in this organization, despite some challenges it may have encountered in the past decades.

The U.S. attitude of cautiousness toward S&D treatment is reflected by American reluctance to improve current S&D provisions in certain WTO agreements and to definitely incorporate the S&D provisions in future agreements. To be specific, for the United States, current S&D provisions in the ASCM are considered good enough as a transitional regime. According to the U.S. view, the members should initiate further negotiations for general rules in the first place, leaving aside the issue of S&D treatment, and then incorporate it into new rules as a transitional or exceptional provision if such necessity is proved. This attitude has its roots in the long-term resistance and disregard of S&D provisions by the United States at multilateral trade negotiations. For the United States, S&D treatment is more an exception than a mandate, and more a mercy than an obligation.

In FTA negotiations, the United States has concluded trade agreements with its trading partners located in Asia, the Middle East, Latin America, North America, and Oceania. The selection of FTA partners is a reflection of the U.S. global, regional, and domestic interests, both in politics and in economy. This standard of selection conforms to the ideology of the United States to take trade as an important instrument of diplomacy. The approach of the U.S. FTAs in addressing environmental, labor, and IPR protection reflects not only the U.S. diplomatic aim of "out-reform" in its trading partners, but also the segmentation of power in the U.S. political regime – that is, the outcome of the Congress, right to supervise the Administration's authorization to negotiate trade agreements.

Since the establishment of the WTO, the United States has been involved in a number of

trade disputes as respondent. In these cases, both domestic legislation and enforcement of trade law have been challenged by its trading partners in cases complaining about U.S. laws “as such,” “as applied,” and “as such and as applied.” The American ideologies challenged by these trade disputes mainly rest on the tension among sovereignty, unilateralism, and multilateralism and the concerns about the extra-territorial application of the U.S. laws.

The conflict between sovereignty and multilateralism in American culture is often criticized by its trading partners as “unilateralism.” This so-called “unilateralism,” on the one hand, may have its roots in the American history. First, the need felt by the founders of the country to retaliate in response to the alleged suppression from Great Britain and some European countries laid the foundation for contemporary “unilateralism” in the United States. Second, the firm belief in reciprocal trade also supported the growth of U.S. “unilateralism” aimed at fighting against trade practices that prejudice “reciprocity” maliciously. This justification of “unilateralism” is characterized by American scholars as “diffusive reciprocity.” Third, “unilateralism” also derives from both the opinion of supreme national sovereignty held by the Americans and the conditional acceptance by the Congress of a multilateral trading system.

Extra-territorial application of the U.S. laws in trade – and particularly of trade-related environmental law – may also have been cited as a reflection or evidence of the American unilateralism, especially taking into account that the application of such U.S. laws will not be restricted to a nationality link. In this chapter, particular attention is given to the tradition of extra-territorial application of the U.S. law, which contains specific prerequisites to justify such extra-territorial application.

The U.S. regime of domestic trade legislation may be one of the world’s most comprehensive and complicated legal systems. The wide coverage and large number of trade statutes, as well as the codification of such statutes, show us the merger of civil law influence into the common law tradition in this country. The United States still retained the statutes on trade sanctions to safeguard its national security and economic interests in the outside world, especially the region of Latin America. Furthermore, dualism adopted by the United States – a separately-enacted domestic law to incorporate international agreements into the U.S. legal

system – gives the country an opportunity to subordinate international law to domestic law. This subordination serves as the most fundamental feature of the American attitude towards international law.

Both administrative and judicial regimes for enforcing U.S. trade statutes exhibit the feature of segmentation of power. For trade administration, the power is shared by the CBP, DOC, DOA, ITC, and USTA. For judicial review, both the CIT and CAFC enjoy jurisdiction over trade cases of first instance. The first instance jurisdiction depends on the types of trade cases. The CIT presides AD and CVD cases as well as safeguards cases, if any. The CAFA presides over the cases arising from Section 337 of the Tariff Act of 1930. Furthermore, the CIT is a specialized court on trade cases within the U.S. judicial system.

The efficiency of judicial review of administrative determinations might be impaired by the following elements: (1) the types of cases that can be reviewed are mainly limited to AD and CVD cases; (2) the courts can only affirm or remand the administrative determinations without giving specific instruction, modifications, or final determinations, pursuant to the doctrine of administrative deference; (3) the Supreme Court is not likely to accept trade appeals on the basis of deference to specialized courts, and (4) the specialized trade courts will give their deference to administrative determinations. Moreover, the application of the factors that justify extra-territorial application of U.S. trade laws and trade-related environmental law fall mainly within the discretion of the courts.

## Appendix 4.1

(Pertinent passages in main text are found largely in subsection IB3 of Chapter 4)

### Excerpt of USA-TN/DS/W/86

#### Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency – Revised Legal Drafting

##### Communication from the United States

The following communication, dated 20 April 2006, is being circulated at the request of the delegation of the United States.

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(1) Open meetings

US proposal:

The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods)...

To reflect the proposal in the text of the DSU:

(a) Article 18 of the DSU is amended by inserting the following new paragraph 3:

“3. Each substantive meeting with the parties of a panel, the Appellate Body, or an arbitrator, and each meeting of a panel or arbitrator with an expert, shall be open for the public to observe, except for any portion dealing with confidential information.”

(2) Timely access to submissions

US proposal:

The DSU should provide that parties' submissions and written versions of oral statements in panel, Appellate Body, or arbitration proceedings are public, except those portions dealing with confidential information.

To help facilitate public access to these documents, the Secretariat should maintain them in a central location that would be responsible for making these documents available to the public.

To reflect the proposal:

(e) Paragraph 2 of Article 18 is amended to read as follows:

“2. Any document that a Member provides to a panel, the Appellate Body, or an arbitrator shall be public, except for confidential information. Nothing in this Understanding precludes a Member from disclosing statements of its own positions to the public. A Member shall not disclose another Member’s confidential information. The Member submitting the confidential information shall provide within 15 days of the request of another Member a non confidential summary of the information.”

...

(3) Timely access to Final Reports

US proposal:

The WTO should make a final panel report available to WTO Members and the public once it is issued to the parties, although only circulation would trigger the relevant DSU deadlines.

Text to reflect the proposal:

(h) A decision by the DSB:

“A final report issued by a panel to the parties is an unrestricted document, except for any confidential information (as defined in Article 18). Any interim report considered final by operation of the last sentence of paragraph 2 of Article 15 is unrestricted when considered final.

This decision is without prejudice to the practice concerning the date of circulation of the report.”

(4) Amicus curiae submissions

US proposal:

In light of the experience to date with amicus curiae submissions to panels and the Appellate Body, Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions to address those procedural concerns that have been raised by Members, panels and the Appellate Body.

The United States notes with interest the procedures proposed by the European Communities for handling amicus curiae submissions (TN/DS/W/1) and looks forward to working with the European Communities and other Members on this issue. The United States does not believe that an amendment to the Dispute Settlement Understanding is necessary for this purpose.

## CHAPTER 5. LEGAL INDIGENIZATION OF WTO LAW IN THE EUROPEAN UNION

As one of the leading members of the WTO, the European Union (EU, formerly EC<sup>453</sup>) provides us with another valuable example with which to study the process of legal indigenization of WTO law. In this chapter, four aspects of EU practice and experience are explored – international trade negotiations, international trade disputes, “domestic” trade legislation, and “domestic” adjudication of trade issues. Although the EU is not a sovereign member of the WTO in the sense of general international law, its Member states, on the one hand, have a cohesive voice in the WTO, and on the other hand, adopt and implement a uniform Common Commercial Policy (CCP) at the Union level. Furthermore, the European Court of Justice (ECJ) and the General Court enjoy the authority to interpret EU trade regulations and jurisdiction over trade disputes between EU governments, institutions, and individuals. Consequently, for the purpose of this chapter, the EU’s own practice and experience in negotiation, dispute settlement, legislation and adjudication are characterized as “domestic.” The term “regional” is used to denote the relationship between the EU and its trading partners.

### I. International Trade Rule-making

As one of the GATT/WTO sponsors, the EU has participated actively in trade negotiations at both the multilateral level and the regional level. In this section, the proposals submitted to the WTO by the EU, along with the terms of regional trade agreements (RTAs) concluded by the EU, are studied as the material of EU practice in trade negotiations. After identifying the characteristics exhibited by these proposals and pertinent RTAs, I try to find their roots in the legal traditions and culture of the EU.

An examination of the EU proposals has helped us observe their characteristics, such as finds that they exhibit some characteristics relating to heavy reliance on overall goal of pertinent mechanism, a particular perspective on DSB constituents, the unique style of proposals, the pondering on the relationship among development, sustainability, and S&D treatment, and highlights of principles and doctrines. Most of these characteristics consist with the traits of the civil law tradition, such as the role of judges, the status of principles, and the dominance of

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<sup>453</sup> In this chapter, the terms EU and EC are used interchangeable in most cases.



jurists.

## A. Overview

Since the establishment of the WTO, the EU has submitted proposals on comprehensive issues covering substantive and procedural provisions in the WTO agreements. These proposals have embraced substantive issues concerning the status of multilateral environmental agreements, market access for non-agricultural products, antidumping measures, subsidy and countervailing measures, regional trade agreements, fisheries subsidies, GATS-related issues, environmental goods, freedom of transit, Article VIII of GATT 1994, and geographical indications.

Procedural issues covered by these proposals have concentrated on institutional and operational aspects of the DSB, including those regarding panels, third parties, the Appellate Body, and surveillance and implementation of recommendations made by the DSB.

The EU also gives some attention to special and differential treatment (S&D treatment), sustainability impact, and technical assistance and capacity building.

As for RTA negotiations, as of June 2011, the EU has given notification of 30 RTAs in force. The EU's RTA partners include Albania, Algeria, Andorra, Bosnia and Herzegovina, Cameroon, CARIFORUM States,<sup>454</sup> Chile, Côte d'Ivoire, Croatia, Egypt, Faroe Islands, Former Yugoslav Republic of Macedonia, Iceland, Israel, Jordan, Lebanon, Mexico, Montenegro, Morocco, Norway, Overseas Countries and Territories (OCT),<sup>455</sup> the Palestinian Authority, South Africa, Switzerland and Liechtenstein, Syria, Tunisia, Turkey, San Marino, and Serbia. Moreover, it is currently negotiating trade agreements with four other countries: India, Ukraine, Canada, and the Republic of Korea.<sup>456</sup>

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<sup>454</sup> The Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM) is a grouping of Caribbean States which are signatories to the Lome IV Convention.

<sup>455</sup> The overseas countries and territories (OCT) are twenty one territories that have a special relationship with one of the member states of the EU: twelve with the United Kingdom, six with France, two with the Netherlands and one with Denmark.

<sup>456</sup> WTO, *The Regional Trade Agreements Information System (RTA-IS)*, available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>, last visited on August 7, 2011, last visited on September 16, 2011.

## **B. Characteristics**

The proposals submitted to the WTO as well as the RTAs concluded by the EU have exhibited some common characteristics. As the following paragraphs indicate, those characteristics involve a range of topics, from the overall goals of the WTO to the operations of the DSB and the handling of regional issues.

### **1. Overall goal of the mechanisms**

Before proposing specific recommendations, the EU typically will first clarify or set the overall goal of the mechanisms at issue. For example, in the proposal of March 13, 2002 on contribution to the improvement of the DSU, the EU pointed out that “any improvement of the DSU should contribute towards [an] overall goal of facilitating the earliest possible resolution of disputes.”<sup>457</sup>

Similarly, in the proposal of August 1, 2002 for a special session on Special and Different Treatment, the EU argued that the primary aim of the Members’ suggestion should be to aid the integration of developing countries into the multilateral trading system based on an analysis of the overall objectives of S&D treatment in the WTO rules.<sup>458</sup>

### **2. Constituents of the DSB**

The attention given to the DSB by the EU is not limited to the DSU procedures only. The Union has recommended reform in the form and constituents of the DSB (especially the panels). In the proposal of March 13, 2002, the EU suggested “moving from *ad hoc* to more permanent panelists.”<sup>459</sup> In the proposal of January 23, 2003, the EU further proposed a draft with regard to establishing permanent panelists. It also suggested in that proposal a procedure to modify the

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<sup>457</sup> The European Communities, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/1, March 13, 2002 [hereinafter EU-TN/DS/W/1].

<sup>458</sup> The European Communities, *Submission for the Committee on Trade and Development - Special Session on Special and Differential Treatment*, TN/CTD/W/13, August 1, 2002 [hereinafter EU-TN/CTD/W/13].

<sup>459</sup> EU- TN/DS/W/1, *supra note* 457.

number of Appellate Body members.<sup>460</sup>

### 3. Style of proposals

The proposals submitted by the EU usually constitute packages of complete, logical and systematic legal analysis. A common style of these proposals features an introduction of the proposal's background, a following statement of issues identified, relevant legal framework, significance of improvement, normative analysis, conclusions, and proposed texts. Examples of such style appear in the proposals of March 13, 2002 on contribution to the improvement of the DSB and of March 21, 2002 on multilateral environmental agreements.<sup>461</sup>

### 4. Development, sustainability, and S&D treatment

The Union has addressed the issue of “development and sustainability,” a topic whose coverage is broader than that of S&D treatment. As shown below, it offered deep and integral assessment on the sustainability impact of trade liberalization from an overall perspective, and gives much attention to technical assistance and capacity building in developing countries through international trade rule making.

The emphasis that the EU places on the issues of “development and sustainability” can be seen in the analysis offered in the EU's proposals of June 2, 2002 on sustainability impact assessment and of July 8, 2002 on the Agreement on Implementation of Article VI of GATT 1994.<sup>462</sup>

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<sup>460</sup> The European Communities, *Contribution of the European Communities and Its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38, January 23, 2003 [hereinafter EU-TN/DS/W/38].

<sup>461</sup> More examples can be found in the proposals of July 9, 2002 on regional agreements, of July 8, 2002 on the Agreement on Implementation of Article VI of GATT 1994, of March 7, 2003 on a swift control mechanism for institutions in AD and CVD, of April 20, 2006 on independent group of experts for the enforcement of initiation standards, of November 21, 2002 on subsidies and countervailing measures, of February 10, 2005 on classification in the telecom sector under the WTO-GATS framework, of April 29, 2005 on freedom of transit, of August 1, 2002 on special session on special and differential treatment, and of November 20, 2002 on S&D treatment. All the proposals mentioned in this paragraph are available at [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm), last visited on September 14, 2011.

<sup>462</sup> More examples can be found in the proposals of April 23, 2003 on fisheries subsidies, of April 29, 2005, April 6, 2006, and September 27, 2007 on technical assistance and support for capacity building, and of May 12, 2005 on RTA. All the proposals mentioned in this paragraph are available at [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm), last visited on September 14,

The EU's attitude toward S&D treatment is different from that of China or the United States. To a large extent, the EU's attitude falls somewhere the middle of those of the above two members. On the one hand, the Union does not take S&D treatment as a mandatory mechanism, nor does it overemphasize the importance of S&D treatment, as China does. On the other hand, the Union does not devalue or denigrate the significance of S&D treatment or take it as an exception that exists at some inferior level, as the United States does. Instead, based on the proposals identified in the preceding paragraphs, the EU's attitude toward S&D treatment can be summarized as follows:

- (1) It is more effective to incorporate negotiations of S&D treatment in separate sessions with regard to specific topics it belongs to than to carry out such negotiations in the Committee on Trade and Development.
- (2) The purpose of S&D treatment is not to create a "second class" membership permanently in the organization.
- (3) Different needs of developing countries should be addressed. In other words, the application of S&D treatment should be differentiated in individual cases.
- (4) Emphasis should be given to full use of the current S&D provisions.
- (5) To make S&D treatment mandatory, as suggested by many developing members, may not be the only way to make them more precise, effective or operational.
- (6) The importance of S&D treatment should be addressed in conjunction with technical assistance and capacity building.<sup>463</sup>

## **5. Proposed texts**

Like the United States, the EC has provided, along with legal analysis, proposed texts of the provisions at issue. Examples of such proposed texts appear in the proposals on the issues of improving the DSU (of March 13, 2002 and January 23, 2003) and subsidies and countervailing measures (of November 18, 2005, November 21, 2002, and April 24, 2006).<sup>464</sup> These proposed

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2011.

<sup>463</sup> See EU-TN/CTD/W/13. See also the European Communities, *The WTO Work Programme on Special and Differential Treatment Some eu Ideas for The Way Ahead*, TN/CTD/W/20, November 20, 2002 [hereinafter EU-TN/CTD/W/20].

<sup>464</sup> More examples can be found in the proposals on the issues of clarifications and improvements to Article X

texts strengthen the various characteristics of the EU proposals summarized in the foregoing paragraphs.

## 6. Regional issues

Being a regional organization, the EU has given particular attention to the mechanisms of FTA in the WTO. Recognizing the long-standing differences in interpreting the WTO provisions in the proposal of July 9, 2002,<sup>465</sup> the EU addressed the principle of overall liberalization regarding RTAs in its succeeding submission on this topic dated May 12, 2005.<sup>466</sup>

## 7. Principles and guidelines

In the proposals, the EU has emphasized the significant role of principles and guidelines in improving the multilateral institutions at issue. It has put forward the principles of further negotiations or improvement of S&D treatment and environmental goods in the proposals of November 20, 2002 on S&D treatment, of February 17, 2005 on market access for environmental goods, and of July 5, 2005 on environmental goods.<sup>467</sup> Before presenting its own specific principles or guidelines, the EU clarified that the purpose of establishing a number of guidelines or working assumptions was to enable the members “better to understand the purpose of S&D treatment and ... to evaluate specific or general proposals made, and take decisions on them.”<sup>468</sup> The specific guidelines and principles proposed by the EU regarding S&D treatment and environmental goods can be found in Appendix 5.1.

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(publication and administration of trade regulations) (of January 28, 2005), freedom of transit (of April 29, 2005), improving GATT Article VIII on formalities and requirements connected with importation and exportation and related proposals on S&D and technical assistance (of June 9, 2005), geographical indications (of June 14, 2005), transparency of anti-dumping activity (of April 20, 2006), independent group of experts for the enforcement of initiation standards (of April 20, 2006), fisheries subsidies (of April 24, 2006), non-agricultural market access (of May 20, 2008, September 9, 2009, and March 19, 2010), and WTO facilitation proposals (of May 1, 2009). All the proposals mentioned in this paragraph are available at [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm), last visited on September 14, 2011.

<sup>465</sup> The European Communities, *Submission on Regional Trade Agreements by the European Communities and Their Member States*, TN/RL/W/14, 9 July 2002 [hereinafter EU-TN/RL/W/14].

<sup>466</sup> The European Communities, *Submission on Regional Trade Agreements by the European Communities*, TN/RL/W/179, May 12, 2005 [hereinafter EU-TN/RL/W/179].

<sup>467</sup> All the proposals mentioned in this paragraph are available at [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm), last visited on September 16, 2011.

<sup>468</sup> EU- TN/CTD/W/20, *supra note* 463.

## 8. Status of independent experts in trade disputes settlement

In a proposal dated March 7, 2003, the EU tried to reflect on a swift control mechanism for initiations, especially unjustified initiations, of AD or CVD investigations. Considering the adverse impact of unjustified initiations of AD or CVD investigations within individual members, the EU suggested that a swift control mechanism be established within the DSU regime by the WTO to reduce the adverse impact of unjustified initiations. In the proposal, the EU further suggested three possible models to establish such mechanism. One is to establish “fast track initiation panels.” Ideally, such panels would issue their recommendations before the actual imposition of measures. The second model is to resort to “binding arbitration,” in order to immediately solve problems of initiation which result from clearly defined and straightforward issues. The third model is to create a “standing advisory body” outside the traditional dispute settlement system. Such a body could be modeled upon the “Permanent Group of Experts” provided for in Article 24.3 of the ASCM (for CVD initiations, it could be this existing Group which could serve as the advisory body). Its task would be to give a non-binding advisory opinion on the WTO legality of the initiation of an anti-dumping or CVD investigation. The standing advisory body could report to the WTO Committee on Anti-Dumping Practices or the WTO Committee on Subsidies and Countervailing Measures where Members could express their views on the report.<sup>469</sup>

In a proposal dated April 20, 2006, the EU focused on the third model mentioned above – that is, establishment of an independent group of experts for the enforcement of initiation standards in AD and CVD investigations. In this proposal, the EU mentioned that this model had received positive comments from many as a workable opinion. Therefore, the EU proposed fundamental solutions and legal text to establish such an independent group of experts. The specific proposed solution appears in Appendix 5.2.

To sum up this subsection, the activities of the EU in participating in international trade rule-making reveal several key characteristics: emphasizing the overall goal of pertinent

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<sup>469</sup> The EU, *Negotiations on Anti-Dumping and Subsidies - Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations*, TN/RL/W/67, March 7, 2003 [hereinafter EU-TN/RL/W/67].

mechanisms, urging reforms of the DSB, displaying a solid style of proposals, addressing development and sustainability, providing proposed legal texts, sharing EU experiences, emphasizing regional issues, focusing on principles and guidelines, and boosting the status of independent experts in dispute settlement mechanism.

### C. Legal Tradition and Culture

Some characteristics exhibited by the EU's trade-negotiation proposals have their roots in the legal tradition and culture of the EU, in particular relating to the role of judges, the status of principles, and the dominance of jurist. Geographically speaking, the EU covers multiple legal traditions, such as Roman law tradition, German-Austrian legal tradition, common law tradition, Scandinavian legal tradition, and the legal tradition of Eastern Europe. However, in this chapter, the legal tradition and culture of the EU refers to a uniquely developed legal tradition and culture accompanying the growth of the European Union. As pointed out by Cruz as follows, since its birth in 1950s,<sup>470</sup> EU law has received influence from the French, German and English legal systems:

European Community law has adopted and adapted a number of different legal styles, beginning with the French style, then the German approach, in its earlier phase when there were only six in the Community; with the enlargement of the Community, it has slowly started to rely on previously decided case law in the style of the common law and has even begun to develop its own version of *stare decisis*.<sup>471</sup>

Based on the above facts, the EU legal system can be characterized as a “hybrid” one. For Cruz, “the EC has given rise to a unique legal system that is at once sui generis, separate from either civil or common law parent families, yet ‘supranational’, a regional system and a distinctive legal order in its own right.”<sup>472</sup> The development of this unique legal system is attributable to the development of the Union itself. One expert offers this observation on the fundamental constituents of the EU legal tradition:

The current legal culture of Europe is the consequence of many years of development shaped by

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<sup>470</sup> For elaborations on the development of the EU, see Gabriël Moens & John Trone, COMMERCIAL LAW OF THE EUROPEAN UNION 4-10 (2010).

<sup>471</sup> Peter de Cruz, COMPARATIVE LAW IN A CHANGING WORLD (3d ed.) 160 (2007).

<sup>472</sup> *Id.* at 140.

similar collective wishes – such as the separation of power and the law, the progressive pre-eminence of the latter, and convergent principles of constitutional law all over Europe, especially in the fields of human rights and the rule of law. Of particular importance is access to the courts, a right that has only recently come to be explicitly recognized in national constitutions. This recognition is an example of the emergence over time of the rule-of-law ideal.<sup>473</sup>

Although the purpose of this chapter is by no means to classify the EU legal tradition and culture, the above observation is helpful for us to find origins of the Union's legal practices.

## 1. Role of judges

The EU proposals on establishing permanent panelists referred to above may astonish some common law scholars, since the role and status of judges in civil law countries have been characterized, especially by common law scholars, as “narrow, mechanical and uncreative.”<sup>474</sup> In other words, in the eyes of some common law scholars, the role of judges in civil law countries is much less important than that of judges in common law countries. To them, judges in civil law countries are only “civil servants and functionaries,”<sup>475</sup> mainly due to their lack of lawmaking power.

Despite the above description of civil law judges, their role is never ignored or debased by civil legal systems. The fact that they do not enjoy the power of law making does not impair their functions “to find the right legislative provision, couple it with the fact situation, bless the solution that is more or less automatically produced from the union,”<sup>476</sup> and to control judicial procedures (mainly investigation).<sup>477</sup> These functions of judges are important enough for the EU to expect permanent or strong constituents of panels.

## 2. Principles and doctrines

In the proposals, the EU suggested giving much attention to principles or guidelines before

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<sup>473</sup> S. Galera, *European Legal Tradition and the EU Legal System: Understandings and Premises about the Rule of Law's Requirements*, in JUDICIAL REVIEW: A COMPARATIVE ANALYSIS INSIDE THE EUROPEAN LEGAL SYSTEM (S. Galera ed.) 277, 277-279 (2010).

<sup>474</sup> John Henry Merryman & Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 38 (2007).

<sup>475</sup> *Id.* at 35.

<sup>476</sup> *Id.* at 36.

<sup>477</sup> Glenn, *supra* note 6, at 145.



the WTO Members make further negotiations. The centrality of principles in EU law can be traced back to French and German legal systems and to the central role played by principles in the civil law tradition, as contained in the notion of “general principles of law.”

“The notion of ‘general principles of law’ was itself derived from French administrative law.”<sup>478</sup> Since the Liberation, the Council of State of France has imported into the administrative law something very much like the British concept of “natural justice.”<sup>479</sup> The change in the attitude of the French tribunal mainly lies in the proposition that, in certain cases, “practical rule gives way to a higher principle,” and that general principles of law can be applicable “even in the absence of a legal text.”<sup>480</sup>

Also, “German law thinks in terms of general principles, rather than in pragmatic terms, conceptualizing problems, rather than working from case to case. The legal terminology and central method of law making – to codify laws in a comprehensive, authoritative and precise manner – distinguish it from the common law approach.”<sup>481</sup> In short, general principles of law are at the heart of legal thinking in civil law countries. This attitude can help explain the motive of the EU for setting principles before negotiating specific rules.

### **3. Jurists in the civil law tradition**

The EU proposed to establish, within the DSB regime but outside the traditional dispute settlement mechanism, a swift control mechanism of initiation of AD/CVD investigations which might be operated by independent experts. The appeal of such an approach to the EU probably originates partially in the preeminent status of jurists (or legal scholars, law professors, experts) in the civil law tradition. The development of the civil law tradition can in fact be attributed largely to the role played over many centuries by jurists. These include the jurisconsults<sup>482</sup> of

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<sup>478</sup> Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed.) 1, 2 (1999).

<sup>479</sup> The Black Law Dictionary (9<sup>th</sup> ed.) defines the term “natural justice” as “justice as defined in a moral, as opposed to a legal, sense.” In the common law tradition, procedural fairness (or due process) is one of the most manifestations of natural justice.

<sup>480</sup> Bernard Schwartz, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 208-209 (1954).

<sup>481</sup> Cruz, *supra note* 471, at 94.

<sup>482</sup> A class of scholar-advisors that would provide guidance on legal matters in ancient Rome. Head, *supra note*

the classical period (from roughly 117 to 235 CE.), the jurists who compiled Justinian’s great law works of the sixth century, the legal scholars who revived Roman law studies beginning in the late eleventh century, and others. The prestige of law professors in the civil law tradition has been identified as one of the main features of this tradition.<sup>483</sup> Someone even characterizes the law thereof as the jurists’ law.<sup>484</sup> To entrust independent experts with the authority to influence AD/CVD initiations, as suggested by the EU proposals reflect to some extent the high respect, trust, and regard given to experts by civil law tradition. In addition, the suggestion to establish expert’s authority in judicial bodies is consistent with the EU’s own “domestic” adjudicative practices on trade, especially its system of General Advocate, as further elaborated in subsection IVC6 of this chapter.

#### 4. Sustainable development

The emphasis on “development and sustainability” in the proposals demonstrates EU attitudes and methodology toward developmental issues. Sustainable development was added to the objectives of the EU by the Treaty of Amsterdam of 1997.<sup>485</sup> That was followed by several steps in the development of the EU’s Sustainable Development Strategy (SDS): (1) the policy of sustainable development in the EU between 1997 and 2001, (2) the background of the revision of the SDS between 2001 and 2006, (3) establishment of the current SDS of the EU in 2006, and (4) an international and integrated approach required by the 2006 revision.

First, the policy of sustainable development in the EU between 1997 and 2001 emphasized three dimensions – economic, social, and environmental.<sup>486</sup> Second, the enlargement of the EU and the changing context of the outside world since 2001 presented new challenges to the EU

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6, at 56.

<sup>483</sup> Glenn, *supra* note 6, at 145.

<sup>484</sup> Paolo Grossi, Damiano Canale & Hasso Hofmann, *A HISTORY OF THE PHILOSOPHY OF LAW IN THE CIVIL WORLD: 1600-1900* 205 (2009).

<sup>485</sup> Moens & Trone, *supra* note 470, at 7.

<sup>486</sup> The European Commission, available at <http://ec.europa.eu/environment/eussd/>, last visited September 16, 2011. Already in 1997 sustainable development became a fundamental objective of the EU when it was included in the Treaty of Amsterdam as an overarching objective of EU policies. At the Gothenburg Summit in June 2001, EU leaders launched the first EU sustainable development strategy based on a proposal from the European Commission. This 2001 strategy was composed of two main parts: economic and social dimensions. The EU SDS added a third, environmental dimension to the Lisbon Strategy of economic and social renewal.

SDS – including climate change, the aging of society, a widening gap between the rich and the poor, terrorist threats, and further globalization. These challenges prompted a shift of the EU’s focus “to take account of progress made, tackle shortcomings and take account of new challenges” as well as a renewed strategy adopted by Heads of State and Governments at the European Council of June 15-16, 2006.<sup>487</sup> Third, considering the enlargement of the EU and the changing context in the outside world, the SDS underwent a revision in 2006 that focuses on gradual change and an integrated approach.<sup>488</sup> Fourth, the integrated approach has also taken into account into the international dimension and the EU’s external policies.<sup>489</sup>

The above elaborations on the EU SDS demonstrate the great importance the EU has attached to it, as well as the EU’s commitment to address this issue in an international context – which is required by its integrated approach to achieve the goal of sustainable development.

In sum, the EU’s participation in international trade rule-making has exhibited some features that have roots in the EU legal tradition and culture, including respect of roles of judges, the importance of general principles, an emphasis on the role of jurists, and a focus on sustainable development.

## **II. International trade disputes**

The EU, as a major participant in the WTO, has also been involved in a large number of international trade disputes. In this section, based on an overview of the disputes, I identify EU

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<sup>487</sup> The European Commission, available at <http://ec.europa.eu/environment/eussd/>, last visited September 16, 2011.

<sup>488</sup> The European Commission, available at <http://ec.europa.eu/environment/eussd/>, last visited September 16, 2011. “The renewed EU SDS sets out a single, coherent strategy on how the EU will more effectively live up to its long-standing commitment to meet the challenges of sustainable development. It recognises the need to gradually change our current unsustainable consumption and production patterns and move towards a better integrated approach to policy-making. It reaffirms the need for global solidarity and recognises the importance of strengthening our work with partners outside the EU, including those rapidly developing countries which will have a significant impact on global sustainable development.” *Id.*

<sup>489</sup> The European Commission, available at <http://ec.europa.eu/environment/eussd/>, last visited September 16, 2011. The document goes on to enumerate the aims and priorities for the EU’s SDS in coming years. “To improve synergies and reduce trade-offs, a more integrated approach to policy making is proposed, based on better regulation (impact assessments) and on the guiding principles for sustainable development (adopted by the European Council of June 2005). The external dimension of sustainable development (e.g., global resource use, international development concerns) is factored into EU internal policy making and through integration of SD considerations in EU’s external policies.” *Id.*

ideologies that have encountered challenges at the multilateral level, which mainly include its methods of interpreting WTO rules, priority of FTA preferences over multilateral treatment, and the application of legal principles. These characteristics reflect some features of the civil law tradition such as those relating to legal interpretation, trade preferences system, and legal principles .

## A. Overview

Since the establishment of the WTO, the EU has been involved in 83 cases as complainant and 70 cases as respondent. Among the 70 cases as respondent, 27 cases have resulted in DSB reports. One kind of these cases revolves around complaints about certain EU legislation. These are also called cases of alleged “as such” violations of WTO-related obligations.<sup>490</sup> Another type of cases centers on allegations of “as applied” violations.<sup>491</sup> Some cases contain both “as applied” and “as such” complaints.<sup>492</sup>

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<sup>490</sup> For example, in the DS 27 case (the Case of European Communities – Regime for the Importation, Sale and Distribution of Bananas, also the Case of EC – Bananas III), the European Communities’ regime for the importation, distribution and sale of bananas, introduced on 1 July 1993 and established by EEC Council Reg. 404/93, was challenged by Ecuador, Guatemala, Honduras, Mexico, and the United States. In the DS 219 case (the Case of European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, also the Case of EC – Tube or Pipe Fittings), the EC Regulation imposing anti-dumping duties on certain imports was challenged by Brazil. Other cases of “as such” include these: DS 26/48 (the Case of European Communities – Measures Concerning Meat and Meat Products (Hormones); also the Case of EC – Hormones); DS 69 (the Case of European Communities – Measures Affecting Importation of Certain Poultry Products; also the Case of EC – Poultry); DS 174/290 (the Case of European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs; also the Case of EC – Trademarks And Geographical Indications); DS 231 (the Case of European Communities – Trade Description of Sardines; also the Case of EC – Sardines); DS 246 (the Case of European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries; also the Case of EC – Tariff Preferences); DS 265/266/283 (the Case of European Communities – Export Subsidies on Sugar); DS 269/286 (the Case of European Communities – Customs Classification of Frozen Boneless Chicken Cuts; also the Case of EC – Chicken Cuts); DS 301 (the Case of European Communities – Measures Affecting Trade in Commercial Vessels; also the Case of EC – Commercial Vessels); DS 316 (the Case of European Communities – Measures Affecting Trade in Large Civil Aircraft; also the case of EC and certain member States – Large Civil Aircraft)

<sup>491</sup> These involve EU application of trade regulations. For instance, in the DS 62/67/68 case (the Case of European Communities – Customs Classification of Certain Computer Equipment, also the Case of EC – Computer Equipment), the European Communities’ application of tariffs on local area networks was challenged by the United States. In the DS141 case (the Case of European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, also the Case of EC – Bed Linen), definitive anti-dumping duties imposed by the European Communities, including the European Communities’ zeroing method used in calculating the dumping margin, was complained about by India. Other cases of “as applied:” DS 135 (the Case of European Communities – Measures Affecting Asbestos and Products Containing Asbestos; also the Case of EC – Asbestos); DS 299 (the Case of European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea; also the Case of EC – Countervailing Measures on DRAM Chips); DS 315 (the Case of European Communities – Selected Customs Matters); DS 337 (the Case of European Communities – Anti-Dumping Measure on Farmed Salmon from Norway; also the Case of EC – Salmon (Norway)).

<sup>492</sup> For example, in the DS 291/292/293 case (the Case of European Communities – Measures Affecting the

## B. Conflicting Ideologies

Behind these specific practices of the Union with regard to trade legislation or the application of trade legislation complained about by other members are EU ideologies relating to the international trading system that other countries have challenged at the multilateral level.

### 1. Methods of interpreting WTO agreements

Almost in every appeal, the EU challenged the Panel's interpretation of pertinent WTO agreements or provisions, and further argued that EU legislation or application could stand up to its own interpretation of these agreements. Generally speaking, in its arguments, the EU adopted the methods of "proper or ordinary meaning,"<sup>493</sup> "object and purpose" of the provisions at issue<sup>494</sup>, context of negotiation<sup>495</sup>, and principles of general international law<sup>496</sup> in interpreting the provisions at issue. As pointed in the Appellate Body report of the DS 27 case, the EU employed "the letter, the context and the negotiating history, and even the Panel's own interpretation" to interpret a WTO article.<sup>497</sup>

The following paragraphs, excerpted from pertinent DSB reports, contain some illustrations of the EU's arguments regarding interpretation of the WTO provisions. The Appellate Body report of the DS 141 case involves the EU's approach of "proper meaning." The Appellate Body report of the DS 246 case mentions the EU's approaches of "ordinary meaning," "object and purpose," and "context."

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Approval and Marketing of Biotech Products, also the Case of EC – Approval and Marketing of Biotech Products), the United States, Canada, and Argentina complained about the alleged general EC moratorium on approvals of biotech products, EC measures allegedly affecting the approval of specific biotech products, and EC member State safeguard measures prohibiting the import/marketing of specific biotech products within the territories of these member States.

<sup>493</sup> WTO, *Appellate Body Report*, WT/DS141/AB/R, ¶9, 10, 12, 13, 18, 25, 29 & 34, March 1, 2001 [hereinafter WTO-WT/DS141/AB/R].

<sup>494</sup> WTO, *Appellate Body Report*, WT/DS27/AB/R, ¶19, 20, 22 & 23, September 9, 1997 [hereinafter WTO-WT/DS27/AB/R]; *Panel Report*, WT/DS69/R, ¶18, March 12, 1998 [hereinafter WTO-WT/DS69/R]; *Appellate Body Report*, WT/DS246/AB/R, ¶15, 19 & 30, April 7, 2004 [hereinafter WTO-WT/DS246/AB/R]; and, *Appellate Body Report*, WT/DS315/AB/R, ¶51, November 13, 2006 [hereinafter WTO-WT/DS315/AB/R].

<sup>495</sup> WTO-WT/DS27/AB/R, *id.*

<sup>496</sup> WTO, *Appellate Body Report*, WT/DS269/AB/R, ¶41-51, WT/DS286/AB/R, September 12, 2005 [hereinafter WTO-WT/DS269/AB/R].

<sup>497</sup> WTO-WT/DS27/AB/R, *supra note* 494.

In the DS 141 case (EC – Bed linen), “the European Communities submits that the interpretation of the Panel fails to give *proper meaning* to the word ‘comparable’ in Article 2.4.2 [of AD Agreement].”<sup>498</sup> In the DS 246 case (EC – Tariff Preferences), “[t]he European Communities suggests that the Panel should have begun its analysis by examining the *ordinary meaning* of the word “notwithstanding” in the Enabling Clause....[I]ts understanding of the relationship between Article I:1 and the Enabling Clause is supported by the *object and purpose* of the Enabling Clause...[It also] emphasizes ...*immediate context* for interpreting the term “non-discriminatory” in footnote 3 [of the Enabling Clause].”<sup>499</sup>

## 2. Trade Preferences in FTAs and multilateralism

In two important and famous cases – the DS 27 case (Banana III) about the Lome Waiver<sup>500</sup>, the DS 246 case (Tariff Preference) about the GSP system<sup>501</sup> – the EU ideology that was being challenged relates to the relationship between regionalism (or regional trade preferences) and multilateralism. In the DS 27 case revolving around the European Communities’ regime for the importation, distribution and sale of bananas, introduced on 1 July 1993 and established by EEC Council Reg. 404/93., the European Communities argues as follows:

[T]here are, in fact, two separate EU import regimes for bananas: one preferential regime for traditional ACP bananas and one *erga omnes*.<sup>[502]</sup> regime for all other imported bananas. The European Communities contends further that the non-discrimination obligations of Article I:1, X:3(a) and XIII of the GATT 1994 and Article 1.3 of the Agreement on Import Licensing Procedures (the ‘Licensing Agreement’), only apply within each of these two regimes.”<sup>503</sup>

In the DS 246 case, the European Communities’ generalized tariff preferences (GSP) scheme for developing countries and economies in transition was challenged by its trading partners. In particular, the complaint centered on special arrangements under the scheme to

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<sup>498</sup> WTO-WT/DS141/AB/R, *supra note* 493, ¶10. (emphasis added)

<sup>499</sup> WTO-WT/DS246/AB/R, *supra note* 494, ¶ 11, 14 & 21. (emphasis added)

<sup>500</sup> The Lome Waiver was a system of trade preferences granted by the EU to approximately seventy-one African, Caribbean, and Pacific (ACP) developing countries. Bhala-Dictionary, *supra note* 15, at 284.

<sup>501</sup> The Generalized System of Preferences is a scheme by which one country (namely, developed one) accords duty-free, reduced-tariff, and/or quota-free treatment to merchandise imported from and originating in another country (typically, a developing or least developed one). *Id.* at 229.

<sup>502</sup> This term means that rights and obligations are owned toward all.

<sup>503</sup> WTO-WT/DS27/AB/R, *supra note* 494, ¶23.

combat drug production and trafficking (the Drug Arrangements), the benefits of which applied only to 12 countries experiencing a certain gravity of drug problems. The EC's opinion in the case regarding the relationship between S&D treatment and Most-Favored-Nation (MFN) treatment was summarized by the Appellate Body as follows:

The European Communities emphasizes that the Enabling Clause is 'the most concrete, comprehensive and important application' of the principle of special and differential treatment. In the view of the European Communities, special and differential treatment is 'the most basic principle of the international law of development', and it constitutes *lex specialis* that applies to the exclusion of more general WTO rules on the same subject matter.<sup>504</sup>

The fundamental ideology reflected by the arguments adopted by the EU in these two cases is that regionalism (or regional trade preferences) can be used in parallel with the multilateral system and can serve as a fundamental feature of the multilateral system (as long as regionalism is a stepping stone, not a stumbling block, in the path toward multilateralism).

### 3. Applying principles in arguments

In order to support its arguments in these trade disputes, the EU applied some general principles of law such as legitimate expectations and good faith. The Appellate Body report regarding the DS 62/67/68 case exemplifies the EU's invocation of the principle of legitimate expectations. In this appeal, the EU challenged the Panel's application of that principle in interpreting its tariff schedule, as summarized by the Appellate Body as follows:

The European Communities submits that the Panel erred in law by not considering the object and purpose of the tariff concession in Schedule LXXX with respect to the products concerned but rather a supposed and erroneous object and purpose of Article II of the GATT 1994, *i.e.*, the protection of "legitimate expectations". ...

... The European Communities questions how it is possible to determine the content of MFN tariff treatment on the basis of the "legitimate expectations" of one Member among all WTO Members. If the "legitimate expectations" of that Member diverges from the "legitimate expectations" of other Members, the consequence would be that a Member, in order to know exactly what is the tariff treatment to grant a given product, would have to verify the potentially divergent "legitimate expectations" of all other WTO Members.<sup>505</sup>

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<sup>504</sup> WTO-WT/DS246/AB/R, *supra* note 494, ¶14.

<sup>505</sup> WTO, *Appellate Body Report*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, ¶13& 16, June 5, 1998 [hereinafter WTO-WT/DS62/AB/R].

Other examples of applying the principle of legitimate expectations appear in the DS 135 case (the case of EC – Asbestos, the Panel report), the DS 231 case (the case of EC – Sardines, the Panel report), and the DS 269/286 case (the case of EC – Chicken cuts, the Appellate Body report).

In the DS 27 case (the case of EC – Banana III), the EU relied on a general principle – that is, a claimant must normally have a legal right or interest in the claim it is pursuing – to cast doubts on the United States’ legitimate status as complainant. The EU’s argument is demonstrated by the Appellate Body report as follows:

The European Communities argues that the Panel infringed Article 3.2 of the DSU by finding that the United States has a right to advance claims under the GATT 1994. The European Communities asserts that, as a *general principle*, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing. ...

According to the European Communities, treaty law is a “method of contracting out of general international law.” Therefore, the WTO Agreement must contain a rejection of the requirement of a legal interest or an acceptance of the notion of *action popularis*<sup>506</sup> in order to conclude that the WTO dispute settlement system set aside the requirement of a legal interest. The absence of such an express rule in the DSU or in the other covered agreements indicates that general international law must be applied.<sup>507</sup>

Moreover, the reference to the principle of good faith appears in the DS 135 case (the Panel report) and the DS 231 case (the Panel report). In both of those cases, the EU relied on the principle of good faith in trade relations, including a particular “application of this general principle, the application widely known as the doctrine of *abus de droit*, [which] prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.”<sup>508</sup>

To sum up, the WTO cases involving the EC as respondent highlight some particular EC

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<sup>506</sup> “In Roman law, an *actio popularis* was an action that could be brought by an individual on behalf of the public interest. This amounts to objective enforcement of law by an individual action.” Anne van Aaken, *Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Provisions For Ius Standi*, in INTERNATIONAL CONFLICT RESOLUTION (Stefan Voigt, Max Albert, Dieter Schmidtchen ed.) 29, 37 (2006).

<sup>507</sup> WTO-WT/DS27/AB/R, *supra note* 494, ¶15 & 16.

<sup>508</sup> WTO, *Principles and Concepts of General Public International Law*, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/p3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm), last visited on July 7, 2011.



practices or ideologies. These ideologies relate to fundamental methods of interpreting the WTO agreements, the understanding of the relationship between trade preferences in the FTAs and multilateralism (especially MFN treatment), and the general principles of law applied by the EU in implementing its WTO obligations,

### **C. Legal Tradition and Culture**

In the following paragraphs, I will look into the EU's legal tradition and culture for the roots of the above practices or ideologies of the EU in implementing its WTO obligations.

#### **1. Interpretation of international agreements**

The methods adopted by the EU for interpreting WTO agreement are consistent with the techniques commonly used in EU legal and judicial practice more generally for the interpretation of legal texts. These techniques include, most prominently, literal interpretation, logical interpretation, and teleological interpretation. Under the first of these techniques, where an EU court (for example, the ECJ) finds that the terms of the text

are clear and unambiguous, it adopts the literal interpretation ... The next interpretative principle is the logical interpretation of the text, wherein the Court will consider the provision within the context of the system. In considering previous judicial interpretations on a provision, the Court may also consider adopting the teleological interpretation, which, although literal to a certain extent, focuses on the intention of the legislature in the light of the conditions prevailing at the time of the judgment.<sup>509</sup>

The general EU techniques of legal interpretation derive from the methods of legal interpretation in its Member States. As pointed out by Cruz, the civil law approaches to legal interpretation include grammatical/literal interpretation,<sup>510</sup> the logical interpretation,<sup>511</sup> the legislative history approach,<sup>512</sup> and the teleological approach.<sup>513</sup> The applicability of this array

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<sup>509</sup> Cruz, *supra note* 471, at 171.

<sup>510</sup> Grammatical/literal interpretation refers to the so-called plain meaning. "If the words of the statute are ambiguous, then all legal systems need to consider the permissible methods of determining the 'proper construction' of the statute in order to give effect to the legislative intention." *Id.* at 275.

<sup>511</sup> The logical interpretation refers to "constru[ing] the legislative provision not only on its stated terms, but within the context of the entire body of rules comprising the legal system, derived from the same statute, in other laws or from recognised general principles of law." *Id.* at 276.

<sup>512</sup> The legislative history approach refers to "seek[ing] to ascertain the legislative intention by embarking on research into the legislative history of the statute...It appears that this is an approach that is pursued very much

of techniques for legal interpretation has also been confirmed by René David and Henry P. De Vries.<sup>514</sup>

Naturally, the civil law approach described above would have little applicability to the UK, another EU member. However, similarity in interpretation methods can also be observed between continental law and English common law. In the common law tradition,

[t]he three main traditional aids to interpretation are the literal rule, the golden rule and the mischief rule. These have always been subject to a court's perception of 'the intention of Parliament', that is, what Parliament intended to achieve or address in passing that provision. Another very important factor, which is increasingly being taken into account, is the context of a statute.<sup>515</sup>

Legal interpretation may be reviewed as part of a larger context of arguments made by (and to) courts in support of particular outcomes to disputes. Some common types of such arguments, as found in different legal systems, are enumerated by one source as follows:

Apart from these similarities, no less than 11 basic types of 'judicial argument' have been identified by Summers and Taruffo (1991) as being frequently used by higher courts in all three major types of legal system: (1) 'ordinary meaning' arguments; (2) 'technical meaning' arguments; (3) contextual arguments; (4) arguments based on precedents; (5) statutory interpretation by analogy; (6) legal concept arguments; (7) arguments based on general legal principles; (8) historical/evolutionary arguments; (9) statutory purpose arguments; (10) substantive reasoning arguments; and (11) legislative intention arguments.<sup>516</sup>

Many of these types of judicial arguments, such as (1), (3), (4), (6), (7), (8), and (9), have been adopted by the EU in its arguments in front of the DSB, as enumerated in the preceding paragraphs.

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more in civil law countries than in common law jurisdictions." *Id.* at 277.

<sup>513</sup> The teleological approach refers to "seek[ing] to interpret the legislative text within the context of contemporary conditions. In other words, it presupposes the need to extend the application of a legislative provision beyond the scope of prior legislative intent, and to adapt it to rapidly changing social or economic conditions." *Id.* at 278.

<sup>514</sup> René David & Henry P. De Vries, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS* 101 (1958).

<sup>515</sup> Cruz, *supra note* 471, at 279. "English judges tend to emphasise the predominance of the 'ordinary meaning' of the words and would generally not be prepared to look at the statutory purpose of a statute or any other policies or rationales unless there is some ambiguity in the words used. The 'golden rule approach' refers to the principle that a judge may depart from the clear meaning of a statute if the result would otherwise be absurd or impractical." *Id.*

<sup>516</sup> *Id.* at 294. The three major types of legal system referred to here (dating back to 1991) are civil law, common law, and socialist law.

In comparison, the Chinese legal system gives much more attention to *authorization* of interpretation than to *principles* of interpretation. The Legislation Law provides that the Standing Committee of the NPC enjoys the power to interpret law.<sup>517</sup> It is evident that Chinese legal system which lacks definite or solid principles of legal interpretation seems to be incapable of relying on various approaches in interpreting international agreements as the EU has done. One scholar describes China's interpretation of international legal system as "a way to shed light on surface appearances of textual interpretation."<sup>518</sup>

## 2. Trade preferences and multilateralism

The EU expressed its attitude toward the relationship between regionalism (or regional trade preferences) and multilateralism in the proposal of July 9, 2002 on regional trade agreements. According to the EU, regional trade agreements must be "stepping stones" rather than "stumbling blocks" towards multilateral liberalization, and that regionalism and multilateralism must be mutually supportive rather than contradictory.<sup>519</sup> This ideology has also been confirmed by EU arguments in WTO trade disputes, as introduced above.

Driven by this firm belief in the role of regionalism and the fundamental status of trade preferences in the overall context of multilateralism, "[a] key feature of EU commercial policy [becomes] the combination of regionalism and multilateralism: on the one hand, the Union has been a strong supporter of multilateral trade rules; on the other, it has developed the most

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<sup>517</sup> Articles 42-47 of the Legislation Law of the PRC. This law further prescribes two circumstances that will call for the Committee's interpretation: (1) the specific meaning of a provision needs to be further defined; and (2) after its enactment, new developments make it necessary to define the basis on which to apply the law. Article 42 of the Legislation Law of the PRC.

Chinese jurisprudence commonly divides authoritative interpretation into three categories: legislative, administrative, and judicial. Generally speaking, "legislative interpretation means interpretation given by legislative authorities on laws and rules issued by themselves; administrative interpretation refers interpretations given by administrative authorities on these rules and regulations; and judicial interpretations are those issued by the Supreme People's Court and the Supreme People's Procuratorate in their judicial and procuratorial work." Chen-Transformation, *supra note* 260, at 106-107.

"[L]egislative interpretation has the greatest weight, while judicial interpretation appears to have the least, and administrative interpretation falls somewhere in the middle." Vai lo Lo & Xiaowen Tian, *LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS AFTER WTO ACCESSION* 14 (2005).

<sup>518</sup> Pitman B. Potter, *China and the International Law System: Challenges of Participation*, in *CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES* (Donald C. Clarke ed.) 145, 161 (2008).

<sup>519</sup> EU-TN/RL/W/14, *supra note* 465.

extensive network of preferential trade agreements (PTAs) of any GATT/WTO member.”<sup>520</sup>

Such a complex regime of trade preferences adopted by the EU put one of the most important mandates of the WTO – the MFN treatment – at the bottom. The EU “pyramid of trade preferences” comprises five tiers: (1) membership to the EU; (2) association agreements, which involve the creation of a Customs Union or an FTA between the EU and the trading partner, as well as common rules on non-trade issues; (3) free trade areas between the EU and various trading partners; (4) non-reciprocal preferences granted by the EU to developing countries under the Generalized System of Preference (GSP); and (5) MFN treatment.<sup>521</sup> Evidently, MFN treatment is at the bottom of this pyramid, which means that all four other types of trade preferences prevail over MFN treatment. And only nine countries (Australia, Canada, Taiwan, China, Hong Kong, Japan, Republic of Korea, New Zealand, Singapore and the USA) export to the EU under MFN treatment.<sup>522</sup> This approach, on the one hand, demonstrates the EU’s attitude toward the relationship between regionalism (or regional trade preferences) and multilateralism, and on the other hand, increases the possibility of trade disputes.

### 3. Legal principles

Most principles frequently resorted by the EU in its argument before the DSB have their origins in the civil law tradition. For example, the principle of good faith appearing in the DS 135 and DS 231 cases has its roots in the civil law tradition. The following excerpt provides an account of the origin of this principle:

Good faith or *bona fides* is very difficult to define. Most scholars agree, however, that it has three constitutive moral elements: (1) honesty, (2) fairness, and (3) reason....

The concept of good faith originated in Roman law, where it gave the judge an equitable discretion to decide a case brought before him according to what seemed to be reasonable and fair. Thus, *bona fides* associated with trustworthiness and honorable conduct permitted the judge to denounce breaches of good faith by taking into consideration the particularities of each case. As such, *bona fides* has affected the entire civil legal family. Despite the fact that modern civil systems vary to some extent, the general concept of *bona fides* constitutes in this legal family one of the most

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<sup>520</sup> Mario Telò, THE EUROPEAN UNION AND GLOBAL GOVERNANCE 163 (2009).

<sup>521</sup> *Id.* at 163-165.

<sup>522</sup> *Id.* at 165.

important abstract rules.<sup>523</sup>

Legal principles are widely resorted to in “domestic” judicature of the EU, which can account for the EU’s frequent invocation of principles in its arguments at the multilateral level. Such domestic application of principles – focusing on those of proportionality, equal treatment, and legitimate expectations – is analyzed in detail in section IV of this chapter.

To sum up this section, we can observe that the practices or ideologies in respect of the EU’s implementation of its WTO obligations have their roots in the EU legal tradition and culture, especially its own approaches to interpreting international agreements and to prioritizing regional trade references in a multilateral context. The practices of the EU to apply general principles of law in adjudication will be further elaborated in section IV of this chapter.

### **III. “Domestic” Legislation on Trade**

Having looked at the EU’s practice in the context of international trade negotiations and international trade disputes, we turn now to another context for the indigenization of WTO law in the EU: “domestic” legislation on trade.

#### **A. Overview**

According to a report on Trade Policy Review released by the WTO in 2009,<sup>524</sup> EU trade policy is formulated and implemented by means of two types of legislation. One is legislation at primary level – that is, treaties and other agreements of similar status. The Common Commercial Policy (CCP) the EC enacts and implements belongs to the legislation at primary level. The other is legislation at secondary level, which comprises (i) regulations (with general application) that are binding and directly applicable in all Member States, (ii) directives (requiring transposition into national law and practice), (iii) decisions (binding upon their addressees), and (iv) recommendations and opinions which are based on treaties but do not have binding force.<sup>525</sup>

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<sup>523</sup> Mitchell & Powell, *supra* note 6, at 39.

<sup>524</sup> WTO, *Trade Policy Review – European Communities*, WT/TPR/S/214, ¶8, March 2, 2009 [hereinafter WTO-WT/TPR/S/214].

<sup>525</sup> *Id.* ¶8.

According to Borchardt, the sources of European Union law include: (1) primary legislation (Union treaties, general principles of law); (2) the EU's international agreements; (3) secondary legislation (legislative actions [regulations, directives, decisions]; non-legislative acts [delegated acts, implementing acts]; other acts [recommendations and opinions, inter-institutional agreements, resolutions, declarations and action programs]); (4) general principles of law; and (5) conventions between the member states (Coreper decisions<sup>526</sup> and international agreements).<sup>527</sup>

In the EU, trade regulations are a constituent of the CCP.<sup>528</sup> The CCP covers trade issues relating to exports, imports, commercial defense, and community statistics. Regulations on exports can be further classified into regulations on common rules for exports, dual-use items, export credit insurance, export of cultural goods, and the ban on trade in instruments of torture. Regulations on imports can be further grouped into regulations on common rules for imports, common rules for imports from certain non-EU Member countries, the EU procedure for administering quantitative quotas, and trade in seal products. In the EU, anti-dumping measures, anti-subsidy measures, and protection against foreign trade barriers are featured as “trade defence.” A list of EU basic regulation on trade appears in Appendix 5.3.

Moreover, the CCP covers schemes of preferences, generalized tariff preferences, aid for trade in developing countries, fair trade and non-governmental trade-related sustainability assurance schemes, agricultural commodities, dependence and poverty, the International Coffee Agreement 2007, global partnership for sustainable development, integration of the environmental dimension in developing countries, and promoting corporate social responsibility.

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<sup>526</sup> Article 16 (7) TEU establishes the Coreper, “a committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council.” Coreper plays a pivotal role in the Community decision-making system, where it is a forum for both dialogue (between the permanent representatives and between each of them and their capital) and political control (orientation and supervision of the work of the groups of experts). The European Commission, available at [http://ec.europa.eu/codecision/stepbystep/glossary\\_en.htm](http://ec.europa.eu/codecision/stepbystep/glossary_en.htm), last visited on October 1, 2011.

<sup>527</sup> Klaus-Dieter Borchardt, *THE ABC OF EUROPEAN LAW* 80 (2010).

<sup>528</sup> For an introduction of the development of the CCP, see Telò, *supra note* 520, at 156-159.

## **B. WTO Law in “Domestic” Context and Characteristics of “Domestic” Legislation**

### **1. WTO law in “domestic” context**

The Council regulation (EC) No. 1225/2009 which prescribes anti-dumping rules expresses the EU’s attitude toward the relationship between the EU trade regulations and the WTO agreements. In short, as demonstrated by the following excerpt from the prologue, the aim of the EU regulations is to ensure a proper and transparent *application* of pertinent WTO rules:

...

(3) The agreement on dumping, namely, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as “the 1994 Anti-Dumping Agreement”), contains detailed rules... In order to ensure *a proper and transparent application* of those rules, the language of the agreement should be brought into Community legislation as far as possible. (emphasis added)

Similarly, in the prologue of the Council Regulation (EC) No. 579/2009 on countervailing measures, the aim of this EU regulation to *implement* and *supplement* pertinent WTO agreements is identified:

...

(4) In order to reach *greater transparency and effectiveness in the application* by the Community of the rules laid down in the 1994 Anti-Dumping Agreement and the Subsidies Agreement respectively, the adoption of two separate Regulations which would lay down in sufficient detail the requirements for the application of each of these commercial defence instruments has been considered as necessary.... (emphasis added)

(20) Even though the Subsidies Agreement does not contain provisions concerning circumvention of countervailing measures, the possibility of such circumvention exists.... It appears therefore appropriate to enact an anti-circumvention provision in this Regulation.

The above excerpts from the prologues of the EU’s trade regulations have conveyed the attitude of the EU with regard to the relationship between the WTO agreements and its “domestic” trade regulations – that is, “domestic” trade regulations aim largely to implement the WTO agreements and serve as the implementation guidance in enforcing the EU’s WTO obligations.

## 2. Characteristics of “domestic” legislation

Some characteristics of EU legislation on external trade can be observed. Two characteristics highlighted here are (i) the principle of subsidiarity, and power distribution more generally, and (ii) the structure and style of the legislation.

### a. Distribution of legislative power

Generally speaking, “[t]he EU may act only within the powers that are assigned to it by its founding Treaties (Art 5(2) of the Treaty on European Union (TEU)). The Member States retain competence over any matter to which jurisdiction has not been assigned to the EU by the Treaties (Arts 4(1), 5(2), TEU). The Member States must exercise their retained powers consistently with EU law.”<sup>529</sup> The exercise of power by the EU is subject to the principle of subsidiarity. Subsidiarity is defined as follows: “in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” (Art 5(3) TEU)

The Union has exclusive competence in legislation on the issues covered by the CCP, including trade. Furthermore, it “may authorize the Member States to make laws regarding these matters (Art 2(1) TEU).”<sup>530</sup> In effect, the Union has exercised this discretion by authorizing the Member States to enact trade-related rules. For example, the Member States have been authorized to (1) lay down the rules on penalties for infringements of the regulation on trade in seal products,<sup>531</sup> (2) introduce additional national legislation to prohibit or impose an authorization requirement for dual-use items;<sup>532</sup> and (3) establish effective, proportionate and

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<sup>529</sup> Moens & Trone, *supra note* 470, at 26.

<sup>530</sup> *Id.*

<sup>531</sup> Council Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, Art 6.

<sup>532</sup> Council Regulation (EC) No. 428/2009 of 5 May 2009 Setting up A Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-use Items, Art 4.



dissuasive penalties for infringements of the regulation on export of cultural goods.<sup>533</sup>

b. Style of legislation

The basic regulations on trade usually have very strong preambles, which contain a large number of recitals relating to legal basis, background, principles, and purposes of the regulations. For example, Council Regulation (EC) No. 1225/2009 [on protection against dumped imports from countries not members of the European Community], which contains 34 recitals, clarifies its legal basis. According to the preamble, the legal basis of the regulation rests on the Treaty establishing the European Union (particularly Article 133) and Council Regulation (EC) No. 1234/2007 establishing a common organisation of agricultural markets, and on specific provisions for certain agricultural products. The prologue reviews the background of the need to codify Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, and the context of GATT 1994 and the 1994 Anti-dumping Agreement.<sup>534</sup>

To sum up this subsection, the EU's "domestic" trade regulations aim to establish implementation guidance of its WTO obligations. Although China and the United States also bring their domestic legislation to the consistency with the WTO agreements largely, neither of them has expressed definitely the "subordinate" status of their domestic law to the WTO law, partially out of the sovereign concern. In "domestic" trade regulations, it is obvious that the authority to enact trade regulations is centralized in the Union but can be entrusted to its member states. Furthermore, the EU trade regulations are subject to a wide range of principles and

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<sup>533</sup> Council Regulation (EC) No. 116/2009 of 18 December 2008 on the Export of Cultural Goods, Art 9.

<sup>534</sup> Examples of the multiple purposes of this regulation (i.e., Council Regulation (EC) No. 1234/2007) as expressed in the prologue, include: to lay down clear and detailed rules on the calculation of normal value, to define the export price and to enumerate the adjustments which are to be made in those cases, to list the factors which may affect prices and price comparability and to lay down specific rules as to when and how the adjustments should be made, to lay down clear and detailed guidance as to the factors which may be relevant for the determination of whether the dumped imports have caused material injury or are threatening to cause injury, to lay down who may lodge an anti-dumping complaint, to lay down the manner in which interested parties should be given notice of the information which the authorities require, and should have ample opportunity to present all relevant evidence and to defend their interests, to lay down the conditions under which provisional duties may be imposed, to specify procedures for accepting undertakings which eliminate dumping and injury instead of imposing provisional or definitive duties, to provide for retroactive collection of provisional duties if that is deemed appropriate, and to define the circumstances which may trigger the retroactive application of duties to avoid the undermining of the definitive measures to be applied, and to provide provisions to deal with circumvention.

prerequisites set in the prologues.

## C. Legal Tradition and Culture

The features of the EU's "domestic" legislation on trade may also find their roots in the EU's legal tradition and culture.

### 1. Concept of the legal rule

As explained in the beginning of this chapter, the EU legal culture is a "hybrid" one, with the dominant influence from the civil law tradition. Therefore, some examination of the notion of law or of a legal rule in the EU's Member States can help us understand the style of legislation the EU uses in its trade relations. The basic notion of law under the French legal system is different from which is typical in common law countries, as pointed out by one authority on the subject:

... [A] Frenchman and French lawyers have a much broader view of the meaning of the word 'law' than the typical English or common law lawyer, who sees it as mainly linked to the possibility of a court action. The French conception of law comprises: ... all the rules devised to establish the structures of society and to regulate people's conduct, and these include many which cannot give rise to an action in the courts but are none the less basic to the organization of the State.<sup>535</sup>

The differences in the French and English concepts of law or legal rules are also addressed by another scholar:

[In France,] the law is not essentially judges' law, but rather a law of jurists and the universities. French law has an aversion to case studies and seeks clarity by looking beyond the decisions in particular cases to the principles proclaimed by the legislator and legal writers. What the English call a legal rule the French regard as the disposition of a dispute. Rules only exist at a higher level of abstraction. The very concept of rule implies generality – abstraction.

For a Frenchman, the English jurist's legal rule is nothing but an isolated judicial decision; it is not a *règle juridique*. For an Englishman, the French jurist's *règle juridique* is not a legal rule. It does not have the precision that is the essence of such a rule. Rather, it is a legal principle.<sup>536</sup>

The differences in the French and English concepts of the legal rule lead to dissimilar legislation techniques in the French and English legal systems. In short, an English statute will

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<sup>535</sup> Cruz, *supra note* 471, at 70.

<sup>536</sup> Liebesny, *supra note* 6, at 49.

deal explicitly with particular problems. A French statute will go into less detail. In the French system, articles which embody general legal rules are referred to as “principles.”

... [An] English statute will necessarily deal explicitly with particular problems. A French statute will go into less detail, will give the judge more discretion, will not try to foresee all problems, and may include general formulae that to a Common lawyer seem to negate its effects as law and made it more a general principle than a command....

If the Common lawyer finds a decision on a particular point that interests him, he feels that he has finally found the legal rule.... For the Frenchman, the statutory text has a very different value, for in such texts the legal rule to be followed is always found.<sup>537</sup>

Apparently, the concept of law or the legal rule in civil law tradition has had a heavier influence on EU law than that in common law tradition has had. Principled, abstract, and systemic thinking has helped bring EU legislation to its current style, with a strong emphasis on legal basis, on background, on principles, and on principles in prologues.

## **2. EU law and national law**

Through the study of the preambles of the EU’s basic regulations on trade, we can observe that one of their fundamental purposes is to increase clarification and practicability of their founding agreements or regulations. This effort makes it sensible to characterize these basic regulations more as “domestic” law than as regional accords. The possibility of achieving this goal of “clarification and practicability” relies heavily on the supremacy of EU law over the national law of on its Member States as well as its nature of direct application.

As pointed out by Cruz, no matter whether the constitution of a Member State adopts (1) monism, which accepts that international law obligations are of the same nature as, or are even superior to, national law obligations (such as the French and Dutch constitutions) or (2) dualism, under which only limited status is given to rules of international law until or unless it is transformed into national law by some method of national enactment (such as in the British government practices), EU law has supremacy over national law within its jurisdiction.<sup>538</sup>

Furthermore, the relationship between EU law and national law is based on “a concept that

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<sup>537</sup> *Id.* at 49-50.

<sup>538</sup> See Cruz, *supra* note 471, at 142-143.

suggests that, in the appropriate case, Community law is directly applicable to national law and can thereby create rights in favor of individuals, which national courts must protect.” The direct application of EEC treaty has been confirmed by the ECJ, whose observations are quoted below:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.

...The Treaty has created in each of the member States, whose constitutional law relating to the internal effect of international obligations differs widely, rules of substantive law that were enforceable by private individuals. ...<sup>539</sup>

The significance of the relationship between the EU law and domestic laws of its Member States – that is, the EU law can be applied directly by domestic adjudication within individual states – lies in that this adoption of monism within the regional organization can guarantee a thorough implementation of the EU law and avoid the second time of absorption of WTO obligations into domestic legal systems of Member States, a path of WTO-agreements-the EU regulations-domestic trade laws that would complicate the process of absorption of the WTO agreements into national law, at the potential risk of bringing out more inconsistencies between them .

#### **IV. “Domestic” Adjudication of Trade Issues**

The administration and adjudication of EU trade regulations constitutes another source that demonstrates how the EU has accommodated its multilateral obligations within its legal tradition and culture. After identifying the administrative and judicial organs in which the relevant cases arise, I will explain below the key characteristics of such cases and their outcomes, and then examine how they are influenced by legal tradition and culture.

##### **A. Overview**

“Domestic” adjudication of trade issues within the EU has demonstrated a variety of

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<sup>539</sup> *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (commonly just referred to as *Van Gend en Loos*). Judgment of the Court of February 5, 1963. Case 26-62.

features deeply rooted in the EU's legal tradition and culture. The following paragraphs give an overview of the administration and adjudication of trade regulations within the Union.

## 1. Administrative organs

Generally speaking, the Commission and the Council of the EU exercise administrative power over trade issues. The following excerpt gives a brief introduction of the administration of trade regulations:

In trade policy, the Commission, mandated by the Council and in consultation with a Council committee of high-level trade officials called the 'Trade Policy Committee', has responsibility for negotiating and managing trade agreements involving tariff amendments, customs and trade provisions and protective measures.<sup>540</sup>

The functions of the Commission with regard to trade include: (1) defining EU interests, (2) negotiating agreements on behalf of EU member states, (3) monitoring implementation of international agreements, (4) acting as liaison with other departments within the Commission with a trade dimension (environmental, competition, agriculture, etc.), and (5) informing the public.<sup>541</sup>

## 2. Courts

The ECJ and the General Court exercise jurisdiction over trade cases. Neither of them is a specialized court on trade. One source explaining the operations of the Court of Justice summarizes its overall purpose as follows:

The Court of Justice (ECJ) interprets EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.<sup>542</sup>

As explained in another source,<sup>543</sup> the jurisdiction of the Court of Justice covers: (1)

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<sup>540</sup> Council of the European Union, available at <http://www.consilium.europa.eu/showpage.aspx?id=1848&lang=en>, last visited on July 27, 2011.

<sup>541</sup> Andreas Staab, THE EUROPEAN UNION EXPLAINED: INSTITUTIONS, ACTORS, GLOBAL IMPACT 140 (2008).

<sup>542</sup> The Court of Justice of the European Union, available at [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm), last visited on July 27, 2011.

<sup>543</sup> See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

references for preliminary rulings,<sup>544</sup> (2) actions for failure to fulfil obligations,<sup>545</sup> (3) actions for annulment,<sup>546</sup> (4) actions for failure to act,<sup>547</sup> (5) appeals,<sup>548</sup> and (6) reviews.<sup>549</sup>

The ECJ gains assistance from another institution – the General Court. “To help the Court of Justice cope with the large number of cases brought before it..., a ‘General Court’ deals with cases brought forward by private individuals, companies and some organisations, and cases relating to competition law.”<sup>550</sup>

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<sup>544</sup> The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>545</sup> These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>546</sup> By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>547</sup> These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed. However, such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures. Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>548</sup> Appeals on points of law only may be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>549</sup> Decisions of the General Court on appeals against decisions of the European Union Civil Service Tribunal may, in exceptional circumstances, be reviewed by the Court of Justice as provided in the Protocol on the Statute of the Court of Justice of the European Union. See the Court of Justice, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/), last visited on July 27, 2011.

<sup>550</sup> THE Court of Justice, available at [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm), last visited on July 27, 2011. The General Court has jurisdiction to hear a wide range of cases. They include: (1) direct actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company; (2) actions brought by the Member States against the Commission; (3) actions brought by the Member States against the Council relating to acts adopted in the field of State aid, ‘dumping’ and acts by which it exercises implementing powers; (4) actions seeking compensation for damage caused by the institutions of the European Union or their staff; (5) actions based on contracts made by the European Union which expressly give jurisdiction to the General Court; (6) actions relating to Community trademarks; (7) appeals, limited to points of law, against the decisions of the European Union Civil Service Tribunal; and (8) actions brought against decisions of the Community Plant Variety Office or of the European Chemicals

## B. Characteristics

Perhaps one of the most noteworthy characteristics of the operations of administrative and judicial organs in the EU system is their level of sophistication and complexity. As detailed below, that system has matured into a highly developed regime of rules and procedures – most of them having applicability to matters concerning international trade.

### 1. Form of determinations on trade defence

The determinations on matters relating to trade defence<sup>551</sup> made by the EU's administrative agencies (the Commission and the Council) – such as those on initiating investigation and imposing, amending, or terminating definitive antidumping duties, countervailing duties or safeguard guarantee – take the form of regulations which have legally binding effect within the EU. Therefore, individuals, companies, associations, or state governments can bring actions for annulment against such regulations in front of the Union courts. We may recall that in both China and the United States, the determinations on trade defence take the form of *administrative* rather *legal* documents.

### 2. Judicial protection of individual rights

The uniqueness of judicial protection of individual rights provided by the EU is reflected in the fact that individuals are entitled to challenge the basic (abstract) regulations enacted by the Union. “Article 241 [of the European Community Treaty] includes the ability of an individual to challenge a regulation adopted by the institutions jointly or singly.”<sup>552</sup> In the European Court of Justice and the General Court, the number of cases that were initiated by individuals, companies or associations overwhelms the number of cases brought by the governments of Member States. Case C-26/00 *Kingdom of the Netherlands v Commission* [2005] and Case C-284/94 *Kingdom of Spain v Council* [1998] are two examples of the small number of cases initiated by the

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Agency. The General Court, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7033/](http://curia.europa.eu/jcms/jcms/Jo2_7033/), last visited on July 27, 2011.

<sup>551</sup> It will be recalled from the discussion in subsection IIIA, above, that in the EU, anti-dumping measures, anti-subsidy measures, and protection against foreign trade barriers are classified as “trade defence.”

<sup>552</sup> Kirk W. Junker, *Conference Conclusions “. . . and beyond”: Judicial Review in the European Union*, 45 *Duq. L. Rev.* 599, 606 (2007).

governments of Member States.

Not only the regulations containing specific decisions, such as those imposing definitive AD duties, but also basic regulations of the Union can be challenged in front of the courts. In Case T-45/06 *Reliance Industries Ltd v Council and Commission* [2008], the applicant applied for the annulment of Article 11(2) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1) and Article 18(1) of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1).

### 3. Types of actions

In a more general context, there are five types of actions that can be brought to the ECJ: (1) preliminary ruling proceedings, (2) proceedings for failure to fulfill an obligation, (3) actions for annulment, (4) actions for failure to act, and (5) direct actions for compensation.<sup>553</sup>

As to trade issues, three of these five types of actions have been resorted to frequently: actions for annulment, direct actions, and preliminary rulings. Of those three, actions for annulment are most frequently brought. Case C-452/98 *Nederlandse Antillen v Council* [2001] and Case T-462/04 *HEG Ltd and Graphite India Ltd v Council* [2008] are examples. In these actions, the applicants urge the courts to annul or partially annul regulations imposing, amending, or terminating certain trade measures.

If the applicants assert that the regulations at issue have caused injury to them, they can bring direct actions for compensation, such as in Case T-364/03 *Medici Grimm KG v Council* [2006] and Case T-429/04 *Trubowest Handel GmbH and Viktor Makarov v Council* [2008]. In the former case, action was filed for damage allegedly suffered by the applicant at a result of the absence of retroactive effect of Council Regulation (EC) No. 2380/98 of 3 November 1998, amending Regulation (EC) No. 1567/97 imposing a definitive anti-dumping duty on imports of

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<sup>553</sup> The Court of Justice, available at [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm), last visited on July 27, 2011.



leather handbags originating in the People's Republic of China (OJ 1998 L 296, p.1), partly annulled by the judgment of the Court of First Instance of 29 June 2000 in Case T-7/99 *Medici Grimm v Council* [2000] ECR II-2671.

In the latter case, application for compensation was brought in respect of the damage allegedly suffered by reason of the adoption of Council Regulation (EC) No. 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No. 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia (OJ 1997 L 322, p.1)

If national tribunals or courts have encountered some difficulties in understanding EU law, they can request preliminary rulings for interpreting pertinent regulations. This was done in Case C-230/98, submitted by the Tribunale Civile e Penale di Treviso, Italy, on the interpretation of Council Regulation (EEC) No. 545/92 of February 3, 1992 concerning the arrangements applicable to the import into the Community of products originating in the Republics of Croatia and Slovenia and the Yugoslav Republics of Bosnia-Herzegovina, Macedonia and Montenegro (OJ 1992 L 63, p. 1)<sup>554</sup> and Commission Regulation (EEC) No. 859/92 of April 3, 1992 laying down detailed rules governing imports of 'baby-beef' originating in the Republics of Croatia and Slovenia and the Yugoslav Republics of Bosnia-Herzegovina, Macedonia and Montenegro, as well as in Case C-93/08, submitted by the Augstākās tiesas Senāta Administratīvo lietu departaments (Latvia), on the interpretation of Article 11 of Regulation (EC) No. 1383/2003 of July 22, 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7).

As indicated by the judgments released by the ECJ, the courts may dismiss the action, may uphold or partially uphold the application, or refer the case back to the General Court.

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<sup>554</sup> The abbreviation "OJ" represents the "Official Journal of the European Communities."

#### 4. Application of legal principles

The applicants in actions before the EU courts can allege that the regulations at issue breach the general principles of EU law. The courts will, in response, give separate analysis as to whether such arguments will apply and prevail. On the grounds of the EU courts' adjudicative practices, the general principles relating to cases of commercial policy that have been frequently invoked mainly comprise the principle of proportionality, the principle of equal treatment, and the principle of legitimate expectations. Specifically, the principle of proportionality is usually used in cases challenging the imposition and amount of antidumping or countervailing duties or safeguard measures. For example, the principle of proportionality was resorted to by the complainants invoked in Case T-97/95 *Sinochem National Chemicals Import & Export Corporation v Council* [1998] in which the applicant sought the annulment of Council Regulation (EC) No 95/95 of January 16, 1995 imposing a definitive anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China (OJ 1995 L 15, p. 11), and argued that the imposition of such duties had breached the principle of proportionality.

The principle of equal treatment is usually employed in cases complaining about different treatment of similar products. The principle of legitimate expectations was resorted to in Case T-401/06 *Brosmann Footwear (HK) Ltd and others v Council* [2010] in which the applicants applied for partial annulment of Council Regulation (EC) No 1472/2006 of October 5, 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1), and argued that the absence of a reaction from the Commission for a significant length of time had breached the principle of legitimate expectations.

The principle of legitimate expectations emerges typically in cases relating to the administrative process of investigation or decision making. For example, it was invoked in Case C-150/94 *United Kingdom of Great Britain and Northern Ireland v Council* [1998] in which the applicants (1) urged annulment of Article 1(2) of Council Regulation (EC) No. 519/94 of 7 March 1994 on common rules for imports from certain third countries and (2) sought the repeal

of Regulations (EEC) No.s 1765/82, 1766/82 and 3420/83 (OJ 1994 L 67, p. 89), in so far as the applied to toys falling within HS/CN Codes 9503 41, 9503 49 and 9503 90. The applicants argued that different treatment on two similar types of products had breached the principle of equal treatment.

## **5. Procedural rights**

The applicants can also complain about the infringement of their procedural rights by the Council or the Commission in their decision-making processes. In trade cases, these rights are mainly the right to a fair hearing and the right of defence. These rights, and claims of their infringements, usually relate to administrative process such as the release of information by the administrative organs, as complained about in Case C-458/98 P *Industrie des Poudres Sphériques v Council* [2000] and Case T-249/06 *Interpipe Niko Tube ZAT and Interpipe NTRP VAT v Council* [2009].

## **6. Style of judgments**

Although the contents obviously are not identical in all judgments, the judgments do have a common style. Generally speaking, the judgments made by the Union courts include these features: background of the case (the parties, the facts, and the procedures before the action), relevant provisions, orders sought by the parties, arguments of the parties, findings of the Court, bearing on cost, and collective judgments. Moreover, there is no dissenting opinion in such a judgment.

## **7. Case law**

Typically, the judgments of the courts cite the outcomes of earlier cases that can support the findings or arguments of the courts. The intent for the Courts to refer to cases is to reemphasize the application of relevant principles or regulations as set forth in settled cases. For example, the Court cited cases in Case 180/00 *Kingdom of the Netherlands v Commission* [2005] to confirm the requirements of applying the principle of proportionality and in Case T-462/04 *HEG Ltd and Graphite India Ltd v Council* [2008] to clarify the application of the principle of equal treatment.

One authority has offered these observations about the use of case law in this setting:

Although cases have grown in importance in interpreting the Codes and statutes, they are still primarily considered to be illustrations of general principles that are universally acknowledged, or illuminations of statutory provisions that embody such principles....

[T]he ECJ appears to be developing a form of *stare decisis* that is broadly in accordance with English common law tradition, but which is not exercised in exactly the same manner as in contemporary English common law. Previously decided cases are relied upon in later cases, but the scope of their applicability may be extended or restricted in accordance with the particular circumstances.<sup>555</sup>

## 8. Opinion of Advocates General

The function of Advocates General is to give expert opinions to the ECJ, including opinions relating to trade cases. Although their opinions are not binding since “[t]he Treaty of Nice empowered the ECJ to rule without first hearing the opinion of the Advocate General,”<sup>556</sup> the Court respects these opinions highly, taking in account the fact that, as of today, the decisions of the Court, so far as released, have not made different conclusions from those of the opinions. For example, all the judgments of Case C-230/98 (submitted by the Tribunale Civile e Penale di Treviso, Italy for a preliminary ruling), Case C-458/98 P *Industrie des Poudres Sphériques v Council* [2000], Case C-76/98 *Ajinomoto Co., Inc. and NutraSweet Company v Council* [2001], Case C-239/99 (submitted by the Finanzgericht Düsseldorf (Germany) for a preliminary ruling) adopted the opinions submitted by the Advocates General.

## 9. Application of WTO agreements

In the Case T-221/05 *Huvis Corp v Council* [2008], paragraphs 71 and 72 of the judgments clarify the principle regarding the application of WTO agreements in the Union courts. In short, the direct application of the WTO agreements is subject to strict conditions – either (1) the Community intends to implement a particular obligation assumed in the context of the WTO, or (2) the Community measure refers expressly to the precise provisions of the WTO agreements:

It must be recalled at the outset that, according to settled case-law, having regard to their nature and

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<sup>555</sup> Cruz, *supra note* 471, at 94.

<sup>556</sup> Roy H. Ginsberg, *DEMISTIFYING THE EUROPEAN UNION: THE ENDURING LOGIC OF REGIONAL INTEGRATION* 132 (2007).

structure, the WTO Agreements are not in principle among the rules in the light of which the Community Courts are to review the legality of measures adopted by the Community institutions (Case C-76/00 P *Petrotub and Republica v Council* [2003] ECR I-79, paragraph 53; Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, paragraph 52; and *Ikea Wholesale*, paragraph 29).

It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO Agreements, that it is for the Community Courts to review the legality of the Community measure in question in the light of the WTO rules (Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 49; *Petrotub and Republica v Council*, paragraph 54; *Biret International v Council*, paragraph 53; and *Ikea Wholesale*, paragraph 30).<sup>557</sup>

To sum up, the direct application of WTO agreements in the Union Courts is very limited and subject to certain conditions, such as an explicit reference to definite WTO provisions by the Community measures.

In this subsection, we observe some characteristics of “domestic” adjudication of trade issues within the EU, such as the issues of the form of determinations on trade defence, judicial protection of individual rights, types of actions, application of general principles of law, procedural rights, style of judgments, opinion of Advocates General, and direct application of WTO agreements.

## **C. Legal Tradition and Culture**

As with our consideration of the other three contexts in which WTO law may be seen as having been indigenized into the EU system – trade negotiations, trade disputes, and “domestic” legislation – we close this chapter with an examination of how European (and English) legal tradition and culture bear on the adjudication of trade matters within the EU system.

### **1. Judicial review**

The EU Courts’ authority to inspect administrative determinations on trade defence is generally featured as judicial review. The wide coverage of the courts’ power of judicial review is conferred by Article 230 of the European Community Treaty, which provides that:

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<sup>557</sup> Judgment of The Court of First Instance (Third Chamber) on Case T-221/05 *Huvis Corp v Council* [2008], ¶71 & 72, July 8, 2008.

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB [European Central Bank], other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-a-vis* third parties.<sup>558</sup>

This scope is regarded because it covers review on any legally binding act as well as interpretation of EU law. As one observer explains, Article 234 of the treaty provides that the Court of Justice shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of the treaty itself, (2) the validity and interpretation of acts of the institutions of the Community and of the European Central Bank, and (3) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.<sup>559</sup>

Moreover, Art 173 of the EEC Treaty (*i.e.*, Treaty establishing the European Economic Community<sup>560</sup>) “permits a natural or legal person to institute proceedings against a decision addressed to him or it. Article 173 confers jurisdiction on the Court to review the legality of Acts of the Council and the Commission other than ‘recommendations’ or ‘opinions’, and Art 173(1) enables parties to attack a Community Act on any one of four grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.”<sup>561</sup> As one authority has explained,

[t]hese four terms are borrowed from French administrative law and the grounds of annulment are similar to those developed by the French Conseil d’État as forms of ‘excès de pouvoir’, which leads to annulment in French administrative law.<sup>562</sup>

The judicial review in the civil law tradition that serves as one of the origins of EU legal tradition and culture is described as a “diffuse system of judicial review,” which is explained in the following excerpt:

The civil-law tradition is compatible with a diffuse system of judicial review – legal certainty will not be in ruins. Legal certainty can be more or less strongly cherished, however. In this regard,

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<sup>558</sup> EC Treaty, as amended by the 2003 Treaty of Nice.

<sup>559</sup> Junker, *supra note* 552, at 608.

<sup>560</sup> The EEC Treaty, signed in Rome in 1957, brings together France, Germany, Italy and the Benelux countries in a community whose aim is to achieve integration via trade with a view to economic expansion. After the Treaty of Maastricht the EEC became the European Community, reflecting the determination of the Member States to expand the Community’s powers to non-economic domains.

<sup>561</sup> Cruz, *supra note* 471, at 160-161.

<sup>562</sup> *Id.*

perhaps the civil-law tradition has given special weight to it. If the protection of legal certainty is to be maximized, the centralized model may be preferable. By establishing a constitutional court that can be reached as soon as a statute raises constitutional problems, the centralized model safeguards legal certainty in a very straightforward manner. The sooner the constitutional court speaks, the more quickly any legal doubts will be dispelled.<sup>563</sup>

This excerpt provides a clue for us to understand the comprehensive scope of judicial review in the EU, which, in turn, guarantees the fulfillment of its WTO obligations. The development of judicial review in the EU legal regime started since WWII, with the shift of the functions of constitutional courts in Europe. The constitutional courts in European countries “stopped being legislative organs and became more judicial institutions.” This fact constituted “an authentic ‘revolution’ in European legal tradition.” Furthermore, this transformation brought about “the introduction in countries with a continental legal tradition (civil law) of the Anglo-Saxon principle of *stare decisis* into the jurisdictional area. Thus, the new constitutional jurisdiction was not limited to comparing abstract norms. It also delved profoundly into matters when there were violations of norms, specifically in the case of fundamental rights, by examining appeals for legal protection.”<sup>564</sup>

## 2. Style of judgments

The style of judgments of the ECJ and the General Court as summarized above reflects a combination of the French style and the German style. In other words, the logic applied in case judgments by the ECJ and the General Courts has been heavily influenced by that practiced within the civil law tradition.

The typical French law report usually contains: (a) the name of the court that heard the case, (b) a concise statement of the precise issue before the court, (c) the judgment, collectively stated (that, in the form of ‘... the court holds...’), and no dissenting (or concurring) judgments apart from the collective judgment. Similarly in Germany, the form of the law report of a Federal Supreme Court judgment will usually contain the following sequence of items: (a) one or more opening paragraphs stating the propositions of the law supported by the decision (this part of the

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<sup>563</sup> Víctor Ferreres Comella, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 23 (2009).

<sup>564</sup> Aguilera, *supra* note 6, at 33.

report forms no part of the decision but nevertheless provides a useful summary of the issues in the case); (b) an identification of the articles of the Civil Code, Criminal Code, or other enactments, that are relevant to the case; (c) the division or section of the court, which had to decide the case; (d) the date on which the trial was concluded; (e) the initials of the parties to the action; (f) a citation of the facts of the case, abbreviated from the appeal court judgment usually along with extracts from the judgment containing the legal reasoning; (g) an indication by the court as to whether it agrees or disagrees with the previous court's reasoning and/or its decision; (h) a consideration of the appellant's grounds for appeal; and (i) finally a statement of the court's own reasons for its conclusions.<sup>565</sup>

### 3. Application of principles in EU jurisprudence

Before we turn to the application of general principles of law in EU jurisprudence, we might first examine the unique system relating to *stare decisis* within the EU adjudication. The term "case law" has different meanings in the context of the civil law and common law traditions:

In the broad sense, this refers to a body of non-statutory rules as declared, or developed, by judicial decisions. This body of law is called 'jurisprudence' in French law. In the narrow sense, case law refers to a method of using the rules, so produced, as a basis for deciding future cases. This ... is the method that is typical of the growth and evolution of the English common law tradition.<sup>566</sup>

Generally speaking, "EU law does not have a doctrine of *stare decisis*"<sup>567</sup> – a matter that is also confirmed by the sources of EU law as introduced above. From this perspective, the concept of case law in the EU is more like the one in French law.

As to the status of case law in French law, Cruz points out that the judicial decisions, although lacking any binding authority *de jure*, do have *de facto* authority. And this authority varies according to the circumstances.<sup>568</sup> The situation is similar in Germany, as explained by another authority:

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<sup>565</sup> Cruz, *supra note* 471, at 260 & 264.

<sup>566</sup> *Id.* at 250.

<sup>567</sup> Moens & Trone, *supra note* 470, at 22.

<sup>568</sup> Cruz, *supra note* 471, at 70.



... In practice a decision of the French Court of Cassation or of the German Federal Court will be followed by the lower courts just as much as the decision of an English or American Appeals Court. This is true not only of a chain of identical decisions. Even isolated decisions of the German Federal Court are accorded the greatest respect by judicial practice. A judge will deviate from such a decision only rarely and such deviation is certainly not typical.<sup>569</sup>

Having acquainted ourselves with the case law system within the EU, we now turn our focus to the application of general rules of law in EU jurisprudence.

#### a. Overview

In the Union, the ECJ has developed much jurisprudence on the application of general principles of law relating to a wide range of topics. Such application is established largely on national administrative law doctrine of the EU's leading member states. In the Union courts, the general principles can be used as (1) interpretive guides of legal documents, (2) grounds of review, (3) grounds to annul EU acts, (4) grounds to annul national measures, and (5) basis for damages actions.

The ECJ has ... developed a rich body of jurisprudence on general principles of law, covering topics such as a process rights, fundamental rights, equal treatment and non-discrimination, proportionality, and legal certainty and legitimate expectations. In developing these concepts the ECJ drew on national administrative law doctrine, German law was perhaps the most influential in this regard, providing the inspiration for the introduction of, for example, proportionality and legitimate expectations into the Community legal order.

The general principles are used in a number of different ways. They function as interpretive guides in relation to primary Treaty Articles and other Community acts. The general principles also operate as grounds of review. The Community Courts cannot invalidate primary Treaty Articles. They can however annul other Community acts, and breach of a general principle will be a ground for annulment. The principles can also be used against national measures that fall within the scope of EU law, although the range of measures caught in this manner is not free from doubt. Breach of a general principle may also form the basis for a damages action.<sup>570</sup>

The practice of applying general principles in the adjudication of disputes has its roots in civil law traditions. In the courts of civil law countries, judges refer to general principles in two kinds of circumstances mainly: one is that the particular case at issue is not covered by code provisions or legislative enactment; the other is that judges want more room for discretion and

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<sup>569</sup> Liebesny, *supra note 6*, at 96.

<sup>570</sup> Paul P. Craig & Gráinne De Búrca, *EU LAW: TEXT, CASES, AND MATERIALS* 544 (2008).

flexibility.

In French and German judgments, judges frequently refer to certain general principle of law (*clausulae generales*) as a means of justifying their decision, where the code provisions or legislative enactments do not cover precisely the particular case before them. This is necessitated by the rule that neither precedent nor doctrine can be cited as the sole ground for decision. On the other hand, even where the code provisions or statute do cover the situation, judges may prefer room for discretion and flexibility. General principles are, therefore, extremely useful to provide this flexibility and room for manoeuvre.<sup>571</sup>

b. Principle of proportionality

Article 5 (ex Article 3b) of the EC Treaty, as inserted under the Maastricht Agreement, incorporates the principle of proportionality, providing that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”<sup>572</sup> The following excerpt explains the German origin of this principle:

As is well known, the principle of proportionality is of utmost importance in German constitutional law, finding its origins in administrative law. ... The German Constitutional Court defined proportionality as “an expression of the general right of the citizen towards the state that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest”. It plays the role as a “tool of interpretation” of two conflicting fundamental rights in order to ensure the principle of unity of the Constitution.<sup>573</sup>

According to German law, three tests must be applied before using the principle of proportionality: (1) the measure must be appropriate for attaining the objective; (2) it must be necessary, in the sense that no other measure is available which is less restrictive of freedom; and (3) the effect or magnitude of the measure must not be disproportionate to its aim (proportionality in the narrower sense).<sup>574</sup>

The history of the development of the principle of proportionality into a general principle of EU law is elaborated below. According to the excerpt, the application of this principle within the Union context aims to guarantee that an individual’s freedom of action is not limited to the degree necessary for the general public interest:

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<sup>571</sup> Cruz, *supra note* 471, at 266-267.

<sup>572</sup> Jacobs, *supra note* 478, at 188.

<sup>573</sup> Xavier Groussot, *GENERAL PRINCIPLES OF COMMUNITY LAW* 20 (2006).

<sup>574</sup> Jacobs, *supra note* 478, at 2.

In EC law, the first manifestation of the principle of proportionality occurred with Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, that concerned a challenge of a general decision of the High Authority fixing Belgian coal prices. The Court observed that “in application of a generally accepted rule of law”, action of the High Authority in response to a wrongful act of an enterprise must be proportionate to the gravity of that fact. The principle developed within the administrative context, *e.g.* assessing the proportionality of legislation in the field of CAP [(*i.e.*, Common Agricultural Policy)], fines and penalties. It constitutes a general principle of law according to which the Community may impose upon Community citizens, for the purpose of the public interest, only such obligations, restrictions and penalties that are strictly necessary for the purpose of the public interest. It guarantees that the individual’s freedom of action is not limited beyond the degree necessary for the general public interest. A “reasonable relationship” must exist between the measures taken by the institutions and the aim pursued by the Community.<sup>575</sup>

The following excerpt gives us a description of applying this principle in EU case law. In short, the application of such principle is typically subject to three sub-principles – that is, *suitability, necessity, and balance*:

The ECJ has apparently borrowed the proportionality requirement from German administrative law and applied it within varying degrees of strictness. Under EC law, the development of case-law and academic commentary have carved out a standardised scrutiny process of proportionality consisting of three elements or sub-principles. Firstly, the requirement of suitability suggests that an interfering action be at least regarded as suitable for attaining its aim. Secondly, the requirement of necessity demands that authorities must choose the least restrictive among equally effective means. The third element is the idea of proportionality in the narrow sense, which demands a proper balance between the injury to an individual and the desired Community interest, prohibiting those measures whose disadvantage to the individual outweighs the purported Community interest. Determinative of the standards of judicial control are such variables as the nature of the area concerned, the value of the purpose to be sought, the intensity of an interference, and the nature of the fundamental rights affected.<sup>576</sup>

In the cases of commercial policy (including trade cases), the EU courts have reiterated the general standard of applying proportionality – the measures at issue must be appropriate and necessary.<sup>577</sup> The courts have clarified that the imposition of the measure itself cannot be questioned by this principle. Only the amount of the duties can be challenged under this

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<sup>575</sup> Groussot, *supra note* 573, at 121.

<sup>576</sup> Jacobs, *supra note* 478, at 188-189.

<sup>577</sup> Judgment of The Court of First Instance (Fourth Chamber, Extended Composition) on Case T-340/99 *Arne Mathisen AS v Council* [2002], ¶112, July 4, 2002. Judgment of The Court (Second Chamber) on Case C-452/00 *Kingdom of the Netherlands v Commission* [2005], ¶101, July 14, 2005. Judgment of The Court (Second Chamber) on Case C-26/00 *Kingdom of the Netherlands v Commission* [2005], ¶126, July 14, 2005.

principle.<sup>578</sup> The mission of the court in applying the principle to examine the amount of assessed duties is not to examine whether other less distortive measures exist, but rather to examine whether the measure that was imposed is manifestly inappropriate.<sup>579</sup> If the measure is not manifestly inappropriate, it cannot create a breach of the principle of proportionality. Furthermore, the courts have emphasized that, in trade issues, a wide discretion has been conferred on the administrative organs.<sup>580</sup> Based on these opinions, we can safely conclude that the courts have significantly raised the threshold for applying this principle in trade cases compared with that in other areas.

### c. Principle of legitimate expectations

As an authority on EU law has explained, “[t]he principle of legitimate expectations is particularly prominent in German law and known as ‘*Vertrauensschutz*’. Like proportionality and equality, it corresponds, according to the German doctrine, to a fundamental right, due to its possible deduction from the *Grundgesetz*.”<sup>581</sup>

The General Court made the following observations as to applying this principle in the Union courts. To be specific, it proposed three conditions of its application: (1) precise, unconditional, and consistent assurances are given; (2) those assurances can give rise to a legitimate expectation; and (3) those assurances comply with the applicable rules:

Three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules ... Even if assurances are made, they must create an expectation on the part of the applicant. This is not simply a subjective test. The expectation must be legitimate and [the] Court will look to

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<sup>578</sup> Judgment of The Court of First Instance (Fourth Chamber, Extended Composition) (Fourth Chamber, Extended Composition) on Case T-340/99 *Arne Mathisen AS v Council* [2002], ¶110, 121 & 122, July 4, 2002.

<sup>579</sup> Judgment of The Court of First Instance (Fourth Chamber, Extended Composition) on Case T-340/99 *Arne Mathisen AS v Council* [2002], ¶113 & 115, July 4, 2002. Judgment of The Court (Second Chamber) on Case C-452/00 *Kingdom of the Netherlands v Commission* [2005], ¶103, July 14, 2005.

<sup>580</sup> Judgment of The Court (Second Chamber) on Case C-452/00 *Kingdom of the Netherlands v Commission* [2005], ¶102, July 14, 2005.

<sup>581</sup> Groussot, *supra note* 573, at 24. The German term “Grundgesetz” is translated as basic law or fundamental law.

whether an ordinary, prudent trader would have relied on it on the basis of the institution's representation. Finally, the Union measure in question must not be illegal. If it is, it will not generate any protected expectation.<sup>582</sup>

As to trade cases such as Case T-401/06 *Brosmann Footwear (HK) Ltd and others v Council* [2010], the court stated that “the principle extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. Moreover, a person may not plead infringement of the principle unless he has been given precise assurances by the administration.”<sup>583</sup> In other words, in trade cases, whether or not the principle can be applied depends on whether or not an applicant can prove that the administration has given him “precise assurance.”

#### d. Principle of equal treatment

The principle of equal treatment applied by the Union courts derives typically from the principle of equality, which is also a principle of German constitutional law.<sup>584</sup>

Equality is one of the general principles established in EU law. In the cases concerning commercial policy, the court stated in Cases T-407/06 and T-408/06 *Zhejiang Aokang Shoes and Wenzhou Taima Shoes v Council* [2010] that the principle of equal treatment “prohibits treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment[.]”<sup>585</sup> In these particular cases, most of the alleged infringement of equal treatment was rebutted due to the findings of the courts that the situation at issue was in fact different. Outcome in these cases illustrate the fact that establishing a breach of the equal treatment principle is not easy for the applicants. The applicants usually complained on the grounds of the first half of the interpretation, but the court usually dismissed such complaints on the basis of the second half of the interpretation, as explained by the court in the language

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<sup>582</sup> Damian Chalmers, Gareth Davies & Giorgio Monti, *EUROPEAN UNION LAW: CASES AND MATERIALS* 412 (2010).

<sup>583</sup> Judgment of The General Court (Eighth Chamber) on Case T-401/06 *Brosmann Footwear (HK) Ltd and others v Council* [2010], ¶88, March 4, 2010.

<sup>584</sup> Groussot, *supra note* 573, at 23.

<sup>585</sup> Judgment of The General Court (Eighth Chamber) on Cases T-407/06 and T-408/06 *Zhejiang Aokang Shoes and Wenzhou Taima Shoes v Council* [2010], ¶92, March 4, 2010. See also Judgment of The General Court (Eighth Chamber) on Case T-401/06 *Brosmann Footwear (HK) Ltd and others v Council* [2010], ¶81, March 4, 2010.

quoted above.

#### 4. Centrality of the person and protection of fundamental rights

The right of individuals to directly appeal EU law and, especially, to challenge the soundness of a general EU regulation reflects the ideology of centrality of the person originating in the civil law tradition. An ideological reform taking place in Europe (especially in France) centuries ago gave rise to the centrality of the person, emphasizing the domain of person over things and the power of every person to receive his due.<sup>586</sup> Consequently, the ideology of centrality of the person led EU legislation to formally emphasize individual's rights, as evidenced by the adoption of the Charter of Fundamental Rights in 2000, which guarantees a broad range of civil and political rights:

In 2000 the EU adopted the Charter of Fundamental Rights, Nice, 7 December 2000..., as amended at Strasbourg, 12 December 2007... This Charter was based upon the case law of the European Court of Justice regarding the protection of fundamental rights as general principles of EU law.

As well as the usual civil and political rights, the Charter guarantees rights such as the freedom to conduct a business (Art 16), the right to strike and to bargain collectively (Art 28), information and consultation rights for employees (Art 27), protection against unjustified dismissal (Art 30), paid maternity leave and parental leave (Art 23(2)) and the protection of personal data (Art 8).<sup>587</sup>

As summarized by one authority, a large number of fundamental rights that have been addressed by the Union courts. They include: the right to dignity, the right to property, freedom of association, the doctrine of margin of appreciation, freedom of religion, the principle of equality and non-discrimination, the right to privacy, freedom to pursue a trade or profession, non-retroactivity of penal provisions, *nulla poena sine culpa*,<sup>588</sup> *nulla poena sine lege*,<sup>589</sup> *non bis in idem*,<sup>590</sup> effective judicial protection, freedom of expression, right against arbitrary

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<sup>586</sup> For elaborations on the development of centrality of the person in France, see Glenn, *supra note 6*, at 149-150.

<sup>587</sup> The Charter does not apply to the United Kingdom and Poland. Moens & Trone, *supra note 470*, at 7-8. "When the Charter was adopted it was a non-binding instrument. ... Since the entry into force [of] the Treaty of Lisbon the Charter has become legally binding upon the EU itself and the Member States when they implement EU law (Art 6(1) TEU; Art 51 (1) Charter). The Charter possesses the "same legal values as the Treaties" (Art 6(1) TEU)." *Id.*

<sup>588</sup> This term means no punishment without guilt.

<sup>589</sup> This term means no penalty without a law.

<sup>590</sup> This term means no one shall be twice tried for the same offence.

intervention, right to a fair legal process, right to be heard in a reasonable time, transparency, right to good administration, right to be heard, right to collective bargaining, right to marry and to found a family, right to liberty of movement, right to life, right to a name, and right to liberty and security of person.<sup>591</sup>

From the above perspective, it seems evident that the protection of procedural rights as well as an individual's right to directly appeal to EU law and, especially, to challenge the soundness of a general EU regulation partially originates in civil law tradition of centrality of the person and protection of fundamental rights.

## 5. Principle of due process

The protection of procedural rights by EU trade administration embodies the principle of “procedural due process,” which has its roots in the common law tradition, as explained below:

The influence on general principles is not only limited to the continental law. In 1973, the accession of common law countries (United Kingdom and Ireland) permitted the Court and the AGs to rely on the general concept of natural justice exemplified by the *audi alteram partem* principle ...[T]he influence of the common law was visible in the TMP (1974) and AM&S (1982) [cases], both concerning procedural due process. The ECJ elaborated, under the influence of the common law, procedural principles like the right to be heard (TMP) and the protection of the legal privilege (AM&S).<sup>592</sup>

## 6. Advocates General

The institution of Advocate General in the Union judicial system can be traced back into the civil law tradition also. A similar position appears in French judicial system:

Another sign of the French influence, apart from the concise single collective judgment, was the individual advisory opinion of the Advocate General that precedes the judgment; this finds its provenance in French law, in the Cour de Cassation, the Supreme Court in private law and criminal law. A similar function is performed in the Conseil d'État by the Commissaire du Gouvernement (Government Commissioner) although, unlike his counterpart with the same appellation in the other administrative courts, this official is not a member of the Conseil d'État at all...<sup>593</sup>

Another scholar also points out that “[t]his system [of Advocate General] is clearly meant to

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<sup>591</sup> Groussot, *supra note 573*, at 110.

<sup>592</sup> *Id.* at 26-27.

<sup>593</sup> Cruz, *supra note 471*, at 161.

compensate for the fact that each state has been assigned one judge, which shows the degree of importance which has been attached to the representativeness of the ECJ.”<sup>594</sup>

To sum up this section, the features of the EU’s “domestic” adjudication of trade issues have their roots in the EU legal tradition and culture, regarding the issues of judicial review, style of judgments, application of principles in EU jurisprudence (including principle of proportionality, principle of legitimate expectations, and principle of equal treatment), centrality of the person and protection of fundamental rights, principle of due process, and system of Advocate General.

## **Summary**

EU practices and experiences in international trade negotiations, international trade disputes, “domestic” legislation, and “domestic” adjudication of trade issues provide us with abundant materials to study the process of legal indigenization of WTO law at the Union level.

As one of the sponsors and leading members of the WTO, the EU participates actively in multilateral trade and FTA negotiations. Some common characteristics exhibited by various proposals with a comprehensive coverage of issues submitted by the EU are: (1) emphasis on the overall goal of the institutions at issue, (2) emphasis on the constituents of the DSB (especially the panel) as well as other procedural issues; (3) a solid style of proposals, (4) a focus on sustainable development, (5) confidence in sharing experiences and submitting proposals, (6) an emphasis on regional trade agreements, (7) a unique attitude toward S&D treatment, and (8) an emphasis on the role of principles and guidelines in improving current WTO law and procedure.

These characteristics of EU trade negotiations can partially find their roots in the legal tradition and culture of the Union. EU law, whether or not having developed into a unique legal order, has received influence from both the civil law tradition (mainly as manifest in the French and German legal systems) and the common law tradition (from the English legal system). Consequently, the characteristics of EU practices may have their roots in the civil law tradition,

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<sup>594</sup> Renaud Dehousse, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 9 (1998).



the common law tradition, and, to the extent that there is such a thing, the EU law tradition.

The role of judges, notwithstanding the views expressed by some common law scholars, is significant in the civil law tradition with regard to their functions of finding correct laws, applying the law correctly, and controlling procedures (including those relating to court investigation). The significance attached to the role of judges by the civil law tradition can partially account for EU efforts to establish permanent panelists.

The central status of principles in civil law countries explains the EU's emphasis on guidelines or principles in recommending proposals on further negotiations. The preeminent status of jurists in the civil law tradition has explained EU efforts to entrust authority to an independent group of experts to influence the AD/CVD investigations within the WTO Members. Sustainable development, as one of its fundamental strategies, leads the EU to place its focus on S&D treatment into a sustainable context.

Since the establishment of the WTO, the EU has been involved in quite a number of international trade disputes, in which its legislation (as such) and application of law (as applied) have been challenged. Behind these specific practices are EU ideologies that might conflict with the multilateral system. The conflicting practices or ideologies mainly comprise the methods of interpreting WTO agreements, the relationship between trade preferences in the FTAs and multilateralism, and the application of general principles of law originating in the civil law tradition.

The methods adopted by the EU in interpreting WTO agreements – those addressing “proper or ordinary meaning,” “object and purpose” of the articles at issue, context of negotiations, and principles of general international law – are consistent with the EU's approaches to legal interpretation originating in both the civil law tradition and the common law tradition.

EU opinion that trade preference in FTAs is the stepping stone to multilateralism and fundamental mechanisms of the WTO accounts for partially the EU's practices in establishing a most complex regime of regional trade preferences, in which the multilateral mandate – MFN

treatment –is at the bottom.

Taking general principles as the foundation of EU arguments in front of the DSB reflects the EU's "domestic" practice of frequently applying general principles of law in its jurisprudence.

The authority of trade legislation is enjoyed by the Union exclusively. In some circumstances, the Union may authorize this power to the Member States. At the Union level, trade legislation, being a part of the Common Commercial Policy which covers broad topics such as import, export, trade defence, trade barriers, and IPR protection. Furthermore, EU trade law usually takes the form of basic regulation.

The style of trade regulations can be traced back to the concept of law or of the legal rule in civil law countries (especially France). EU trade regulations usually begin with a strong and long that contains the legal basis, background, purposes and principles of the regulation at issue.

The effect of direct application of EU trade regulations within its Member States can effectively avoid the risk of taking a more complicated path of WTO-Union-States to indigenize the WTO agreements into domestic legal systems.

As for adjudication, EU trade regulations are administered by the Commission and the Council, and both the ECJ and the General Court have jurisdiction over trade cases at Union level. The determinations made by the Commission and the Council, especially those on trade defence issues, take the form of "regulation," which has general legal binding force within the EU. Importantly, individuals are given the rights to bring actions against both specific determinations and basic regulations. Action for annulment, direct action for compensation, and preliminary ruling are three main actions that have been brought regarding trade issues. The style of the judgments is relatively solid. And the opinions of Advocates Generals are highly respected by the ECJ.

Broad authorization of judicial review has been entrusted to the ECJ, influenced by the legal systems of EU Member States (especially civil law countries), the style of courts judgments stands for a combination of French and German styles. The ideology of applying

general principles of law is in the Union courts also inherited from the civil law tradition. Furthermore, the Union courts have established their own thresholds of application of these general principles in trade cases. Centrality of the person and protection of fundamental rights originating in civil legal systems have also appeared in “domestic” adjudication of trade issues within the EU. The system of Advocates General in the Union adjudication represents high respect given to jurists by the civil law tradition.

## Appendix 5.1

(Pertinent passages in main text are found largely in subsection IB7 of Chapter 5)

### Excerpts of EU- TN/CTD/W/20, EU-TN/TE/W/47, and EU-TN/TE/W/56

#### The WTO Work Program on Special and Differential Treatment

##### Some EU Ideas for The Way ahead

Communication from the European Communities (TN/CTD/W/20)

The following communication dated 18 November 2002 has been received from the European Communities.

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...

12. Several delegations have made suggestions as to these working assumptions or guidelines. We suggest that the following would be particularly useful in steering our future work:

(a) All S&D treatment proposals should be evaluated against the following basic criterion: will this aid the economic development of developing countries and their fuller integration of developing countries into the trading system, as opposed to creating what has been described as permanent exclusion or second tier Membership of the system? The following sub-set of criteria will help to answer this question.

(b) S&D treatment provisions should be seen as steps towards, or flexibilities within, a common system of rights and obligations rather than a parallel set of rules in themselves. ...

(c) Given that S&D treatment is intended to assist integration of Members into the WTO system, S&D treatment provisions should be understood to be an operational part of the integration process, often of a temporary nature, and reflecting developing countries' specific capacities, limitations or needs in a given area. Their application by Members should thus be regularly reviewed, and Members should cease to apply, or rely upon, such provisions as soon as the problems they were designed to compensate for no longer apply. ...

(d) Since the aim of S&D treatment is the integration of developing countries into the multilateral trading system, it follows that S&D treatment provisions which are trade expanding should be preferred to those which are trade restrictive. The latter should remain

exceptional in nature.

(e) In evaluating proposals made by Members to modify existing S&D treatment provisions, the previous level of utilization of the provision in question should be known, and the reasons for this identified. Where S&D treatment provisions have been shown not to have been used or not to have had the impact on Members' integration for which they were originally designed, it is obvious that they should be carefully reconsidered, and either abandoned or modified.

(f) The current categorisations of developing countries for S&D treatment purposes are LDCs and developing countries more generally. ...

(g) It should however be feasible to accept further differentiation amongst developing country users of S&D treatment in specific cases, or within specific agreements, preferably based on some simple and transparent criteria that would reflect in an objective manner the very different institutional capacities of different Members, their ability to participate in international trade, their income levels, or the ability of their economies to adjust to fuller rights and obligations. ...

(h) The corollary of this is that there is a relationship between the extent of S&D treatment that may be sought or applied, and the developing country Members who could qualify for it. ...

(i) There should be a more clearly articulated relationship between extent of commitments, lengths of transitional periods for assumption of commitments, and the provision of technical assistance to help meet commitments. This relationship should be put on firmer foundations in those agreements and areas where it is most relevant. ...

### **Market Access for Environmental Goods**

Communication from the European Communities (TN/TE/W/47)

#### Paragraph 31(iii)

In this first submission to the Committee on Trade and Environment Special Session and fifth submission to the NAMA negotiating group, the European Communities wishes to clarify its approach to achieve the objectives Ministers set with regard to the negotiations on environmental goods under paragraph 31 (iii) of the Ministerial Declaration.

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...

## II. GUIDING PRINCIPLES

6. The European Communities considers that the identification of environmental goods should be guided by the following principles:

- Environmental goods should be defined in order to contribute to the fulfilment of national and internationally agreed environmental priorities. Multilateral Environmental Agreements and the MDGs, in particular on access to safe water and sanitation, provide useful guidance on the environmental objectives that are relevant for the identification of environmental goods. Pollution prevention, resource use reduction and waste minimization could also be guiding priorities that are included in both Agenda 21 and the WSSD Plan of Implementation.
- Any definition should encompass categories of interest to all Members. In particular, Members should welcome contributions by developing countries defining products of their interest.

### **EC Submission on environmental goods**

Submission by the European Communities (TN/EE/W/56)

Paragraph 31 (iii)

The following communication, dated 4 July 2005, is being circulated at the request of the Delegation of the European Communities.

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...

The selection of environmental goods is guided by two main principles:

- They contribute to the fulfilment of national and international environmental priorities including Multilateral Environmental Agreements, the Millennium Development Goals (in particular on access to safe water and sanitation), Agenda 21 and the WSSD Plan of Implementation.
- They encompass categories of interest to all WTO Members including developing countries.

## Appendix 5.2

(Pertinent passages in main text are found largely in subsection IB8 of Chapter 5)

### Excerpt of EU-TN/GL/GEN/109

#### Independent Group of Experts for the Enforcement of Initiation Standards

##### Submission from the European Communities

The following communication, dated 19 April 2006, is being circulated at the request of the Delegation of the European Commission.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/90) also be circulated as a formal document.

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...

##### Proposed solution

- We believe that it is worth pursuing the option of the creation of a group of independent experts, and to examine in particular, the way such a group would work in practice. Thus, we are considering proposing that:
  - Any Member subject to an investigation which considers that the evidence contained in the complaint does not fulfil the requirements of Articles 5.1, and 5.2 of the ADA or that the authorities of the importing country have not acted in accordance with Articles 5.3, 5.4, 5.6 and 5.8 of the ADA, could call upon the group of experts in order to obtain an independent assessment of the facts.
  - The Member carrying out the investigation would be required to provide the necessary assistance, in particular by providing to the group the facts on which the decision to initiate was based. It could be discussed whether third parties should be allowed to participate in this process.
  - The group of experts should be composed of highly experienced officials in AD. ...
  - Although the opinion issued would not be binding (i.e., the investigating authority could proceed with the investigation or decide to terminate it and tackle the problems found before initiating a new investigation), the opinion of the group of experts could be presented as additional

evidence before DSU proceedings. Even if not legally binding, successive negative opinions on a Member's initiation standards would highlight unsustainable systemic breaches of the ADA.



## Appendix 5.3

(Pertinent passages in main text are found largely in subsection IIIA of Chapter 5)

### Illustrations of EU Basic Regulations on Trade

- Council Regulation (EC) No. 1225/2009 [on protection against dumped imports from countries not members of the European Community];
- Council Regulation (EC) No. 1236/2005 of 27 June 2005 [concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment];
- Council Regulation (EC) No. 1061/2009 of 19 October 2009 [establishing common rules for exports];
- Council Regulation (EC) No. 260/2009 of 26 February 2009 [on the common rules for imports];
- Council Regulation (EC) No. 597/2009 of 11 June 2009 [on protection against subsidised imports from countries not members of the European Community];
- Council Regulation (EC) No. 428/2009 of 5 May 2009 [setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items];
- Council Regulation (EC) No. 116/2009 of 18 December 2008 [on the export of cultural goods];
- Council Regulation (EC) No. 625/2009 of 7 July 2009 [on common rules for imports from certain third countries];
- Council Regulation (EC) No. 717/2008 of 17 July 2008 [establishing a Community procedure for administering quantitative quotas];
- Council Regulation (EC) No. 427/2003 of 3 March 2003 [on a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China and amending Regulation (EC) No 519/94 on common rules for imports from certain third countries];
- Council Regulation (EC) No. 625/2009 of 7 July 2009 [on common rules for imports from certain third countries]; and

Council Regulation (EC) No. 3286/94 of 22 December 1994 [laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.]

## CHAPTER 6. LEGAL INDIGENIZATION AND THE WTO

As defined in Chapter 2, legal indigenization of WTO law is a two-way process. That is, the indigenization process has both an inward direction and outward direction. On the one hand, the Members have characterized their rights or obligations under multilateral trade rules in ways that are consistent with their own legal traditions and cultures (*i.e.* the inward direction). On the other hand, they have consistently tried to develop a set of trade rules at the multilateral level that can best fit into their own legal systems or traditions (*i.e.* the outward direction). The preceding three chapters analyze how China, the United States, and the European Union have tried to indigenize WTO law in international trade negotiations, in international trade disputes, in domestic trade-related legislation, and in domestic trade-related adjudication.

The purpose of this chapter is different. The aim here is to observe the significance of legal indigenization at the multilateral level from the perspective of the WTO itself. Three questions are raised on this point. (1) To what extent have the Members indigenized the multilateral rules and practices? (2) How has legal indigenization been reflected in their efforts in further trade negotiations? (3) What are the implications of legal indigenization for the WTO? These three questions are addressed separately in the following parts and answered collectively in the *Summary* with which this chapter concludes.

### I. Indigenized WTO Agreements and Practices

Both the process and the outcomes of the efforts to negotiate WTO agreements, as well as practice of WTO adjudication emerging from those agreements, have shown evidence of imbalanced influence from the Members. Generally, the more powerful a Member is, the more influence it can exercise, especially in an outward direction, over the agreements and their application. Three examples – the United States and the multilateral antidumping mechanism, the rules for applying the notion of “legitimate expectations,” and the admissibility of *amicus curiae* submission in the DSB proceedings – are analyzed in the following paragraphs in order to demonstrate three aspects of indigenized WTO agreements and adjudication: (1) how certain

members have influenced the negotiations and conclusion of WTO agreements; (2) how the organization has undertaken efforts to establish its own rules for applying a notion borrowed from the civil law tradition; and (3) how a member persuaded the Appellate Body to admit *amicus curiae* submissions in light of the fact that the rules are unclear on the admissibility of such submissions.

## **A. The United States and the Multilateral Antidumping Mechanism**

Since the emergence of the GATT in 1947, the development of multilateral rules on antidumping have undergone four important stages: (1) Article VI of GATT 1947, covering *Anti-dumping and Countervailing Duties*, (2) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1968 (the Kennedy Code), (3) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1979 (the Tokyo Code), and (4) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (the ADA 1994). The development of multilateral antidumping rules can be regarded as a combined result of influence coming from several sources – from the U.S. antidumping legislation and practices, from concerns and criticisms thereon made by other members, and from an exercise of the *de facto* “decisive” power of the United States as well as the EU over multilateral negotiations.

### **1. History of U.S. antidumping legislation**

An examination of the history of U.S. antidumping legislation can explain that, in addition to the willingness of indigenizing multilateral rules, the achievement of expected outcome of a country at the multilateral level also depends on its capacity of promoting outward indigenization. In this instance, the capability of the United States to influence the multilateral antidumping rules relies heavily on its own relatively mature legal system of antidumping. In addition, the U.S. antidumping legislation, especially that existed before 1947, was an important source of multilateral rules.

Before Article VI of the GATT 1947 emerged, the United States had developed a solid legal mechanism for handling antidumping claims – that is, claims that imported goods were being

“dumped” on U.S. markets at unfairly low prices. It was a mechanism which was established mainly by the Sherman Act of 1890, the Revenue Act of 1916, the Antidumping Act of 1921, and the Tariff Act of 1930.

In some opinions, the genesis of U.S. antidumping legislation can be traced to 1890, when Congress passed the Sherman Antitrust Act, which dealt in general with unfair trade.<sup>595</sup> However, this law was not applicable to imported goods, even though it prohibited the monopolization of the U.S. domestic market,<sup>596</sup> taking into account the fact that the U.S. domestic market had not been unified at that time.

Under Title VIII of the Revenue Act of 1916, the concept of dumping in international trade was formally addressed for the first time in the United States. The following excerpt gives a brief introduction of this act:

The Act’s antidumping provisions were rooted more in the concepts of unfair trade under U.S. antitrust law than in tariff law. Borrowing the term of “market value” established in the Tariff Act of 1913, section 801 of the new law declared the importation and sale of articles “sold at a price substantially less than market value or the wholesale price of such articles” to be unlawful.<sup>597</sup>

Due to the weaknesses revolving around applicability pointed out by the following excerpt, the 1916 Act was, in fact, an ineffective piece of legislation with regard to antidumping:

Violation of the 1916 Act was punishable by serious criminal and civil penalties (injured parties could recover treble damages). However, as a criminal statute, the Act was subject to strict interpretation, and the level of proof required and the need to show an intent to injure a domestic industry severely curtailed its effectiveness. The failure to assign the task of enforcement to a specific government agency also contributed to the Act’s ineffectiveness.<sup>598</sup>

In order to overcome the ineffectiveness of the 1916 Act identified above, the Antidumping Act of 1921 was enacted on May 27, 1921. The 1921 Act gave much attention to substantive

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<sup>595</sup> Terence P. Stewart, Susan G. Markel & Michael T. Kerwin, *Antidumping*, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terence P. Stewart ed., vol. 2) 1383, 1401 (1993).

<sup>596</sup> K.D. Raju, WORLD TRADE ORGANIZATION AGREEMENT ON ANTI-DUMPING: A GATT/WTO AND INDIA LEGAL JURISPRUDENCE 13 (2008).

<sup>597</sup> According to most authorities, the intent of the exporter would be a factor to establish dumping, for dumping was illegal only if such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. Stewart, Markel & Kerwin, *supra note* 595, at 1402.

<sup>598</sup> *Id.* at 1403.

issues, such as the definitions of certain significant terms including “purchase price,” “exporter’s sales,” “foreign market value,” and “cost of production.”<sup>599</sup> In addition, it

granted the Secretary of the Treasury the responsibility to determine whether a U.S. industry was being injured, or was being threatened with injury, by imports sold in the U.S. at prices less than “fair value”.<sup>600</sup>

A few years later, the Tariff Act of 1930 set out provisions on procedural issues, mainly with regard to the imposition of antidumping duties and the review of such duties.<sup>601</sup>

## 2. Article VI of the GATT 1947

The first multilateral rules on antidumping came in the form of Article VI of the GATT 1947. Although Article VI is a short section and does not provide detailed rules for administering the mechanism (except for the definition of dumping and some other basic parameters), the incorporation of antidumping issues into the GATT was a benchmark of the multilateral trading system. As pointed out in the excerpt below, this incorporation was an outcome of the insistence of the United States:

In November 1945, the United States issued a pamphlet entitled *Proposals for Expansion of World Trade and Employment*, which contained several proposals, including some rules for international trade and an outline for an International Trade Organization (ITO). The report was published and

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<sup>599</sup> The 1921 Act specified how the prices were to be determined, through definitions of the concepts of “purchase price” (the price paid for the imports when purchased by a buyer independent of the exporter), “exporter’s sales price” (the price for imports purchased “by or for the account of the exporter”), “foreign market value” (the home market price of the exporter), and “cost of production” (the sum of costs associated with the production of the goods exported, including general expenses and profit). The Act specified that imported merchandise was to be considered dumped “if the purchase price or exporter’s sales price is less than the foreign market value (or, in the absence of such value, than the cost of production),” and that such merchandise was to be assessed by the customs authorities a “special dumping duty” equal to the difference in prices (no criminal penalties or damages to plaintiffs were imposed). *Id.* at 1404.

<sup>600</sup> *Id.* at 1403-1404.

<sup>601</sup> The 1930 Act is confided in Title 19 *Customs Duties* of the United States Code. Parts II and III of Subtitle IV *Countervailing and Antidumping Duties* of Title 19 elaborate on procedural issues of the imposition and review of antidumping duties.

Part II *Imposition of Antidumping Duties* deals with issues of: imposition of antidumping duties, procedures for initiating an antidumping duty investigation, preliminary determinations, termination or suspension of investigation, final determinations, assessment of duty, treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order, conditional payment of antidumping duty, and establishment of product categories for short life cycle merchandise.

Part III *Reviews; Other Actions regarding Agreements* deals with issues of: administrative review of determinations, special rules for section 1675(b) and 1675(c) reviews; special rules for injury investigations for certain section 1303 or section 1671(c) countervailing duty orders and investigations, required consultations, definitions, and special rules.

sent to other governments for their review. It specifically addressed the problems with cartels, and suggested that one function of the ITO be to formulate “a general definition of circumstances under which antidumping and countervailing duties may properly be applied to products imported from other members.”

Largely at the insistence of the United States, one of the areas addressing in the original General Agreement was unfair trade in the form of dumping and subsidized exports. There was general support in the negotiations for allowing the imposition of antidumping and countervailing duties under a multilateral agreement, as long as such duties were imposed where conditions had been properly investigated.<sup>602</sup>

During the negotiations of Article VI, the scope of the definition of dumping became one of the major areas of disagreement arising among the participants. Supported by developed countries including the United States, a relatively narrow definition was adopted ultimately, as reviewed below:

First, with regard to the scope of the definition, early in the negotiations the parties established that there were four types of dumping: price, service, exchange, and social. Opinion on the definition of dumping was divided into two camps. On one side were the developing countries, who argued that almost all forms of unfair trade practices should come under the dumping heading, rather than just price dumping. Such a broad definition would have left open a wide range of retaliatory actions...

In contrast, the developed countries (the U.S., the U.K., Canada, and other British Commonwealth countries) favored a more limited definition. Their basic position did not exclude other types of dumping from international consideration, but it deemed non-price dumping as beyond the parameters of the antidumping articles and the technical sub-committee. In the end, the more narrow definition was adopted.<sup>603</sup>

### **3. The Kennedy Code**

The lack of specificity of Article VI provided a large space for countries to implement it in accordance with their own legal systems and existing laws, a flexibility that would naturally lead to conflicts among trading partners. In the Kennedy Round of multilateral trade negotiations, therefore, the United States established its own objectives in the antidumping negotiations – that is, to develop a set of rules that could increase procedural transparency of antidumping mechanisms in its trading partners, as iterated below:

While the U.S. was a frequent user of antidumping law, American exporters regularly faced

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<sup>602</sup> *Id.* at 1405-1406.

<sup>603</sup> *Id.* at 1406-1407.

accusations of dumping. It was the U.S. position that the antidumping investigations of its trading partners were overly secretive, with no public divulgence of the reasoning behind decisions. An increase in procedural transparency in the administration of the systems of the United States' trading partners was, therefore, a major concern. ...

Although the United States faced criticism of its antidumping laws on issues such as the standard of injury, it was prepared to negotiate a more unified set of international antidumping standards...

The initial U.S. position on the negotiations was that agreement had to be reached on the broad conceptual and philosophical aspects of antidumping before discussion of specific issues of procedures and administration could take place. The U.S. representative to the Group on Antidumping Policies regarded procedural matters as an essential part of any international agreement but did not believe that a discussion of procedures was the best way to initiate a negotiation of an international antidumping agreement. ...<sup>604</sup>

In the Kennedy Round, the U.S. antidumping legislation and practices which had established a sophisticated antidumping mechanism by both conceptual provisions (as in the 1921 Act) and procedural provisions (as in the 1930 Act), became the focus of discussion, as recalled below.

While the U.S. was not alone in criticism it received for its antidumping system, the importance of the U.S. market in the world economy made it a special focus. U.S. antidumping law was more developed and specific than that of a number of other countries, which engendered detailed examination by other countries. In addition, the transparency of the American system permitted other parties to examine the U.S. antidumping regime closely. <sup>605</sup>

As indicated above, the U.S. legislation on antidumping invited criticisms from other negotiators in the Kennedy Round. One of the concerns was that the U.S. legislation itself was not consistent with Article VI of the GATT 1947, especially regarding its injury standards:

[W]hile Article VI specified that dumping and subsidization must result in "material injury" to a domestic industry for duties to be assessed, the U.S. Antidumping Act of 1921 specified only that a domestic industry must be or be likely to become "injured." While Article VI did not define material injury, the subtle difference in phrasing in the U.S. legislation would in time become an area of contention, as many of the other contracting parties held that the U.S. standard for injury was significantly lower than that specified in other countries and under Article VI.<sup>606</sup>

The criticisms from other negotiators covered a broader scope of issues than merely the

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<sup>604</sup> *Id.* at 1421-1422.

<sup>605</sup> *Id.* at 1423.

<sup>606</sup> *Id.* at 1409.

standard of establishing “injury.” For instance, the United Kingdom raised concerns about the U.S. law regarding such matters as these:

...[T]he U.S.’s division of responsibilities between the Treasury Department (which first determined dumping) and the Tariff Commission (which subsequently determined injury)...[t]he withholding of appraisalment by the U.S. ... the ability of United States authorities to initiate antidumping investigations. ...the U.S. procedure on quantity discounts in the home market in the determination of fair value. ... [the U.S.] regulations on the disclosure of information received in antidumping investigations [which were considered] inequitable toward foreign respondents accused of dumping, “and inhibit[ed] exporters from presenting their case to the best effect” ... [the fact] that decisions of the U.S. Tariff Commission were unpredictable, because U.S. law had no formal standards as to what constituted injury or how to determine causality.<sup>607</sup>

In addition to the concerns raised by the United Kingdom, the dispute over the U.S. practice of regarding a regional industry to be “an industry of the United States” was an extremely contentious one. Nevertheless, with the support of a number of countries, such as Denmark, Sweden, and Australia, the concept of recognizing a regional industry was ultimately adopted by the Kennedy Round.<sup>608</sup>

#### 4. The Tokyo Code

In the post-Kennedy era, the United States made some modifications to its antidumping law, which also brought about concerns from its trading partners, especially the EC. Various issues of U.S. legislation, such as “sales at a loss,”<sup>609</sup> “allowances relating to price comparability,”<sup>610</sup> “determination of material injury,”<sup>611</sup> and “regional protection,”<sup>612</sup> triggered vigorous

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<sup>607</sup> *Id.*

<sup>608</sup> See *id.* at 1423-1429.

<sup>609</sup> “The U.S. Congress amended the U.S. Antidumping Act of 1921 in the Trade Act of 1974. The 1974 amendment included a provision describing how sales in the home market were to be treated if made at prices less than the cost of production. It provided that when there was reasonable ground to believe that products were being sold below cost, an investigation would be undertaken regarding the cost of production.” *Id.* at 1442-1443.

<sup>610</sup> “Generally, the U.S. would allow adjustments for any expenses that were incurred because of one specific sale or group of sales. These expenses included direct material and labor costs as well as related factory overhead expenses.” *Id.* at 1446.

<sup>611</sup> “Many were concerned that the U.S. in particular had initiated investigations without sufficient evidence of injury, thus creating unwarranted burdens for innocent exporting countries. Even though pleased that the U.S. had abandoned the ‘de minimis doctrine,’ signatories continued to be concerned over the future U.S. interpretation of the phrase.” *Id.* at 1447-8.

<sup>612</sup> In 1964, the United States began assessing the impact of goods imported at less than fair value on regional markets. The U.S. Constitution requires that all duties be applied uniformly throughout the country. As a result, before issuing an affirmative injury determination, the International Trade Commission must “be confident that



complaints. Consequently, although antidumping was not considered a priority in the area of non-tariff barriers at the early stages of the Tokyo Round of multilateral trade negotiations,<sup>613</sup> the concerns from other negotiators about the U.S. legislation led to the adoption of a new code on antidumping in the Tokyo Round. As one authority has emphasized, the revision of the Kennedy Code in the Tokyo Code was largely based on European negotiators' concerns on certain U.S. legislation and practices:

Largely based on European negotiators' previously mentioned concerns regarding injury standards (and in conflict with the concerns of the developing countries), the Tokyo Round Agreement revised the Antidumping code so that it was no longer necessary to show that dumping was the principal cause of injury when contributing factors existed.<sup>614</sup>

## 5. Anti-dumping Agreement (ADA) 1994

Early in the Uruguay Round of multilateral trade negotiations, the U.S. legislation once again became the focus of discussion and criticism. Two examples are the U.S. definition of "industry"<sup>615</sup> and its use of cumulation.<sup>616</sup> Despite such criticisms, the United States still submitted several proposals in the early stages of the Uruguay Round, focusing on various issues of antidumping rules, such as those relating to clarification, injurious dumping practices, and circumvention.<sup>617</sup>

When the Uruguay Round entered into the phase of draft discussion, the United States

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regional impacts have the proscribed injurious effect on an industry as a whole when considering the magnitude of regional injury attributable to [less than fair value] imports." *Id.* at 1449.

<sup>613</sup> *Id.* at 1436.

<sup>614</sup> *Id.* at 1456.

<sup>615</sup> "In response to the U.S. enactment of the Trade and Tariff Act of 1984, a number of signatories objected to the U.S. definition of "industry" in that legislation, which stated that the domestic industry for the production of wine included the producers of grapes. For example, the EC stated the U.S. definition of industry: "clearly departed from Article 4:1 of the Code." *Id.* at 1475.

<sup>616</sup> "A number of signatories, especially developing countries, express objections to the use of cumulation by certain parties in their antidumping proceedings in determining whether the domestic industry had been injured by dumped imports. In a discussion of the U.S. Trade and Tariff Act of 1984, the Nordic Countries representative stated that it was "not clear how this would be applied over time if it included imports which were negligible in volume and market share, and if imports already subject to antidumping measures would also be included." *Id.* at 1475-1476.

<sup>617</sup> "The representative of the United States introduced a submission in December of 1987 that proposal called for clarification of Code remedies regarding the concept of recidivist (or repeat) dumping and consideration of possible revision of the Code to deal with diversionary practices taken by companies to avoid antidumping duty orders." *Id.* at 1486-1507.

began to exercise its *de facto* “decisive” influence on the drafts of antidumping agreement. Briefly, due to the strong criticism from the United States as well as the EU, the drafts of Carlisle I,<sup>618</sup> Carlisle II,<sup>619</sup> New Zealand I, New Zealand II, New Zealand III,<sup>620</sup> and the Ramsauer text<sup>621</sup> were disqualified as the foundation multilateral agreement. Instead, because of support from the United States and the EU, the Dunkel Draft successfully served as the basis of further discussion and led to the conclusion of ADA 1994.<sup>622</sup>

To sum up, based on a domestically well-developed mechanism in the United States, the country can be said to have successfully incorporated the issues of antidumping into the multilateral trading system. And this incorporation occurred over many decades. The adoption of a narrow definition of dumping in Article VI of the GATT 1947, the first multilateral antidumping rules, had been insisted on by the U.S.-led group of developed countries. In the Kennedy Round, a new code on antidumping was negotiated and concluded, originating in the

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<sup>618</sup> “Deputy Director-General Carlisle drafted his proposed negotiating text and distributed the document on July 6, 1990, after considering the country positions set forth in the Informal Group over the previous several months and in anticipation of the Trade Negotiations Committee meeting of July 1990. The first draft, Carlisle I, incorporated certain provisions proposed by the U.S. and EC on anti-circumvention...The United States indicated that it ‘understood that the Acting Chairman would revise the paper on the basis of recent informal discussion [and] expressed its strong belief that any such revision maintain the balance that had been in the original paper.’” *Id.* at 1515-1517.

<sup>619</sup> “The second revised antidumping text, commonly referred to as Carlisle II, was released on August 14, 1990. This draft incorporated almost all suggestions made by the parties on Carlisle I. Outside the correction of technical items, the Carlisle II was roundly criticized. The U.S. delegation said it did not consider the second draft an improvement over Carlisle I and that the use of so much bracketed text left too many issues unresolved.” *Id.* at 1519-1521.

<sup>620</sup> “GATT Director-General Arthur Dunkel called a “green room” meeting of top-level negotiators on October 30 [of 1990]. During this meeting, Dunkel assigned two important tasks to various delegations in an effort to break the impasse. First, he asked the New Zealand delegate to attempt to address the most contentious antidumping issues and to forge a compromise agreement or a text acceptable for future negotiations. At another “green room” meeting held on November 12, New Zealand reported that it had still been unable to achieve a consensus on the text. This delay was reportedly attributable, in large part, to strong criticisms from the U.S. and EC. The second text drafted by New Zealand also invited much criticism.” *Id.* at 1522-1525.

<sup>621</sup> “In a final attempt to get the parties to agree on a negotiating text, in late November of 1991, Rudolph Ramsauer, head of the informal working group on antidumping, issued a new draft text that was designed to be a compromise document for continuing negotiations. The Ramsauer text was criticized by the U.S. and the European Community, with one EC official quoted as saying that the draft was “not balanced” and “not operational.”” *Id.* at 1529-1532.

<sup>622</sup> “On December 20, 1991, the Dunkel draft of the Uruguay Round agreement was released, including the antidumping text. In the antidumping area, a “private-sector source” was quoted as saying that the U.S. Department of Commerce was of the opinion that the Dunkel draft “would mark the beginning of serious negotiations in the area of antidumping.” Another source was quoted as saying that the U.S. stood firmly against changes to antidumping rules, and that progress on antidumping was related to the overall Uruguay Round agreement. The US still gave some criticisms to the antidumping text. After tough negotiations, the antidumping agreement was agreed.” *Id.* at 1536-1591.

U.S. objectives to develop uniform rules for its trading partners. Despite the criticisms and concerns from its trading partners, the U.S. legislation and practices still served as the basis of the discussion. Unlike the Kennedy Code, the Tokyo Code, which modified the Kennedy Code, was negotiated and concluded out of the EU's concerns on U.S. legislation and practices in the post-Kennedy era. Early in the Uruguay Round, the U.S. legislation and practices on antidumping in the post-Tokyo era again raised wide concerns and criticisms from other negotiators. In the course of those negotiations, however, the United States, as well as the EU, exercised their *de facto* "decisive" influence and pressed successfully for the conclusion of a multilateral agreement based on a draft they supported.

## **B. Rules for Applying the Notion of "Legitimate Expectations"**

The notion of "legitimate expectations," whose origin and contents are analyzed above in Chapter 5, is one of the representative concepts developed by the civil law tradition. The following excerpt will help us review general meaning of this principle:

The principle of legitimate expectations concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority. The principle therefore concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tend to undermine them. The role of the administrative court is to determine the extent to which the individual's expectation can be accommodated within changing policy objectives.<sup>623</sup>

Taking into consideration the influence of European countries on the emergence of the GATT, it is no wonder that this notion has been used since the establishment of the multilateral trading system in 1947. The GATT 1947 and WTO dispute settlement practice have established a non-violation claim, of which "legitimate expectations" constitutes one of the elements. Under a non-violation claim, which is unusual in international law, a benefit that is reasonably expected

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<sup>623</sup> Robert Thomas, LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW 41 (2000).

by the complaining party must be established.<sup>624</sup>

The requirement of “legitimate expectations” to establish a benefit is contained in both the GATT and the General Agreement on Trade Services (GATS), as elaborated below:

Notably, the requirement of existence of “legitimate expectations” of benefit found its way into the GATT 1947 disputes settlement practice, even though the Article XXIII:1(b) of GATT 1947 did not explicitly refer to it. Similarly, Article XXIII:1(b) of the GATT 1994 does not indicate such a requirement. The only exception, under the WTO Agreements’ relevant Articles, is Article XXIII:3 of the GATS Agreement, which explicitly requires such a concept for the element “benefits accruing” to exist.<sup>625</sup>

Article 26.1 of the Understanding of Dispute Settlement (DSU) also gives some elaboration of such a non-violation claim, as reviewed by one authority as follows:

[T]he *chapeau* of Article 26:1 of the *DSU* elaborates on the meaning of non-violation nullification or impairment. It both confirms that DSU procedures apply to this claim, and modifies them. . . .

Most significantly, read together, Paras 1(b) to (d) imply a WTO Member prevailing on a non-violation nullification or impairment claim has no right to retaliate (*i.e.*, to withdraw concessions) against the losing Member.<sup>626</sup>

Furthermore, according to the same authority, the notion of “legitimate expectations” represents an evident distinction between violation and non-violation claims:

[A] “violation” claim under Article XXIII:1(a) [] means the complaint alleges the respondent has implemented a trade measure violating some provision of GATT (or an accord negotiated thereunder). The expectations of the complaint are irrelevant to a “violation” case. What matters is whether the disputed measure does, or does not, derogate from GATT disciplines.<sup>627</sup>

Although the civil law tradition, as the place of origin of the notion of “legitimate

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<sup>624</sup> Kern Alexander & Mads Tønnesson Andenæs, *THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES* 539 (2008).

<sup>625</sup> *Id.* at 538-539.

<sup>626</sup> The contents of Article 26.1 is summarized as follows:

First, Para.1(a) calls for a more rigorous pleading, namely, a “detailed justification,” than a typical case. Secondly, sub-Para.1(b) makes clear there is no obligation to withdraw a measure. The logic is there is no allegation or legal conclusion the measure violates a GATT obligation. Thirdly, sub-Para.1(c) explains a decision of an arbitrator about the level of benefits nullified or impaired is not binding on the parties. Fourthly, sub-Para.1(d) modifies the preference in Article 22:1 of the DSU, which is for full compliance over compensation or retaliation. In effect, sub-Para.1(d) says in a non-violation case, compensation is the preferred as a remedy, which follows logically from the fact sub-Para.1(b) does not require full compliance (in the sense of withdrawal of the measure). Raj Bhala, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 1154 (2005) [hereinafter *Bhala-GATT*].

<sup>627</sup> *Id.* at 1152.

expectations, is able to provide a sophisticated foundation regarding the application of the pertinent notion, the WTO has been trying to develop its own rules in applying this notion. Three cases in particular have made significant contributions to establish such rules. Those cases, as discussed below, are Japan – Film (the DS 44 case), EC – Computer Equipment (the DS 62/67/68 case), and EC – Asbestos (the DS 135 case).

### **1. Case of Japan – Film**

In the Case of Japan – Film, actions adopted by the Japanese Government affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper were challenged by the United States. The following excerpt gives an explanation of how the elements of “legitimate expectations” were established by the DSB in this case. In short, the DSB held that in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time of negotiations of the commitments resulting in such benefit.

The practice, as developed under the GATT 47/WTO dispute settlement, has established standard for determining the existence of expectation and its legitimacy or reasonableness. It has been established that in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time of negotiations of the commitments resulting in such benefit. If the measures were expected, at that time, no legitimate expectation of benefits accruing to from the relevant agreement, could exist. In *Japan-Film*, the panel explicitly linked the “non-expectation of a measure” with the legitimacy of expectation of improved market access could exist.<sup>628</sup>

To sum up, the essential elements of the principle of “legitimate expectations”, as established in this case involving Japan, are:

- The existence of expectation basing on action or omission by an actor; and
- The legally valid justification of the expectation (reasonableness).<sup>629</sup>

### **2. Case of EC – Computer Equipment**

The Case of EC – Computer Equipment is another important one that helped the DSB

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<sup>628</sup> Alexander & Andenæs , *supra note* 624, at 539.

<sup>629</sup> *Id.*

establish its rules for applying the notion of “legitimate expectations.” In this case, the European Communities’ application of tariffs on local area networks was challenged by the United States. One of the pivotal arguments of the United States is that the EU Schedule of Concessions is to be interpreted based on an exporter’s legitimate expectations. This argument received support from the Panel, as summarized by an authority as follows:

The critical aspect of the American argument concerned a concept known in GATT practice as “legitimate expectations,” or (more or less equivalently) “reasonable expectations.”<sup>630</sup> ...

[T]he Panel felt it appropriate to ascertain the meaning of “ADP equipment” by examining the legitimate expectations of an exporting WTO Member.

[For the Panel,] application of Article 31 of the *Vienna Convention on the Law of Treaties*, which permits examination of the object and purpose of an accord, indicates that “legitimate expectations” have not just a complementary or supplementary role to play, but are an essential interpretative device.<sup>631</sup>

The finding of the Panel that “legitimate expectations” can be an essential interpretative device under Article 31 of the Vienna Convention was, however, reversed by the Appellate Body, which completely denied the role of “legitimate expectations” in interpreting a Schedule of Concessions. The succeeding excerpt gives a summary of the Appellate Body’s opinion:

The Appellate Body reversed the Panel’s holding that the meaning of a tariff concession in a Schedule may be ascertained in light of the legitimate expectations of an exporting Member.

[For the Appellate Body,] [t]he GATT concept of “legitimate expectations,” or “reasonable expectations,” arose in the context of, and was designed for, this cause of action, *i.e.* where there is no affirmative claim of a violation of a provision of GATT, but where there is an allegation that benefits accruing are being nullified or impaired because of application of a trade measure that may be consistent with GATT. ...

[And] the Panel was wrong to think the *Vienna Convention* called for an examination of the legitimate expectations of an exporting WTO Member to assure the security and predictability of tariff concessions.<sup>632</sup>

The significance of the Case of EC – Computer Equipment is further summarized by the

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<sup>630</sup> According to Bhala, the gist of the American argument is also what in a basic Anglo-American contract law course would be dubbed “promissory estoppel.” Unfortunately, for the United States, the Appellate Body neither applied nor could apply Anglo-American contract law doctrines of promissory estoppel and detrimental reliance. Bhala-GATT, *supra note* 626, at 292.

<sup>631</sup> *Id.* at 292-293.

<sup>632</sup> *Id.* at 293-295.

same authority:

The unmistakable message of *EC customs Classification* case is in a case of alleged violation of Article II, the legitimate (or reasonable) expectations of an exporting WTO Member play no role in interpreting the scope or nature of tariff concessions granted by, or the terms in the Schedule of Concessions of, an importing Member. ... If necessary, that is, if the plain meaning of the text is ambiguous and its object and purpose is unclear, then the adjudicator may look to the historical background of the Article, and the circumstances of its conclusion. If expectations are to play any role, then it is in a case of non-violation nullification or impairment.<sup>633</sup>

### 3. Case of EC – Asbestos

It is commonly held that the notion of “legitimate expectations” adopted by Article XXIII:1(b) of the GATT can only be applied in non-violation cases. Even in the Case of EC – Computer Equipment, the Appellate Body affirmed this assumption based on the following reasoning:

Is it permissible to transport the expectations concept from non-violation to violation cases of action? The Appellate Body repeated the answer it had given in a 1998 case involving the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”), the India – Patent Protection Case. The answer is “absolutely not.” If the concept were transported, then the distinction between Article XXIII:1(a) violation cases, and Article XXIII:1(b) non-violation cases, would be blurred.<sup>634</sup>

The significance of the Case of EC – Asbestos, however, lies in the fact that a “contradictory” or “inconsistent” conclusion was made by the Appellate Body compared with that of the case of EC – Computer Equipment. In this case, the EU’s trade measures affecting asbestos and asbestos-containing products were complained about by Canada. In front of both the Panel and the Appellate Body, the EU argued as follows:

[I]t is important first of all to note that there can be no “legitimate expectations” in the case of a measure that is taken to protect human health and can therefore be justified, particularly with regard to Article XX(b) of the GATT or Article 2.2 of the TBT Agreement. ...

The EC claim that the rules on “non-violation” apply only if the measure in question does not fall under other provisions of the GATT. ...

In the EC’s view, this means that the potential problem of abuse and bad faith, alluded to by Canada, is adequately covered by the “chapeau” of Article XX and there cannot be two sets of provisions

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<sup>633</sup> *Id.* at 296.

<sup>634</sup> *Id.* at 294.

(non-violation and the chapeau of Article XX) which address the same problem twice. The EC therefore propose that this argument of Canada also be rejected.<sup>635</sup>

In addressing the two central arguments of the EU, the Appellate Body first rebutted the EU's argument that Article XXIII:1(b) does not apply to measures that fall within the scope of application of other provisions of the GATT:

The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a "benefit" is being "nullified or impaired" through the "application ... of any measure, *whether or not it conflicts with the provisions of this Agreement*". (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure "conflicts" with some substantive provisions of the GATT 1994*. It follows that a measure may, at one and the same time, be inconsistent with, or in breach of, a provision of the GATT 1994 and, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure "conflicts" with a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994. We ... support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994. Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994.<sup>636</sup>

In the second place, the Appellate Body dismissed the EU's argument that Article XXIII:1(b) applies to commercial measures only and does not apply to measures pursuing health objectives:

[W]e look to the text of Article XXIII:1(b), which provides that "the application by another Member of *any measure*" may give rise to a cause of action under that provision. The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).<sup>637</sup>

#### **4. Rules for applying the notion of "legitimate expectations"**

In drawing guidance from the cases summarized above, we can conclude that according to the DSB practices, the WTO has established its own rules in applying the borrowed notion of "legitimate expectations" in multilateral dispute settlement. These rules have the following features:

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<sup>635</sup> WTO, *Panel Report*, WT/DS135/R, ¶ 3.515, 3.527 & 3.531, September 18, 2000 [hereinafter WTO-WT/DS135/R].

<sup>636</sup> WTO, *Appellate Body Report*, WT/DS135/AB/R, ¶187, March 12, 2001 [hereinafter WTO-WT/DS135/AB/R].

<sup>637</sup> *Id.* ¶188-189.



- The essential elements of the notion include: (1) the existence of expectation basing on action or omission by an actor; and (2) the legally valid Justification of the expectation (reasonableness).
- The party complaining under Article XXIII:1(b) has no right to retaliate to the losing party.
- The notion cannot serve as an interpretative device under Article 31 of the Vienna Convention on the Law of Treaties.
- The application of the notion is not limited to cases of commercial measures.
- The notion can be applied to measures that fall within the scope of application of other provisions of the GATT other than Article XXIII:1(b).

### **C. Admissibility of Amicus Curiae Submissions**

The influence of WTO Members – and the stronger influence of its stronger members – can be seen not only in the formulation and interpretation of WTO agreements but also in the practices and procedures followed by the DSB. In particular, the Case of US – Shrimp (the DS 58 case) demonstrated how the United States persuaded the Appellate Body to establish an important rule in judicial proceedings as to the admissibility of amicus curiae<sup>638</sup> submissions. In the text of the DSU itself, the admissibility of briefs by non-governmental organizations (amicus curiae) is not clear.

In the Case of US – Shrimp, the United States attached to its own brief some briefs from non-governmental organizations. The Appellate Body, based on the following reasoning, permitted such submission:

We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least prima facie an integral part of that participant’s submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

In the present appeal, the United States has made it clear that its views “on the legal issues in this appeal” are found in “the main U.S. submission.” The United States has confirmed its agreement with the legal arguments in the attached submissions of the non-governmental organizations, to the extent that those arguments “concur with the U.S. arguments set out in [its] main submission.”

... [C]onsidering that the United States has itself accepted the briefs in a tentative and qualified

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<sup>638</sup> These are briefs filed by a friend of the court, *i.e.*, one that is not a party to the case at bar. Bhala-Dictionary, *supra note* 15, at 22.

manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.<sup>639</sup>

One of the grounds on which the United States could successfully persuade the Appellate Body to admit the amicus briefs, as indicated by the above excerpt, is that the United States emphasized that it had used the briefs submitted “in a tentative and qualified manner.” By agreeing with this approach, the Appellate Body established simultaneously a condition for admitting amicus curiae briefs – the opinions contained in the briefs concur with the opinions in the main submissions largely. Such admission of amicus curiae submissions provides one more illustration of the outward indigenization of multilateral practices by an individual member.

## **II. Legal Indigenization in the Context of Further Negotiations**

The efforts of legal indigenization at the multilateral level will almost surely continue to influence further negotiations on multilateral trade rules initiated by the Doha Development Round (DDA). In Chapters 3, 4, and 5, I analyze how the three members have tried to make their participation in international negotiations compatible with their own legal traditions and cultures. In this part, I seek to compare, at the multilateral level, competing opinions these countries hold toward the same critical topics of the DDA – that is, I emphasize the divergence among their opinions arising from the efforts to indigenize multilateral rules. For this purpose, I concentrate in the following pages on four topics, both substantive and procedural, that are essential to the DDA and that are selected from a wide coverage of multilateral trade negotiations. They are: S&D treatment, fisheries subsidies, environment, and the DSU.

### **A. Competing (Indigenized) Views on S&D Treatment**

Before we examine the specific proposals made by China, the United States, and the EU on S&D treatment, I would like to point out first that the divergence among their opinions on “S&D treatment” may particularly derive from their different understanding of the term “development” contained in the term “Doha Development Agenda.” My observation of the Chinese proposals

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<sup>639</sup> WTO, *Appellate Body Report*, WT/DS58/AB/R, October 12, 1998, ¶¶88-91 [hereinafter WTO-WT/DS58/AB/R].

shows that “sustainability” seems largely a slogan for China. When coming to specific proposals, the term “development” mainly refers to social development, especially economic development, in developing countries, which can be achieved mainly by improving the treatment granted to developing countries by the multilateral system. For the other two members, especially the EU, the term “development” stands for “sustainable development,” which should be achieved by increasing emphasis on S&D treatment in a broad context of sustainability (such as environmental protection) as well as S&D treatment. The EU’s focus on sustainable development is demonstrated by the excerpt below cited from its proposals:

The European Union, like many WTO Members, believes that the Multilateral Trading System has a key role to play in the achievement of global sustainable development. This was underlined by the 4th Session of the WTO Ministerial in Doha and the launch of the Doha Development Agenda (DDA).<sup>640</sup>

Bearing this in mind, we can better understand, as explained in the following paragraphs, the discrepant views among these key players with regard to further negotiations on S&D treatment.

## 1. China

In a proposal on antidumping and countervailing duties, China argued that it was necessary, according to the Doha Ministerial Declaration, to grant S&D treatment to developing and least-developed participants.<sup>641</sup> In other words, for China, strengthening S&D treatment should be the major approach to realize “development.” Also in this same proposal, China recommended some specific provisions with regard to antidumping and countervailing issues, which focus more on granting preferential treatment than improving specific rules.<sup>642</sup>

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<sup>640</sup> The European Communities, *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, TN/TE/W/1, March 21, 2002 [hereinafter EU- TN/TE/W/1].

<sup>641</sup> China-TN/RL/W/66, *supra note* 163.

<sup>642</sup> The suggestions focus on preferential treatment include mainly: (1) lesser duty rule should be mandatory in the application of anti-dumping measures by developed country Members on the imports from developing country Members; (2) the negligible volume of dumped imports under Article 5.8 should be increased from 3 per cent to 5 per cent for imports from developing Members; and the existing de minimis dumping margin under Article 5.8 should be increased from 2 per cent to 5 per cent of export price for imports from developing country Members; (3) in the application of anti-dumping measures by developed country Members on the imports from developing country Members, the investigating authorities of the former shall accept the proposal of price undertakings from the exports concerned as long as the proposal of the undertaking offsets the dumping margin determined; and (4) in cases of anti-dumping measures taken by developed country Members against exports from developing country

In most cases, the pertinent approach adopted by China is to underscore the significance of granting S&D treatment but to avoid providing recommendations on specific provisions. The following paragraphs can serve as the illustrations of such approach.

In a proposal on fisheries subsidies, China urged granting S&D treatment to developing members:

Special and differential treatment to developing countries, particularly to the least developed countries, is an important principle in the WTO and has been consistently emphasized in previous rounds of negotiations. With regard to the fisheries subsidies, it is already pointed out in the Doha Ministerial Declaration that participant should take into account the importance of this sector to developing countries. Therefore, S&D treatment should be accorded to developing countries while participants aim to clarify and improve the disciplines on fisheries subsidies.<sup>643</sup>

Similarly, in a proposal on market access for non-agricultural products, China made these suggestions relating to granting preferential treatment to developing countries:

Longer implementation period shall be given to developing country Members and more flexibility to least developed country Members with regard to binding of tariffs, conversion of *ad valorem* tariffs, elimination of tariff peaks and tariff escalations.

Those sectors and products of substantial export interest to developing country Members and least developed country Members shall be subject to reduction as priorities in the negotiations. As regards the newly-acceded Members, their reduction commitments shall be fully taken into consideration and no further reduction shall be required.<sup>644</sup>

Moreover, in respect of environmental goods, China recommended drafting separately a common list and a development list, without further proposing the content of each list. Studying closely the Chinese proposals involving S&D treatment, we can observe that, in most cases, Chinese proposals:

- are principled – they only reiterated the significance of incorporating S&D treatment but give no further specific recommendations (except in the proposal on antidumping and countervailing duties mentioned above and in the one on DSB discussed in a following section of “on reform of the DSB);”
- give more attention to “treatment” than to “rules-making;”

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Members, such measures shall automatically cease after five years. And no application to initiate new investigations against the same products from the same developing country Members shall be accepted 365 days after ceasing of the sunset of previous measures.

<sup>643</sup> China-TN/RL/W/9, *supra note* 161.

<sup>644</sup> China-TN/MA/W/20, *supra note* 162.

- address little about the different needs among developing or least-developed countries – in Chinese proposals, they are all treated as belonging to one single group;
- address the mandatory nature of S&D treatment; and
- care little about technical assistance or capacity building.

Inside China, there always exists a voice arguing that China is playing a game with western countries in the WTO under the rules made by these western countries, and that China cannot benefit a lot from a game that is controlled by others. S&D treatment, consequently, may become an opportunity for China to operate with less limitation imposed by western countries. This expected situation is, on the contrary, the one that the United States and other rule-makers have been trying to avoid. For these international rule-makers, the emergence of a “second class” of countries – subject to a separate set of rules – should not be permitted. China, by contrast, has tried to insert such separate rules whenever and wherever possible.

## 2. The United States

For the United States, the approach of negotiating future S&D treatment and provisions should be the same as that adopted earlier – that is, a two-step approach which gives priority to negotiations on general rules over those on S&D provisions.

This two-step approach advocated by the United States derives from its firm belief that the nature of S&D treatment is transnational and exceptional. This belief is illustrated by a proposal on the subsidies agreement submitted by the United States, as follows:

The Subsidies Agreement envisions that over time, all countries will be subject to a single set of disciplines; the special and differential treatment provisions were not intended to be in effect for perpetuity. ... Upon reaching “export competitiveness” in a particular product however, developing and lesser-developed countries must also phase out their export subsidies with respect to that particular product.<sup>645</sup>

The nature of S&D treatment as an exception rather than a fundamental mandate of the WTO, as held by the United States, was confirmed by the following excerpt from a proposal on fisheries subsidies, in which the United States argued that a rule-based system should be combined with S&D treatment “only where appropriate”:

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<sup>645</sup> USA-TN/RL/W/33, *supra* note 297.

The United States is confident that the certainty and predictability of adhering to a rules-based system, combined with a thoughtful recourse to special and differential treatment provisions only where appropriate, are the best way to promote long-term trade liberalization and economic growth.<sup>646</sup>

Likewise, in a proposal on market access for non-agricultural products, the United States reaffirmed its insistence on the two-step approach of negotiating S&D treatment as follows:

As a first step in the negotiations, Members should secure agreement on the modalities and a common vision for the result of our negotiation. Once achieved, WTO Members should turn to more precise and customised approaches to ensure participation by individual developing countries, particularly the least-developed country Members, consistent with their individual development needs.<sup>647</sup>

Recalling the exceptional nature of S&D treatment, the United States addressed the need to examine the necessity to incorporate S&D provision before substantive negotiation, as expressed below:

The United States looks forward to working with Members to examine the question of whether appropriate transition mechanisms would be necessary to address particular needs [of developing countries].<sup>648</sup>

### **3. The EU**

For the EU, sustainability impact assessments (SIAs) lie at the very center of its methodology in undertaking further trade negotiations. This is evidenced by the EU's comprehensive research submitted to the WTO with regard to SIAs, and it reflects the emphasis (as identified above) that the EU places on sustainability.<sup>649</sup>

The broad understanding of the term "development" as contained in the term "Doha Development Agenda" has also been mirrored by the EU's analysis on the "development dimension" of regional trade agreements. In a 2002 proposal, the EU argued that all "economic development, structural and regulatory reforms, and sustainable development" should be

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<sup>646</sup> *Id.*

<sup>647</sup> USA-TN/MA/W/18, *supra note 298*.

<sup>648</sup> USA-TN/TF/W/12, *supra note 305*.

<sup>649</sup> The European Communities, *Sustainability Impact Assessment*, WT/COMTD/W/99, WT/CTE/W/208, TN/TE/W/3, June 3, 2002 [hereinafter EU-WT/COMTD/W/99].

addressed in order to improve the multilateral mechanism of regional trade agreements.<sup>650</sup>

With regard to the proper sequence of negotiating general rules and S&D treatment, the EU agreed with the U.S. two-step approach, as expressed below:

A special and clearly defined developing country package should be prepared once clear, effective and updated rules for all WTO Members have been discussed. Only such a two-step approach will allow the identification of those areas where, on top of the general rules, the special needs of developing countries call for additional action.<sup>651</sup>

Moreover, for the EU, the overarching principle of assessing proposals on S&D treatment is to meet the test of aiding development and integration into the WTO system, as opposed to permanent exclusion or 'second class' Membership.<sup>652</sup>

Furthermore, the method by which negotiations should be conducted on S&D treatment in multi-topic work programs and in the work of the Committee on Trade and Development (CTD) is elaborated by the following excerpt contained in a proposal submitted by the EU:

The EC recalls the link between the work programme on S&D treatment and the overall WTO Doha Work Programme, as stated in paragraph 50 of the Doha Ministerial Declaration. In particular, the EC notes that the work of the CTD in Special Session will be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees. ... S&D questions now being addressed in the negotiations (*e.g.* on Rules) also would not need to be separately addressed in the CTD although the CTD should be aware of those discussions so that coherence of approach can be maintained in accordance with paragraph 51 of the Doha Ministerial Declaration.<sup>653</sup>

The Doha Decision on Implementation-Related Issues and Concerns established three pillars aimed at strengthening S&D treatment provisions which were reiterated in an EU proposal.<sup>654</sup> In order to implement the pillars, the EU put forward several guidelines that would

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<sup>650</sup> EU-TN/RL/W/14, *supra note* 465.

<sup>651</sup> EU-TN/CTD/W/13, *supra note* 458.

<sup>652</sup> EU-TN/CTD/W/20, *supra note* 463.

<sup>653</sup> EU-TN/CTD/W/13, *supra note* 458.

<sup>654</sup> The three pillars reiterated by the EU include: (i) identify those S&D treatment provisions that are already mandatory in nature and those that are non-binding in character and identify those provisions that Members consider should be made mandatory; (ii) consider ways in which S&D treatment provisions can be made more effective, including especially ways in which developing countries, in particular the least-developed countries, may be assisted to make use of S&D treatment provisions; and (iii) consider how S&D treatment may be incorporated into the architecture of WTO rules. *Id.*

be particularly useful in steering future work on S&D treatment, as enumerated in subsection IB7 of Chapter 5.<sup>655</sup>

Moreover, according to EU proposals, the improvement of S&D treatment should take into account of the needs, interests and specific circumstances of different countries as well as the different nature of WTO commitment.<sup>656</sup> This approach differs from the Chinese approach described above – treating all developing countries as comprising a single group.

Lastly, the EU has repeatedly emphasized technical assistance and capacity building as a part of the task of further strengthening S&D treatment. For example, in a proposal on fisheries subsidies, the EU suggested “special help” for some countries:

Perhaps the best way forward here is to consider a phase-in period of several years for developing countries. During this phase-in, these countries should be given special help via an intensive programme on how to set up a comprehensive system for transparency and enforcement which could be either WTO based or introduced as a domestic control system.<sup>657</sup>

Similar focus on technical assistance and capacity building also appears in the proposals on Article VIII<sup>658</sup> and on environmental goods<sup>659</sup> submitted by the European Union to the WTO.

## **B. Competing (Indigenized) Views on Environment**

Environmental issues have steadily taken on more significance in trade agreements and negotiations. In the DDA context, two central topics on environmental issues are (i) a clarification of the status of Multilateral Environmental Agreements (MEAs) within the multilateral trading system and (ii) the identification of environmental goods. These are discussed below, again from the Chinese, U.S. and EU perspective.

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<sup>655</sup> EU-TN/CTD/W/20, *supra note* 463.

<sup>656</sup> EU-TN/CTD/W/13, *supra note* 458.

<sup>657</sup> The European Communities, *Fisheries Subsidies*, TN/RL/W/178, April 11, 2005 [hereinafter EU-TN/RL/W/178].

<sup>658</sup> The European Communities, *Improvements to GATT Article VIII on Formalities and Requirements Connected with Importation and Exportation and Related Proposals on Special and Differential Treatment and Technical Assistance*, TN/TF/W/46, June 9, 2005 [hereinafter EU-TN/TF/W/46].

<sup>659</sup> The European Communities, *EC Submission on Environmental Goods*, TN/TE/W/56, July 5, 2005 [hereinafter EU-TN/TE/W/56].



## 1. China

With regard to identifying environmental goods, China has suggested developing separately “a common list” and “a development list” of environmental goods, which partially reflects that country’s focus on S&D treatment. According to China:

A Common List means a list for all, which comprises specific product lines on which there is consensus that they constitute environmental goods. The products included in this list should reflect the interests of both developed and developing Members. ...

A Development List is a list for S&D treatment born from the common list, which comprises those products selected by developing and least-developed Members from the common list for exemption or a lower level of reduction commitment, with a view to reflecting the principle of less than full reciprocity, taking into consideration the needs of their economic development and the vulnerability of their relevant domestic industries in the area of environmental goods.<sup>660</sup>

On the other issue noted above – the status of MEAs – China has put forward five elements that would be used to identify an MEA:

- *Authoritativeness*: MEAs should have been negotiated under the auspices of the United Nations system. The Agreements should be deposited with Secretary-General of the UN or Director Generals of the relevant specialized agencies of the UN.
- *Universality*: An MEA in question should have a substantial number of contracting parties which account for a majority of WTO Members.
- *Openness*: The agreement should be open for accession by relevant parties, which is eligible on the terms applied to the original contracting parties of the agreement.
- *Impact on trade*: MEAs should contain explicit trade measures; the implementation of these measures should exert a substantial impact on trade.
- *Effectiveness*: A selected MEA should be in force and open for accession.<sup>661</sup>

Moreover, China has further suggested five elements for the purpose of identifying a special trade obligation (STO):

- *Objective*: The measures are designed to achieve the objective of MEAs, *i.e.*, to protect and improve environment and to protect natural resources.
- *Trade-related*: Measures that we all recognize from the WTO context as being related to import and export, and whose implementation can exert an actual impact on trade.
- *Relevance*: Trade measures stipulated in MEAs that are related to WTO disciplines.

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<sup>660</sup> China-TN/TE/W/42, *supra note* 165.

<sup>661</sup> China-TN/TE/W/35/Rev. 1, *supra note* 171.

- *Mandatory*: Trade measures that are explicitly provided for and mandatory in MEAs.
- *Specificity*: Measures to be implemented must be explicitly provided for and clearly identified in the Agreement. They must not be arbitrarily interpreted or substituted by other measures.<sup>662</sup>

In addition, after categorizing STOs into five categories – (1) STOs under preamble of MEAs; (2) STOs under provisions of MEAs; (3) STOs under annexes of MEAs; (4) STOs under amendments of MEAs; and (5) STOs in the decision of the Conference of Parties (COP) of MEAs – China has elaborated their legal effect as follows:

STOs set out in the provisions and annexes of MEAs are the least disputable. It is reasonable to regard the amendments of MEAs and decisions by the COPs as constituent parts of MEAs. However, given the various situations in which the amendments and decisions were made, it is preferable that STOs contained therein be identified on a case-by-case basis.<sup>663</sup>

Based on the above views expressed by China on identifying MEAs, STOs, and their legal effect, it appears that China has tried to identify a relatively narrow scope of MEAs and STOs by imposing strict requirements for such identification.

## 2. The United States

The method proposed by the United States to identify environmental goods is simple and direct – to list explicitly all the goods that should be identified as environmental goods. This list, as explained by the United State, is based on a practical, bottom-up approach to identifying environmental goods.<sup>664</sup> In addition, this approach focuses on end-use criteria (*e.g.*, goods which are used to clean the environment or to contain or prevent pollution), and does not rely on product distinctions based on process or production methods (PPM-based criteria) or end-use certificates.<sup>665</sup>

As to the issue of MEAs, the United States submitted a paper to the Committee on Trade and Environment in June 2002<sup>666</sup> setting out ideas to improve cooperation between WTO bodies

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<sup>662</sup> *Id.*

<sup>663</sup> *Id.*

<sup>664</sup> USA-TN/TE/W/52, *supra note* 286.

<sup>665</sup> *Id.*

<sup>666</sup> The United States, *Contribution of the United States on Paragraph 31(ii) of the Doha Ministerial Declaration*, TN/TE/W/5, June 6, 2002 [hereinafter USA-TN/TE/W/5].

and MEA secretariats in two main areas: information exchange and observer status. In a follow-up proposal of February 20, 2007, the United States gave further elaborations on these ideas from the perspectives of “information sessions” and “document exchange.”<sup>667</sup>

Moreover, in the same 2007 submission the United States has given its opinion on “observer status” within the MEA Secretariats. It has clarified that “the mandate of paragraph 31(ii) of the Doha Ministerial Declaration concerning criteria for granting observer status is limited to the question of observer status for relevant MEA secretariats. The mandate does not extend to the more general issue of observer status in the WTO.”<sup>668</sup> The U.S. submission reaffirms that observer status is decided on a council or committee basis. Furthermore, the United States has urged that “in the event that a decision cannot be reached on an MEA observer request, WTO bodies be encouraged to invite that MEA to relevant meetings on an ad hoc basis.”<sup>669</sup> It is evident, compared with the proposals of China, that the attention given to MEAs-related issues by the United States is from the perspective more of the organization than from that of an individual member. This emphasis partially demonstrates the inclination of the United States to view this issue from an organizational more than a member’s perspective and to underline the operational more than theoretical aspect of the issue.

### 3. The EU

The EU has put trade-related environmental issues into the context of global governance, saying that such issues relate “to the functioning of the global governance system and, in particular, to the necessary links between bodies of law dealing with international trade and environment which both form part of a global system.”<sup>670</sup>

The EU has also worked out some principles regarding both (1) dealing with environmental issues in this context of global governance<sup>671</sup> and (2) the relationship between

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<sup>667</sup> USA- TN/TE/W/70, *supra note* 285.

<sup>668</sup> *Id.*

<sup>669</sup> *Id.*

<sup>670</sup> EU-TN/TE/W/1, *supra note* 640. See also The EU, *The Relationship between WTO Rules And MEAs in the Context of the Global Governance System*, TN/TE/W/39, March 24, 2004 [hereinafter EU-TN/TE/W/39].

<sup>671</sup> *Id.*

environment-related rules and MEAs in the context of a global governance system.<sup>672</sup>

Addressing that the WTO's definition of an MEA should be limited to trade-related issues,<sup>673</sup> the EU argued that an MEA at issue should exhibit the following features:

- (a) The agreement should have been negotiated under the aegis of the UN or one of its agencies or programmes, such as UNEP, or under procedures for negotiation open for participation of all WTO Members;
- (b) the agreement should be open for accession by any WTO Members on terms which are equitable in relation to those which apply to original Members;
- (c) if the agreement is regional in nature, the elements above should apply to all countries in the region, *i.e.* openness in negotiation and accession. Moreover, the agreement should also be "open" to any countries outside the region whose interests may be affected by the agreement.<sup>674</sup>

The above definition and elements demonstrate the EU's attempt to define MEAs broadly. On the one hand, it has not taken "universality" as an element of the MEAs, as China has done. On the other hand, it has added regional elements into the scope of MEAs.

As for STOs are concerned, the EU has classified the environmental measures revolving around trade obligations into the following four categories as follows:

- Trade measures explicitly provided for and mandatory under MEAs.
- Trade measures not explicitly provided for nor mandatory under the MEA itself but consequential of the "obligation de résultat" of the MEA.
- Trade measures not identified in the MEA which has only an "obligation de résultat" but that Parties could decide to implement in order to comply with their obligations.
- Trade measures not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law.<sup>675</sup>

The EU reaffirmed its approach to broadly define MEAs and STOs in a proposal dated May 14, 2003, working on the relationship between MEAs and the WTO Agreements. In the same proposal, the EU underscored the issue of general binding effect of MEAs and all subsequent

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<sup>672</sup> EU-TN/TE/W/1, *supra note* 640.

<sup>673</sup> *Id.*

<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

Conference of the Parties (COP) decisions.<sup>676</sup> Furthermore, the EU has worked out two principles to guide the identification of environmental goods, as enumerated in subsection IB7 of Chapter 5.<sup>677</sup>

Resting in these two principles, the EU has classified two general categories of environmental goods as well as their subcategories: (1) goods used in pollution control and resource management,<sup>678</sup> and (2) goods that have a high environmental performance or low environmental impacts.<sup>679</sup> These categories are broader than those identified by the United States.

Generally, the Chinese proposals suggested a narrow and theoretical scope of MEAs. The United States submitted a relatively broad and operational description of MEAs. The EU proposed a similarly broad but theoretical definition thereof.

### **C. Competing (Indigenized) Views on Fisheries Subsidies**

The approaches adopted by the three members – the United States, the EU, and China – in respect of disciplining fisheries subsidies give us another example of the divergence among these countries in their efforts to create and implement future multilateral rules.

#### **1. China**

The approach adopted by China with regard to disciplining fisheries subsidies is quite the same as that adopted in traditional subsidies disciplines – that is, to prohibit those distorting trade and to exempt those listed in the excerpt below:

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<sup>676</sup> The European Communities, *The Relationship between MEAs and WTO Agreements: “Set out in MEAs”*, TN/TE/W/31, May 14, 2003 [hereinafter EU-TN/TE/W/31].

<sup>677</sup> EU-TN/TE/W/56, *supra note* 659.

<sup>678</sup> This category includes technologies and goods used in the provision of environmental services for pollution control or resource management, and technologies that reduce emissions or resource consumption. The European Communities, *Market Access for Environmental Goods*, TN/TE/W/47, February 17, 2005 [hereinafter EU-TN/TE/W/47].

<sup>679</sup> This category encompasses some of the products identified by UNCTAD as products that “cause significantly less ‘environmental harm’ than alternative products that serve the same purpose”. It includes goods identified on the basis of objective parameters such as composition (e.g., the renewable character of components) and/or environmental performance (e.g., energy consumption, efficiency, recycleability/bio-degradability, low/zero pollution). *Id.*

Certain subsidies, such as those on infrastructure construction, prevention and control of disease, scientific research and training, fisherman's switching to other business, have no adverse effect on trade, environment and sustainable development. Moreover, such subsidies contribute to the protection of environment and sustainable development of fishery resources. Therefore, these subsidies should be defined as "non-actionable" subsidies and should not be challenged.<sup>680</sup>

Although China has realized the relationship between fisheries subsidies and sustainable development to some extent, the approach it has adopted is quite traditional, in the sense that, for China, the significance of fishery subsidies it has addressed still adheres to the effect of subsidies on trade distortion, similar to other kinds of subsidies, rather the facet of fishery subsidies that relates to sustainability or environmental protection.

## **2. The United States**

With regard to fisheries subsidies, the U.S. proposals have used much ink on addressing the particular significance of fisheries subsidies and a sustainable way to use them. In a proposal of March 19, 2003, the United States recommended expanding the category of prohibited ("red light") fisheries subsidies based on the considerations stated below:

As an initial matter, it should be emphasized that the goal of clarified and improved rules is to provide better disciplines on government programmes that promote overcapacity and overfishing, or have other trade-distorting effects.... Better disciplines on fisheries subsidies that promote overcapacity and overfishing should also contribute to reductions in illegal, unreported, and unregulated (IUU) fishing, a charge given by world leaders in the Johannesburg Plan of Implementation of the World Summit on Sustainable Development. Furthermore, by addressing fisheries subsidies, significant environmental and developmental benefits are likely to be realized.<sup>681</sup>

In short, the reason for the United States to expand the prohibited fisheries subsidies is that these types of subsidies have adverse impact on environment and sustainability, rather trade distortion as concentrated on by China.

## **3. The EU**

According to a proposal submitted by the EU, it has made a clear strategic choice to adjust the objectives of its fisheries policy to ensure sustainable development in environmental,

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<sup>680</sup> China-TN/RL/W/9, *supra* note 161.

<sup>681</sup> USA-TN/RL/W/77, *supra* note 275.

economic, and social terms. Consequently, one of the outcomes of the reform process is the decision to take measures to reach a stable and lasting balance between the capacity of fishing fleets and the available resources.<sup>682</sup>

The relationship of fisheries subsidies and sustainable development as well as its legal basis has been elaborated by the EU as follows:

It is ... evident that restoring and maintaining fisheries resources at sustainable levels will require that capacity enhancing subsidies are addressed directly to tackle the problem of overcapacity....

... The “chapeau” of paragraph 31 reminds negotiators of one of the main aims of the negotiations, namely, to enhance “the mutual supportiveness of trade and the environment”. Addressing those fisheries subsidies that have negative effects on fisheries resources will undoubtedly contribute to this objective.

Bearing in mind the significance of fisheries subsidies to sustainable development, the EU has set out three main pillars of future subsidy disciplines on fisheries:

- (1) certain types of capacity enhancing subsidies, such as subsidies for marine fishing fleet renewal and subsidies for the permanent transfer of fishing vessels to third countries, should be prohibited;
- (2) certain types of subsidies – which are necessary in order to achieve the objective of reducing fishing capacity, and to mitigate negative social and economic consequences of the restructuring of the fisheries sector – should be clearly defined and permitted; and
- (3) provision should also be made for the review of these lists of “prohibited” and “permitted” subsidies, both in terms of their operation and to consider whether they should be modified to further advance the ultimate aim, which is to match capacity to the available fish and so contribute to the sustainable exploitation of fishery resources.<sup>683</sup>

A scrutiny of the above excerpt reveals that, for the EU, “trade distortion” should no longer

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<sup>682</sup> The European Communities, *Submission of the European Communities to the Negotiating Group on Rules – Fisheries Subsidies*, TN/RL/W/82, April 23, 2003 [hereinafter EU-TN/RL/W/82].

<sup>683</sup> The European Communities, *Fisheries Subsidies*, TN/RL/GEN/134, April 24, 2006 [hereinafter EU-TN/RL/GEN/134].

be a standard or element of future subsidy disciplines on fisheries. As reaffirmed by the EU, the guiding principle on such discipline should be that “public aid can under no circumstances contribute to overcapacity.”

## **D. Competing (Indigenized) Views on Reform of the DSB**

In addition to substantive issues, the proposals of the three members referred to above on reforming procedural issues have also been made with their own characteristics. As explained below, these proposals provide further examples of how future negotiations will also surely reflect the kind of “indigenization” explored in earlier chapters.

### **1. China**

Chinese proposals on DSB reform can be summarized as “S&D treatment centered.” In its 2003 proposal on Improving the Special and Differential Provisions in the Dispute Settlement Understanding, China concentrated on three aspects with regard to the reform of the DSU:

- (1) establishing explicit special and differential (S&D) provisions applicable to all developing-country Members;
- (2) implementation of recommendations of the panel or the Appellate Body; and
- (3) shortening the time-frame of dispute settlement.

As for establishing explicit S&D provisions which would be applicable to all developing-country Members, China proposed that:

- (a) Developed-country Members shall exercise due restraint in cases against developing-country Members. ....
- (b) Where a developed-country Member brings a case against a developing-country Member, if the final rulings of a panel or the Appellate Body show that a developing-country Member does not violate its obligations under the WTO agreements, the legal costs of the developing-country Member shall be borne by the developed-country Member initiating the dispute settlement proceedings.
- (c) Developed-country Members shall help developing-country Members participate in the dispute settlement mechanism in a more effective way through providing technical assistance and capacity



building programmes.<sup>684</sup>

China also proposed that existing S&D provisions in the DSU be strengthened and made more effective. Moreover, it suggested that, as a general S&D principle, any rules that would be agreed upon in the future negotiations concerning more tightened trade rules than existing ones shall not apply to developing-country Members as appropriate.<sup>685</sup> In other words, to China, a general S&D principle justifies the exclusion of developing countries from being bound by future multilateral rules that would impose stricter WTO obligations.

With respect to implementation of recommendations of the panel or the Appellate Body, China expressed the following opinion relating to full compliance by developed members with the DSB recommendations, especially in the disputes involving developing countries. “[A] developing-country Member will be in an embarrassing situation of being short of necessary means for retaliation, although it has been granted the authority to suspend its concessions.” Therefore, “China supports developing-country Members’ right to request developed-country Members to make cash compensations in case of the latter’s failure of compliance.”<sup>686</sup> As for shortening the time-frame of dispute settlement, China recommended shortening the time-frame and exempting developing countries from being bound by the shortened time-frame, “in light of the lack of resources of developing-country Members.”<sup>687</sup>

After making the above recommendations, China proposed (also in 2003) a draft S&D provision containing these recommendations as well as some corresponding changes that it proposed in relevant articles of the DSU. These included the provision on establishment of a panel, the timeframe for safeguard and antidumping cases (as above), and working procedures.<sup>688</sup>

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<sup>684</sup> China-TN/DS/W/29, *supra note* 166.

<sup>685</sup> *Id.*

<sup>686</sup> *Id.*

<sup>687</sup> *Id.*

<sup>688</sup> China-TN/DS/W/51, *supra note* 173.

## 2. The United States

The U.S. proposals on the reform of the DSB can be summarized as “improving transparency and practical issues” and characterized as “specific and practical.” The main points made by the United States with regard to transparency include opening meetings, timely access to submission, timely access to final reports, and amicus curiae submissions.<sup>689</sup> In a follow-up proposal, the United States underscored the importance of these proposals and gave some consideration to corresponding practical issues, such as physical presence of the public in the procedure of dispute settlement.<sup>690</sup>

## 3. The EU

On March 13, 2002, the EU submitted a proposal summarizing its previous proposals on the reform of the DSU. According to the EU, although these previous documents were produced in the context of the Decision on the Application and Review of the DSU, which is no longer relevant for the mandate given at Doha, the EU and its member States believe that the points made in those earlier documents remain to a large extent relevant for possible improvements to the DSU.<sup>691</sup> An overall principle guiding the EU proposals on the DSB is to facilitate the earliest possible resolution of disputes. On that point, the EU expressed these views:

It should be recalled at the outset that the purpose of a dispute settlement procedure is the amicable – and quick – resolution of a dispute. In this context, the WTO Members should always endeavour to solve the dispute at the earliest possible stage, if possible at the consultation stage but also via recourse to good offices or mediation by the Director-General, as provided in Article 5 of the DSU. The EC and its member States consider that any improvements of the DSU should contribute towards this overall goal of facilitating the earliest possible resolution of disputes. Should early resolution or timely compliance not prove possible, preference should be effectively given to trade compensation over trade-restrictive suspensions of concessions.<sup>692</sup>

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<sup>689</sup> USA-TN/DS/W/46, *supra note* 287. Details are contained in Appendix 4.2.

<sup>690</sup> USA-TN/DS/W/79, *supra note* 288. “[P]hysical presence may not necessarily be the preferred approach....In some cases, physical presence might lead to issues of maintaining order or security as well. Some alternatives to physical presence could be electronic broadcast, either through a closed-circuit or intranet facility or through webcasting.... If meetings were broadcast electronically, it may be possible to include a delay in the broadcast to ensure that there would be no individual disclosure of confidential information. As in general with working procedures, the exact modalities in individual disputes would be left up to the panel, Appellate Body, or arbitrator to refine as part of the appropriate working procedures.” *Id.*

<sup>691</sup> EU-TN/DS/W/1, *supra note* 457.

<sup>692</sup> *Id.*

That EU submission also reveals its preference for trade compensation over trade-restrictive suspensions of concessions in trade disputes. Although China has also expressed similar preference on this point as the EU, their reasons are different. For China, compensation is a more feasible way than suspension of concession for developing countries to enforce favorable rulings, taking into account their disadvantageous status in the multilateral trading system. For the EU, however, trade compensation is preferable because it will not further impair the fundamental principle or purposes of the WTO, compared with adverse consequence brought by suspension of concessions.

In the above proposal, the EU recommended “moving from *ad hoc* to more permanent panelists.” It gave four reasons to establish permanent panelists: (1) a growing need for panelists, (2) increasing complexity of recent cases, (3) promoting the legitimacy and credibility of the panel process, and (4) enhancing the involvement of developing countries.<sup>693</sup> As discussed earlier in Chapter 5, such proposal reflects one feature of the civil law tradition – the characterized role of judges. Another issue that received emphasis from the EU is “transparency.” The reason given by the EU that the proceedings should allow public attendance in the DSB proceedings is as follows:

Because “the aim of the dispute settlement mechanism is to secure a positive solution to a dispute” (Article 3.7 DSU), continuing to keep panel or Appellate Body proceedings not accessible to the public should not be a priori excluded, to the extent one of the parties to a dispute consider that this can help to resolve the dispute, for the same reasons that consultations can remain confidential. It should indeed be remembered that some disputes have found a solution before the circulation of the panel report.<sup>694</sup>

The difference between the proposals made by the EU and the United States with regard to

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<sup>693</sup> *Id.* “The first reason is that there is a growing quantitative discrepancy between the need for panelists and the availability of ad hoc panelists....Second, recent developments concerning the actual consideration of cases by panelists put a greater strain on panelists selected on an ad hoc basis. Indeed, the actual conduct of a dispute settlement procedure has become much more sophisticated than before and has substantially increased the workload of panelists. ...Thirdly, it would enhance the legitimacy and credibility of the panel process in the eyes of the public, as the possibility of conflicts of interests would be eliminated and the independence of the panelists would be protected as is the case in domestic proceedings or in the Appellate Body. Fourthly, it would increase the involvement of developing countries in the panel process. Under the current system, only 35% of the panelists having served since 1995 come from a developing country. Such a figure would increase with a more permanent roster of panelists that, as is the case with the Appellate Body, would be broadly representative of the WTO Membership.” *Id.*

<sup>694</sup> *Id.*

public attendance in the DSB proceedings is that: the United States has recommended setting the “public presence” as a general right that is commonly enjoyed by the public, except in the circumstances involving confidential information and or methods of law enforcement. The EU, however, has suggested that the authority of deciding whether the dispute can be tried in public be vested in the disputing parties:

The DSU should therefore provide sufficient flexibility for parties to decide whether certain parts of the proceeding before the panel or the Appellate Body should be open to the public for attendance. At the same time, third parties should also have the right to decide whether their interventions should take place in open or closed sessions.<sup>695</sup>

The fourth issue that the EU has addressed regarding DSB reform is on clarifications and modifications of the DSU itself. The EU has concentrated in this respect on some technical issues, and proposed a lengthy draft of corresponding clarifications and modifications as well as new articles on permanent panelists, amicus curiae submissions, remand procedure, determination of compliance, and examination of mutually agreed solutions.

As for the issue of dealing with S&D treatment in the context of DSB reform, the EU has said that it would agree on the need to provide greater flexibility in the case of a complaint against a developing country.<sup>696</sup> It can be safely concluded here that the EU has called for the most comprehensive and dramatic reforms in the DSU or DSB among the three members.

The above comparison on the proposals made by China, the United States, and the EU on four specific areas – S&D treatment, fisheries subsidies, environment, and the DSU or DSB – reveals to us that, in some critical elements up for discussion in the DDA, deep divergence exists among the three members. If we enlarge the picture to embrace all the WTO members, the situation will become extremely complicated, since every member tries to make proposals out of its own understanding of the DDA and the multilateral trading system, and gives preferences to approaches or concepts that can best fit into its own legal tradition and culture as well as its political and economic interests. The following table illustrates the divergence of the three members in those four areas.

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<sup>695</sup> *Id.*

<sup>696</sup> *Id.*

**Table 6.1** Comparison on proposals made by China, the United States, and the EU on further trade negotiations

	<b>China</b>	<b>The United States</b>	<b>The EU</b>
<b>S&amp;D treatment</b>	Priority of negotiations; Incorporation in every trade area; Mandatory nature.	Two-step approach in which S&D treatment should be negotiated after general rules have been achieved; The necessity of incorporating S&D provisions might be examined before substantive negotiations; Exception and transition mechanism.	Two-step approach; principles should be used in guiding further negotiations; part of the mandate of sustainability.
<b>Fisheries subsidies</b>	Traditional approach (prohibition those causing trade distortion plus exemption of those arising from environmental concerns).	Different with other types of subsidies due to its significance to sustainability.	Overall principle of struggling against overcapacity; Trade distortion is not a standard with regard to further disciplining.
<b>Environment</b>	Strict definition of MEAs and STOs; S&D treatment should be incorporated with regard to identifying environmental goods.	A simple and direct method – identifying all environmental goods in a complete list; the relationship of MEAs and trade rules is considered from the perspective of the organization rather an individual country.	A broad definition of MEA and STO; broad definition of environmental goods; the relationship of MEAs and trade rules is considered in the context of global governance.
<b>DSU</b>	To give S&D treatment as much as possible.	Transparency and practical issues.	Constituents, new designed proceedings, implementation, and S&D treatment.

### III. General Implications for the WTO

What are the implications of legal indigenization, both inward and outward, for the WTO?

The question can be answered from both short-term and long-term perspectives. In the short run,

the WTO may avail itself of existing mechanisms, especially the Trade Policy Review Mechanism (TPRM), to understand, monitor, and even predict the process of legal indigenization by improving the TPRM functions. In the long run, the WTO may try to reduce the space available for “legal indigenization” by negotiating multilateral rules that have both more specificity and wider coverage.

### **A. In the Short Term**

The TPRM is a mechanism that was established in order to further understand and monitor the Members’ domestic trade policies and their implementation. Although the TPRM is not a mandatory mechanism, its focus is extraordinarily consistent with that of studying legal indigenization among all current WTO. In other words, the TPRM offers a singularly important opportunity to address indigenization of the sort explored above. It should aim at providing authoritative preference to both country members and the organizational agencies for further understanding of specific practices of a certain member. The following paragraphs give a brief introduction to this mechanism, its specific significance to legal indigenization, and the aspects that can be improved to bear fruit in this regard.

#### **1. Overview of Trade Policy Review Mechanism (TPRM)**

The birth of the TPRM is partially attributed to the inefficiency of the notification mechanism. It was designed for enlightenment, not enforcement, of WTO mandates. The context and purpose of the mechanism are introduced in the following excerpt:

Until at least the end of Tokyo round of GATT trade negotiations in 1979, the principal form mechanism for mutual surveillance of members’ trade policies was notification: still nominally in force under WTO today, Article X of the GATT requires that each member make public all changes in its trade policies. Notification never worked well, however....

As a result of changes introduced in the Tokyo Round, beginning in 1980 the Secretariat prepared twice-yearly reports on general developments in the world trading system. The findings of these reports were debated at meetings of the GATT Council [] and subsequently published. But this did not answer the need for detailed information on trade policies at the level of the individual country.

[T]he TPRM is intended for enlightenment, not enforcement. It provides an “external audit” of members’ trade and economic situation. It is thus a means of shedding light on both the policies and the practices of member countries – both the direction of trade policy and its implementation – but

not for compelling change.<sup>697</sup>

## 2. TPRM and legal indigenization

The contents of TPR reports are relatively standardized. They typically contain six parts: *the Economic Environment, Trade Policy Regime: Framework and Objectives, Foreign Exchange Regime* (in reports from 1991 to 1993) or *Foreign Direct Investment and Trade* (in reports from 1993 to 1996), *Trade Policies and Practices by Measure, Trade Policies and Practices by Sectors*, and *Trade Disputes and Consultations*.<sup>698</sup>

Some of the parts, such as Parts II, IV, and VI, could very appropriately address certain aspects of legal indigenization, including the topics discussed above in Chapters 3, 4, and 5 – namely international trade negotiations, international trade disputes, domestic legislation and judicial practices. The fact is, however, that little attention has been given to these aspects in the released reports. Examining the previous TPR reviews on trade policies of the three members highlighted above (China, the EU, and the United States), we can find that none of their disputed legislation or practices brought under scrutiny by other members to the DSB have been reviewed in such reports, even if such legislation or practices definitely constitute an indispensable part of domestic trade policies and their implementation.

Such ineffectiveness may be partially attributable to the fact that such reports are prepared by an economist<sup>699</sup> rather by lawyers. It is true that the WTO is an international economic organization. But it is an international organization in the first place, and it necessarily relies heavily on both domestic and international rule making and judicial practices. Therefore, legal perspective should be given more weight – or at least the same weight as the economic perspective – in TPR reports.

The ineffectiveness of the TPRM as a tool to understand, monitor, or predict legal indigenization does not, however, derive solely from its predominantly economic, not legal, perspective. Its shortcomings can also be attributed to a variety of substantive weaknesses and

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<sup>697</sup> Donald B. Keesing, *IMPROVING TRADE POLICY REVIEWS IN THE WORLD TRADE ORGANIZATION* 4-6 (1998).

<sup>698</sup> *Id.* at 16-17.

<sup>699</sup> *Id.* at 10.

limitations of the mechanism, as pointed out in the next subsection.

### 3. Concerns regarding TPRM

One expert has identified several substantive weaknesses in the published TPR reports. Although his assessment dates from more than a decade ago, the situation has not changed much since that time:

- TPRs need to avoid the temptation to focus only on developments of the past few years, and instead take a longer-term historical perspective that puts current policy and recent changes in meaningful context. ...
- TPRs should not only report and analyze the likely impact of recently announced or implemented policy reforms but should also comment forthrightly, albeit cautiously, on their credibility and sustainability.
- TPRs need to overcome a bias toward optimism and saying what the country under review would like to hear. ...
- TPRs need to pay more attention to the “bottom line”: they should make more of an effort to summarize total taxes on imports and calculate the total costs of protection....
- The extension of multilateral negotiations during and after the Uruguay Round to a much broader range of issues demands that TPRs likewise extend and deepen their analyses into a number of subject areas....
- Some emerging issues pose serious problems at the level of the global trading system as a whole but not necessarily at the level of individual countries, and thus fall through the cracks of the country-oriented TPRM process. ...<sup>700</sup>

Moreover, the same observer has suggested several methods for improving the TPR in order to address the concerns listed above. These methods include: (1) taking a longer-term perspective, (2) questioning the credibility and sustainability of reform, (3) avoiding bias, (4) analyzing the cost of protection, (5) widening breath of coverage, and (6) controlling the length of review.<sup>701</sup>

Actually, if we put the above concerns in the context of legal indigenization, it will be apparent that the TPRM has not efficiently provided the assessment of one member’s legal indigenization. Even though the TPRM gives some attention to legal regime, the depth of

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<sup>700</sup> *Id.* at 50-51.

<sup>701</sup> See *id.* at 26-41.



pertinent report is insufficient to understand the process of legal indigenization within a certain country. For instance, no report has successfully played an efficient role in predicting or alerting potential risks of trade relationships among the members. This insufficiency will definitely impair the operational significance of the TPRM.

The conclusion that these observations lead us to is that the TPRM has functioned thus far, unfortunately, on the basis of a short-term, biased, economic, narrowly-focused perspective. This should, in my view, change. In order to understand, monitor, or predict legal indigenization within the Members, the TPR reports should take into account all the elements influencing this process, such as the country's underlying legal tradition, its larger legal system, its judicial environment, and the trends it has shown in administering domestic law or international agreements.

To sum up, in the short term, the TPRM offers an eminently feasible path to realize further understanding, monitoring or predicting of legal indigenization taking place in the Members. However, in order to realize that purpose, the TPRM should first give priority to legal issues over economic issues. Then the TPRM should make improvement to overcome its institutional shortcomings or limitations as identified above.

## **B. In the Long Term**

Since the space for Members to indulge in legal indigenization is largely decided by the multilateral rules themselves, the most effective and fundamental method of reducing the space for the Members to indigenize WTO law in the long run must be to improve those multilateral rules. The more specific the agreements are, and the more comprehensive their coverage is, the less room they will leave for the Members to indigenize the rules.

This raises fundamental questions of global governance, which may be envisioned as a spectrum. At one extreme end of that global governance spectrum, we might see the WTO promulgating rules that can be directly applied domestically by the Members. In this regard, the EU has provided us a good example of "regional governance." But whether this end can be achieved at the global (as opposed to a regional) level seems unlikely. Among the numerous

obstacles, one might be the United States, which is not likely to accept a set of multilateral rules conflicting with its domestic law or to give priority to international law over domestic law. Another obstacle might be the fact that different levels of development among 153 members make it infeasible to adopt a single set of rules directly applied at the domestic level.

The reality, therefore, is that for quite a long period, legal indigenization is almost surely unavoidable. Despite this reality, global governance of some sort – that is, institutional authority such as that granted to the WTO – can still play a positive role in reducing or eliminating the negative influence of legal indigenization, assuming that the organization has the capacity (and the will) to fully understand, monitor, and predict such process. This positive role can be realized by making rules as specific and widely-encompassing as possible.

## Summary

The analysis of this chapter partially answers the questions raised at the beginning of the chapter. Let us recap briefly.

As to the extent to which the Members have indigenized the organization, the three examples – (1) the United States and the multilateral antidumping mechanism, (2) rules of applying the notion of “legitimate expectations,” and (3) the admissibility of *amicus curiae* submissions – demonstrate the following points:

- the WTO agreements have been largely influenced by certain members’ domestic legislation and practices, concerns thereon raised by other members, and their *de facto* “decisive” power on multilateral negotiations;
- the WTO, although it has borrowed some notions from individual countries or legal traditions, has been trying to establish its own rules on applying such borrowed notions or principles;
- even if some issues have not been clearly regulated in the DSU, the practices and the reasonable arguments of the Members, especially certain powerful members, can still persuade the DSB to adopt general rules with regard to the proceedings for dispute settlement.

As to how the Members have tried to indigenize further trade negotiations (that is, negotiations designed to expand on or reform existing rules), the comparison of the proposals submitted by China, the United States, and the EU on four central areas of the Doha Round –

S&D treatment, fisheries subsidies, environment, and the DSU – demonstrates the deep divergence with regard to the attitude, approach, or concept adopted by these three members. As for the third question posed at the beginning of this chapter – what are the implications of legal indigenization for the WTO – the answer can be given from both a short term perspective and a long term perspective. Above all, we should bear in mind that thus far, legal indigenization has not been avoided. Looking forward in the short run, it seems that the WTO mechanisms, especially the TPRM, should give priority to legal issues, in order to understand, monitor, and predict legal indigenization, by improving the mechanism itself. In the long run, the focus should be to reduce the opportunity (the space) for Members to engage in legal indigenization granted to the Members. This might be accomplished by developing specific and widely-encompassing multilateral rules in the context of global governance.

## CONCLUSION

### *– The Context, Concept, and Significance of Legal Indigenization*

The review of the literature pertinent to the theme of this dissertation establishes its two fundamental hypotheses. One is that the insufficiencies of the WTO system provide the possibility and necessity of legal indigenization within the WTO members. The other hypothesis is that the WTO members' practices with the WTO have shown their willingness to indigenize WTO law.

Responses at the international level to legal fragmentation in world trade prior to World War II brought about the emergence of the multilateral trading system that contributed greatly to legal globalization. However, legal globalization, which is exemplified by WTO law, has been undermined by the inherent and acquired problems of the multilateral trading system. Therefore, legal globalization still needs further responses from its participants – and this takes the form of legal indigenization.

The concept of indigenization has been defined in various disciplines such as decolonization, anthropology, and culture. In the context of international law, it refers to the process or ideology in which domestic authorities, when behaving as international actors, make and implement international and domestic rules in a way appealing to their native features (especially legal tradition and culture), as responses to globalization led by a defective global legal system, for the purpose of getting an advantageous position in the context of globalization. As shown in this definition, the process of legal indigenization comprises two directions. One is the outward direction – domestic legal traditions and cultures try to influence the rule-making and dispute settlement at the international level. The other is the inward direction – domestic legal traditions and cultures try to influence the implementation of international rules domestically, especially regarding domestic legislation and adjudication of trade issues. In the context of international law, the term indigenization differs from two other relevant terms – globalization and localization in some aspects such as actors, backgrounds, leverages, purposes,

influential scope, and legal consequences.

Based on the concept of legal indigenization, the substantive process of legal indigenization that has taken place within China, the United States, and the EU have been explored in the foregoing pages, starting with China

### *Legal Indigenization and China*

In international trade rule-making, China has given special attention to S&D treatment. This characteristic typically reflects China's emphasis on substantial equality in international economic affairs. Furthermore, its proposals addressing substantive matters exhibit vagueness as a common feature – which has its roots in China's traditional attitude of instrumentalism toward international law as well as its lack of confidence in substantial participation in international rule-making. The Chinese proposals on procedural issues have their roots in Chinese legal history. Significantly, China's long experience with procedural matters prompts it to focus on administering litigations rather realizing procedural justice.

In international trade disputes, China's ideologies relating to (1) protecting subjects involving illegality, (2) moral control by publications, and (3) centralized trade rights – which have traced their origins into Chinese legal tradition and culture – were challenged by its trading partners.

As for domestic legislation on trade, one of its characteristics is that the degree of specification of trade laws and regulations increases while legal effect of these laws descends. On the one hand, this characteristic is consistent with the historic practices of legislation in dynastic China; on the other hand, it caters to the legal culture reflected by contemporary China's legal regime, considering that (1) since trade issues, especially trade remedy issues are a new area to China, it is appropriate of enact “temporary” rules with relatively low legal effect, which can subject to frequent supplements or adjustments; and (2) the procedure to amend administrative regulations and departmental rules are much simpler than that to amend laws (in a narrow sense).

Another characteristic of domestic legislation on trade is that the contents of such

legislation address the facet of “managing” rather “regulating” foreign trade. This reflects the age-old ideology that the state’s function regarding foreign trade lies in mostly management and even control. In dynastic China, the main contents of trade legislation were management and control of foreign trade. In contemporary China, state management of trade in China was practiced until the WTO accession.

As for domestic adjudication of trade issues, the Supreme Court has designated immediate or higher level of the people’s courts to exercise jurisdiction over judicial review of administrative determinations on trade issues. The domestic adjudication of trade issues in China has also demonstrated several features relating to: (1) the classification of trade cases, (2) applicable laws in trade disputes, (3) jurisdiction over trade cases, and (4) types of judgments. All these features have their roots in Chinese legal tradition and culture.

#### *Legal Indigenization and the United States*

After examining legal indigenization of WTO within China, we shifted our focus to that process within the United States. The participation of the United States in international trade rule-making exhibits some features: (1) the confidence in leading international rule-making, (2) the cautiousness toward S&D treatment, and (3) an emphasis on procedural justice as well as international rule of law – all of which can find their origins in U.S. legal tradition and culture.

In FTA negotiations, the United States acts with cautiousness in selecting FTA partners and takes effort to stimulate both political and economic reforms within its partners, which appeals to its pursuance of both national interests and expected reforms in its trading partners.

In the international trade disputes involving the United States as respondent, two pertinent U.S. ideologies relating to its attitude toward international trade regime were challenged by its trading partners: one is so-called “unilateralism,” the other is extra-territorial application of U.S. law. Both ideologies have also been deeply influenced by U.S. legal history and its long-term practice.

The comprehensiveness and thoroughness U.S. domestic legislation on trade reflected a great influence of the civil law tradition on this traditional common law country. A subordinate

status of international law within U.S. legal system and the retaining of embargo policy further reveal the historically-rooted legal practices.

Domestic adjudication of trade issues within the United States also reflects some U.S. characteristics. Judicial review of administrative determinations is carried out by specialized courts on trade – the CIT and the CAFC. The efficiency of judicial review of administrative determinations on trade issues might be impacted by two kinds of deference within the U.S. judicial system. One is administrative deference given by the CIT and the CAFC to the administrative agencies which made the determinations at issue. The other is the “expertise” deference given by the United States Supreme Court to the CIT and the CAFC.

#### *Legal Indigenization and the EU*

An examination of legal indigenization of WTO law within the EU follows the study of the United States. The characteristics of the EU’s participation in international trade rule-making – which include: (1) emphasizing overall goal and principles in trade negotiations, (2) solid style of the proposals, (3) strengthening the functions of the DSB (especially panels), (4) relying heavily on independent experts, and (5) adhering sustainable development – reflect certain characteristics of the civil law tradition, which has given significant influence to the formulation of EU legal culture.

The international trade disputes revolving the EU as respondent reflect the EU ideologies and practices that seem conflicting with those of its trading partners. One of these ideologies is its broad range of approaches to interpreting pertinent WTO provisions, which are, again, consistent with those adopted by the civil law tradition. The other kind of EU practices that has invited concerns from its trading partners revolves around its unique opinion in respect of the prevailing effect of trade references in FTAs over those in the multilateral system.

As for “domestic” legislation on trade, the EU adopts the legislation style typically used in the civil law countries. It also clarifies in its legislation the relationship between WTO law and EU law – that is, the fundamental purpose of EU trade legislations is to implement the WTO agreements.

“Domestic” adjudication of trade issues within the EU exhibits some unique features compared with those in China or the United States: (1) the types of actions involving trade issues usually take the forms of actions for annulment, preliminary ruling, and direct action for compensation; (2) judgments of trade issues cases employ a style that the civil law countries typically adopt; (3) the Union Courts rely on application of general principles of law in its jurisprudence, as influenced by the civil law tradition; (4) the Union Courts practice a restricted and careful use of case law, as partially influenced by the common law tradition; and (5) the system of Advocate General reflects the high status of jurists in the civil law tradition.

### *Legal Indigenization and the WTO*

Having examined legal indigenization of WTO law within three individual members, we shed the light on this process at the multilateral level. The multilateral antidumping mechanism, the principle of “legitimate expectations” in the DSB jurisprudence, and the admissibility of amicus curiae submissions in the dispute settlement procedure constitute three illustrations of how the WTO rule-making and adjudication have been heavily influenced by its members’ legal traditions and cultures. Moreover, the discrepancies among the three members relating to four aspects of future negotiations – S&D treatment, environment and trade, fisheries subsidies, and reform of the DSB – have demonstrated that how different legal traditions and cultures might impede a future consensus within the organization.

The general implications of legal indigenization for the WTO can be observed both in the short term and in the long term. In the short run, an urgent need for improving further understanding among the members appears. At the multilateral level, one option might be the improvement of Trade Policy Review Mechanism. In the long run, legal indigenization might provide a new clue for the WTO to design its blueprint. Considering that domestic legal tradition and culture is relatively solid and stable, discrepancies among the Members that originate from their own legal traditions and cultures should be taken into account seriously in the future construction of the organization.

The main findings of the foregoing chapters have partially answered the two questions raised by Chapter 1 – that is, (1) how the legal traditions and cultures will influence the WTO



operations at the multilateral level, and (2) how the legal traditions and cultures will influence the WTO operations at the domestic level. These findings demonstrate that it is a common and inevitable phenomenon that an individual member will negotiate multilateral rules and implement its WTO commitments on the ground of its own legal tradition and culture. Moreover, the degree of legal indigenization within the three members varies. As implied by the above analysis, we may sense that legal indigenization within China goes to the highest degree among the three members, considering that it has to absorb the international system established largely on the basis of western concepts and rules into its own legal system that is quite different from the western systems. By contrast, legal indigenization within the EU may cause the least twisting of the multilateral rules, partially because the consistency and compatibility between its legal tradition and culture and the international regime. The degree of legal indigenization within the United States may fall somewhere in the middle. In many cases, it has to balance between international rule of law it advocates and strong beliefs in its own legal practices.

Therefore, even if a unified rule can be achieved at the multilateral level, it will not definitely bring out unified results of implementation at the domestic level. This observation might be essential to figuring out the realistic background of the WTO's operations. Specifically, on the one hand, considering that some discrepancies among the Members arising from their own legal traditions and cultures are difficult, and even impossible, to eliminate, it is of practical significance for the organization to distinguish between those kinds of consensus that can be achieved at the multilateral level among different legal traditions and cultures and those that cannot. On the other hand, the organization should pay sufficient attention to the issues of how to reduce the possibility or the degree of legal indigenization by its multilateral mechanisms.

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