THE VALUE OF COMPARATIVE AND LEGAL CULTURAL ANALYSES OF INTERNATIONAL ECONOMIC LAW

Colin B. Picker

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The effective development and operation of the law faces many obstacles. Among the more intractable yet hidden barriers to the law are legal cultural disconnects and discontinuities. These occur when opposing legal cultural characteristics from different legal cultures are forced to interact as part of the implementation of the law across two different legal cultures. That conflictual interaction can impede or block the success of that law. While present in domestic legal systems, those conflicts are more likely and the conflicts may be deeper between the many different legal cultures involved in the international legal order. Identification of such legal cultural disconnects and discontinuities is the first step towards developing strategies to ameliorate potential conflicts between opposing legal cultural characteristics. That identification requires examination of the relevant legal systems with legal culture in mind—a legal cultural analysis. But, that methodology is rarely employed. To the extent we do see legal cultural analyses, they are applied almost exclusively in the domestic arena. When it is applied across legal systems it becomes a part of comparative law methodology. This merger of comparative law and legal cultural approaches is unusual, indeed almost unheard of in the international legal arena. This thesis explores that methodology, to show it is possible and valuable, through the use of case-studies employing the methodology to identify such legal cultural conflicts. To highlight the suitability of the methodology and to help us understand the field under examination, the case studies focus on the area of international economic law. As a result of the analyses, numerous insights are revealed that help us to better understand international economic law, public international law, and legal culture. Most critically, the analyses clearly show the applicability and value of legal cultural analyses within the international legal order.

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THE VALUE OF COMPARATIVE AND LEGAL CULTURAL ANALYSES OF INTERNATIONAL ECONOMIC LAW

By Colin B. Picker*

Submitted October, 2012

* Associate Professor, Law Faculty, University of New South Wales, Sydney, Australia. A.B. (Bowdoin College), J.D. (Yale Law School).

PREFACE

Thanks to Ross Buckley and Leon Trakman, my PhD supervisors, whose invaluable help and support made this dissertation possible.

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CHAPTER 1: INTRODUCTION TO THE DISSERTATION

I. Introduction

The effective development and operation of the law faces many obstacles. Among the more intractable yet hidden barriers to the law are legal cultural disconnects and discontinuities. These occur when opposing legal cultural characteristics from different legal cultures are forced to interact as part of the implementation of the law across two different legal cultures. That conflictual interaction can impede or block the success of that law. While present in domestic legal systems, those conflicts are more likely and the conflicts may be deeper between the many different legal cultures involved in the international legal order. For example, a successful interaction between traditional knowledge and the international intellectual property regimes may be frustrated by the disconnect between the individualism present within the legal culture of international intellectual property and the collectivism within many indigenous legal cultures.[1]

Identification of such legal cultural disconnects and discontinuities is the first step towards developing strategies to ameliorate potential conflicts between opposing legal cultural characteristics. That identification requires examination of the relevant legal systems with legal culture in mind—a legal cultural analysis. But, that methodology is rarely employed. To the extent we do see legal cultural analyses, they are applied almost exclusively in the domestic arena. When it is applied across legal systems it becomes a part of comparative law methodology. This merger of comparative law and legal cultural approaches is unusual, indeed almost unheard of in the international economic law (~~"I~~IEL") context. This dissertation, the body of the PhD, will undertake just such a task to show it is possible and valuable, through the use of case-studies employing the methodology to identify such legal cultural conflicts.

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[1] *See*, *e.g.*, Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. UNIV. J. L. & POL'Y 313 (2005).

This dissertation is divided into three sections—methodology, case-studies, and insights and conclusions. The first and last sections in particular (Chapters 1, 2, 8, and 9) serving to unify the dissertation.

The first section concerns methodology at the theoretical and practical level. This introductory chapter will perform a few initial but critical functions with respect to this dissertation. As an initial matter, the central issue examined throughout the various publications will be laid out in one place. That central issue, the thesis or question examined, will form the over arching framework against which the varied publications that constitute the dissertation can then be understood and for which they provide support. This first chapter will also provide a background on the methodologies that form the subject of the thesis, including the traditional research methodologies employed in IEL as well as those that comprise comparative law. This introduction will then discuss the history and development of the primary methodology at issue in this dissertation—legal cultural analysis, and the associated concept of legal culture. In the process, extensive use of the existing literature on these methodologies will be made. Finally, while the overall conclusions and insights that can and have been identified in the publications will only be discussed in the dissertation's concluding chapter, this introductory chapter will note the unique and special contribution this dissertation makes to the fields of international law, IEL and comparative law.

The second chapter of the dissertation's methodologies section explores the practical methodological issues that arise when engaging in comparative and legal cultural analyses of international law fields and institutions. Specifically, that chapter outlines the common pitfalls and obstacles that ordinary comparative analyses encounter. The chapter then focuses more specifically on the issues that will arise when engaging in comparative analyses, including legal cultural analyses, of international law subjects, using international organizations as the example through which the issue is explored.

The second section of the dissertation provides a series of case-studies that employ comparative and legal cultural analyses to examine different parts of IEL. Chapter 3 of the dissertation, the first chapter in that section, explores the issue of law and development from a comparative perspective. In so doing, that chapter shows the strength of applying the traditional comparative analysis to the contentious area of international development law. The next publications concern different aspects of the WTO, focusing on its interaction with China and on its governance. With both, a more explicit legal cultural analysis begins to replace the more traditional comparative law approaches, quickly showing the ease with which legal cultural analyses can be applied and the value that results from such applications. Showing the versatility of the methodology, chapter six then explores yet another area of IEL—international investment law. The lack of a centralizing institutional structure in international investment law makes the legal cultural analysis in chapter six more complex, but still fruitful. Chapter seven is a case-study that focuses on the narrow area of poverty-reduction that spans the entire area of IEL. Nonetheless, the methodology proves its worth in that setting as well.

The last section of the dissertation focuses on the final applications, insights and conclusions derived from the case studies. The first chapter of that last section is a case study of a discrete proposed IEL policy, in which the methodology is applied in its most comprehensive and current form, as it has been developed through the earlier case studies. The final chapter, the concluding chapter, then brings together the many different insights and conclusions that were identified in the methodology and case-study chapters. Those insights concern the methodology, as well as the concept of legal culture in general. In addition, insights and conclusions relevant to IEL are presented. Recommendations are then made that would help ameliorate the legal cultural conflicts identified by the methodology. Those recommendations would either be applicable prospectively or retrospectively, depending on the development of the IEL field or institution examined. Finally, ―next steps", including a proposed legal cultural impact analysis are suggested for the development and application of the methodology to IEL—and beyond.

II. The Thesis

The central question that can be considered throughout this dissertation's collection of publications is:

> *Whether domestic law centred comparative methodologies, and particularly legal cultural analyses, can be effectively applied within the international legal order, and specifically within the international economic legal order*.

The thesis and corresponding dissertation are thus concerned with legal cultural analyses as a methodology, and not specifically with exploring the underlying concept of legal culture. Though the term ‗legal culture' is further refined throughout the dissertation and specifically defined and discussed in some detail later in this chapter.[2]

Methodology in legal scholarship is both too little explored and an awkward area.[3] Hence, the examination of a novel methodological approach provided in this dissertation provides an unusual legal research subject. Too often legal scholars simply ―do" research without careful consideration of methodologies.[4] Unlike the social sciences or other intellectual fields, methodology is significantly missing as an explicit matter from much legal scholarship. It is often absent in the publications, frequently not receiving any

[2] *See* Section V.

[3] While not the subject of this thesis, the reasons for the dearth of explicit methodological concern in legal research are not entirely understood, but thought to be connected to beliefs that: legal education typical fails to teach research methodology, beyond that required for the practice of law; law, in the common law world in particular, is less intellectually rigorous than other social science fields; the traditional sources of legal research (cases, statutes, etc) may not require complex methodological approaches; the supremacy of doctrinal research has stifled development of research methodological capability by researchers; and so on. This issue is presently the subject of research by the author, *see also* note 4 below. *See also* Section III.

[4] A recent UNSW Law Faculty research seminar, held 26 June 2012, focused on the question ―Should legal scholars worry about research methodology?". The view that much legal research does not include consideration of research methdoology was one expressed by many of the academics present.

mention at all, and it is seldom explicitly discussed by legal researchers.[5] All too typically, legal researchers only confront legal research methodology when they do interdisciplinary work and the non-law participants press them for an explanation of the research methodology. When law scholars apply for grants they may also be asked for an explanation of their proposed research methodology.[6] Such requests are often viewed with dread by legal researchers who then struggle to explain their methodology in an acceptable manner.

Comparative law, however, is one of the few areas of legal scholarship where methodology is regularly discussed and arguably constitutes a significant portion of the field. Indeed, some have considered comparative law to merely be a methodology, though the more accepted and modern view is that in addition to providing powerful research methodologies it also constitutes a field with substantive content.[7] But, as discussed in Section IV below, comparative law methodologies are almost exclusively applied to domestic law systems. Similarly, as discussed in Section VI, they are rarely applied to international or transnational legal systems or institutions, and, as noted in Section III below, almost never to IEL fields. Furthermore, for the reasons discussed below, when comparative law is applied to the international legal order it is typically applied in a simplistic and limited manner. Rarely is a complete or holistic comparative analysis performed. Furthermore, a contextual comparative analysis, such as a legal cultural analysis, is almost never undertaken. This dissertation will refute the reasons and obstacles that stand in the way of comparative analyses of international law fields. It will provide case-studies of sophisticated comparative contextual analyses, using legal culture as the primary contextual methodology. In doing so, it will show the power of these methodologies in revealing hitherto hidden insights and understandings of the IEL fields examined in the case-studies.

Those case-studies are presented in separate chapters, each of which is a peer-reviewed publication—appearing in journals or edited books. Those chapters together with the introduction and conclusion chapters constitute this "PhD by publication". In a "PhD by Publication" the "thesis should be presented as a coherent whole with an overarching argument or theme that flows through the individual chapters".[8] The argument and theme here concerns the employment, suitability and utility of comparative methodologies in the international legal arena. Those issues are explored as a whole through the publications in which each explores different aspects of that argument and theme, but when taken together support the thesis as a whole.

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[5] *Id*.

[6] *See*, *e.g.*, Australian Research Council Discovery – Instructions to Applicants for funding commencing in 2013, at 16, available at http://www.arc.gov.au/ncgp/dp/dp_instructions.htm.

[7] *See generally*, Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002) (hereinafter "Reimann (Comparative Law)").

[8] *See* UNSW Faculty of Law Guidelines on Submission of PhD Thesis by Publication, available at http://www.law.unsw.edu.au/current-students/my-academic-life/research-students/thesis-submission-examination#pub (note the maximum word count for the entire dissertation, including footnotes and bibliography is 100,000 words).

Nonetheless, each publication was produced to stand on its own. As such, each publication necessarily restates some of the basic contexts, approaches and assumptions. Furthermore, each publication was produced to speak to a different audience and within a different context. For example, Chapter 6, *International Investment Law: Some Legal Cultural Insights*, is part of a book that is solely concerned with investment and whose readers will likely be researchers and practitioners that are already knowledgeable about investment and who have a keen interest in the practicalities that may result from a legal cultural analysis of investment law.[9] Whereas, Chapter 7, *Anti-Poverty v. The International Economic Legal Order? A Legal Cultural Critique*, is merely the beginning of the conversation by anti-poverty theorists in their effort to understand the role of modern IEL in eradicating poverty.[10] In reflecting the dissertation's thesis, each of the "case-study" publications applies comparative analyses to different aspects of the international economic legal order, though some of the publications more specifically employ a legal cultural analysis. While each of the publications is not a definitive or comprehensive analysis, each succeeds in showing the applicability and the utility of the analysis by revealing trends, characteristics and relationships within and without those parts of IEL not previously considered or even visible to IEL scholars and practitioners. In so doing, the methodology is shown to be a highly effective tool in our efforts to understand and develop the field.

Finally, the publications that constitute the dissertation build on my earlier works that applied a traditional comparative framework to public international law in an effort to identify its connections to the common or civil law traditions.[11] Therefore, some of the publications in this dissertation, particularly the earlier pieces, continue to build along that more traditional comparative analysis, albeit in the context of building the argument for the application of comparative methodologies within IEL. That approach is gradually replaced by an ever more explicit legal cultural analysis in the later publications. In doing so, it became quite clear that the legal cultural analysis, a deeper and more contextual analysis, would be even more fruitful and original as applied to IEL.

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[9] INTERNATIONAL TRADE AND INVESTMENT LAW: DEVELOPMENTS AND DIRECTIONS (Leon Trakman & Nick Ranieri, eds) (Oxford University Press) (forthcoming 2012).

[10] Appearing in POVERTY AND THE INTERNATIONAL ECONOMIC LAW SYSTEM (Krista Nadakavukaren Schefer, ed.) (Cambridge University Press) (forthcoming 2013).

[11] Colin B. Picker, *International Law"sMixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1083, 1085 n.3 (2008) (herinafter "Picker (International Law)"); Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 3 JOURNAL OF COMPARATIVE LAW 160 (2008); Colin B. Picker, *Beyond the Usual Suspects: Applications of the Mixed Jurisdiction Methodology to Public International and International Economic Law*, appearing in MIXED LEGAL SYSTEMS AT NEW FRONTIERS, (Esin Örücü, Ed.) (2010).; Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization*; COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold , eds.)) (PUBL. OF SWISS INSTIT. COMP. L) (2010) (hereinafter "Picker (WTO)").

III. International Economic Law Research Methodologies

International economic law as a field is relatively new.[12] Indeed, it is so new that it at times still faces existential challenges.[13] While the individual components, such as trade, investment and finance, have been the subject of research for a long time, it is only in the last few decades that there has been vigorous and sustained research into these areas as individual parts of a connected field, each with their own, yet related, internal orders and approaches.[14] Though, as such a new field, the exact contours and characteristics remain contentious and hidden, with very different views on what should be included within the field. Detlev Vagts notes:

> [IEL's] scope is controversial. According to one definition, it encompasses _the total range of norms (directly or indirectly based on treaties) of public international law with regard to transnational economic relations.' A wide variety of international law rules have been said to have a financial impact somewhere. For practical purposes, . . . I define international economic law as the international law regulating transborder transactions in goods, services, currency, investment, and intellectual property. I exclude from the inquiry issues of private international law, as well as of economic warfare."[15]

The dissertation does not need to engage in the debate about the definition of the field, though those parts of IEL covered in the dissertation do in fact conform to Vagts' definition of IEL.

Like public international law, which is considered to have an insufficient understanding of its theoretical and methodological bases,[16] there is little agreement or understanding and, until recently,[17] little work on IEL theory and research methodologies. In part this is because IEL researchers would rather spend time discussing and presenting the results of their work, not how they researched those results. Thus, aside from the recent attention given to empirical methodologies,[18] it is hard to persuade IEL academics to organize or take part in workshops or conference panels on methodological approaches.[19]

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[12] *See generally* Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L L. 769 (2006).

[13] *See* Steve Charnovitz, *What is International Economic Law?* 14 J. INT'L ECON. L. 3 (2011) (–I have not been able to find even two definitions that match.").

[14] Tomer Broude, *At the End of the Yellow Brick Road*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn, Douglas W Arner, eds) (2008) at 15.

[15] Vagts, *supra* note 12 at 769.

[16] Joel P. Trachtman, *International Economic Law Research: A Taxonomy* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (2008) at 45.

[17] *See*, *e.g.*, SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT (Amalya Perry-Kessaris, ed.) (2012).

[18] *See*, *e.g.*, Susan Franck, *Empiricism & International Law*, 48 VIRGINIA J. INT'L 767 (2008).

[19] My experience as an organizer of numerous local, regional and global IEL conferences over the last decade has consistently found that formal discussion of methodology and teaching are typically eschewed by the vast bulk of researchers within the field.

Nonetheless, occasionally a conference or book will buck the trend and delve into IEL methodology. One of the more accessible and holistic discussions on the subject are the works of Tomer Broude, Gregory Shaffer and Joel Trachtman presented at a conference that I organized with the explicit goal of seeking clarity on and understanding of the field of IEL.[20] The products of that conference were then published in an edited collection, of which I was the chief editor.[21] While other works exist, they are less precisely focused on the methodology of the entire field.[22] As such, the work of Broude, Shaffer and Trachtman that appear in that edited volume will be the primary sources here for this chapter's brief overview of IEL research methodologies.

The ―bedrock" of IEL research methodology is traditional doctrinal analysis.[23] As Trachtman notes, this reflects the practice orientation of legal education, ―[b]ecause practicing lawyers need not often argue about what the law should be, but are more concerned with what the law is, theory and methodology are unimportant."[24] Though, to the extent theory is present, it is a form of liberal economic theory, but then that theory is itself converted into ―hard-nosed practical formulas" of the sort on which doctrinal analysis thrives.[25] Broude, in discussing the continued relevance of this form of scholarship, even critiqued his own earlier work that employed that methodology as ―ostrich-like, self centred, technical and legalistic".

Of course, other methodological research approaches do exist. Shaffer has argued that some of the other approaches in IEL research include ―normative advocacy", ―theoretical exposition" and empirical approaches.[26] While empirical approaches are well understood and will not be further discussed or defined here, resort to Shaffer's terminology on the other two less well known descriptions is helpful. In normative advocacy

> ―[a]uthors writing in a normative vein typically advance a particular normative goal and then address how the institution, treaty or case law needs to be reformed, revised or interpreted to advance that normative goal. . . . The distinction of normative scholarship is that it explicitly aims to be transformative, while traditional legal formalist scholarship aims to be objective, purporting to describe law in neutral terms".[27]

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[20] The American Society of International Law - IEL Group, Annual Conference: *International Economic Law – The State and Future of the Discipline* (November 9th to Sunday November 12th, 2006, held at the historic Mount Washington Resort at Bretton Woods, New Hampshire—birthplace of the IMF and World Bank).

[21] INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (2008).

[22] *See*, *e.g.*, Issue 2, of 10 AM. J. INT'L L. & POL'Y 595-992 (1994-95), comprising a series of articles from a conference on *Interdisciplinary Approaches to International Economic Law*.

[23] Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (2008) at 30; Broude, *supra* note 14 at 24.

[24] Trachtman, *supra* note 16 at 46.

[25] Broude, *supra* note 14 at 19.

[26] Shaffer, *supra* note 23 at 31-33.

[27] *Id*. at 31.

In theoretical exposition ~~t~~he scholarship does not constitute theory in a positivist sense in which theory signifies the making of propositions (or axioms) that can be tested and refuted, but rather puts forward a positive or normative analytic framework for understanding law."[28] Shaffer's terminology is not exhaustive, with others describing similar approaches under different terms. Indeed, throughout legal methodological discussions one can find a proliferation of terms, with the taxonomy being confusing and suggestive of a plethora of approaches, and yet they often overlap or duplicate with other supposedly different methodological approaches.[29] Nonetheless, Shaffer's terms are sufficient here, especially as his work may constitute one of the best works on IEL methodology. Therefore, staying within his taxonomy, it can be said that doctrinal analysis remains the overarching approach for IEL, often supplemented by normative advocacy and qualitative or quantitative empirical research, yet with a theoretical framework likely included.

Of direct relevance to this dissertation, Shaffer then strongly argues for a ~~n~~ew legal realist" approach which he claims would provide important insights into IEL—it ~~b~~uilds from the socio-legal tradition of _law and society' to engage in actual empirical work."[30] At times the exact content of that approach overlaps with some of the legal cultural methodologies discussed in this dissertation. But, unlike legal cultural analysis it does not employ comparative methodological techniques and approaches. Nonetheless, Shaffer does notes the vital role of legal culture in creating the legal reality central to his methodology. As an IEL scholar he even uses the World Trade Organization as an example for his proposal:

> WTO law does not exist in a separate, autonomous sphere—such as in the treaty texts or in the Appellate Body's adopted decisions—but operates within particular legal cultures in which these texts and decisions play a part. These legal cultures include the interaction of the WTO judicial process with those who bring arguments to it, on the one hand, and the national institutions and ~~c~~ivil society" to whom the judicial decisions are addressed, on the other.[31]

Shaffer's proposal is not the same as that presented in this dissertation. In significant part because it does not delve deeply into the inevitable legal cultural clashes and disconnects. Nor does it employ comparative law to the extent found in the legal cultural analyses in this dissertation. His suggestion nonetheless provides support for the idea that methodologies along his approach and that discussed in this proposal are legitimate methodologies for research in IEL. Indeed, Broude and others have argued for the employment of different and alternative approaches.[32] Trachtman even argues that IEL

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[28] *Id*.

[29] *Id*. at 41.

[30] *Id*. at 38.

[31] *Id*. at 40.

[32] Broude, *supra* note 14 at 25-26.

researchers should go off in new directions specifically based on a better understanding of the many different and possible research methodologies:

> ~~w~~e . . . should recognize where our collective knowledge of a particular problem is adequate. One of the pathologies of IEL research, as of other law research, is to cover again ground that has already been covered. Greater understanding of, and agreement on, research methodology will allow us to form a consensus that certain issues are adequately known, and to go on to unknown issues."[33]

That includes consideration of methodologies employed by non-law disciplines, though, Broude in particular notes that we risk leaving the law behind when we delve into non-law methodologies and are no longer ~~b~~being jurists.[34] Thus, some efforts, such as those employing institutionalism,[35] may be viewed as straying out of law and into sociology or other disciplines, though, of course, may still provide useful insights. But, comparative legal methodologies, as employed in this dissertation, are firmly within the law and permit us to stay solidly on safe ground, even as they answer the challenge posed by the failures or inadequacies of traditional methodologies.

IV. Comparative Law Research Methodologies

Despite the lack of comparative law methodology in international law research, comparative examinations are one of the central components in the intellectual inquiry into the law. Comparative law has played a critical role in the development of the law from ancient to modern times. Reputedly, Aristotle and Solon engaged in comparative consideration of other city-states' laws as they developed their theories on constitutions and law.[36] More recently, the drafting of the Australian constitution at the end of the nineteenth century benefited from comparative considerations of other constitutions, such as that of the United States.[37] In addition to helping develop the law, comparative law also permits greater understanding of one's own law, through reflection and understanding of other legal systems.[38] But, the use of foreign systems as models or for self reflection cannot take place without methodologically appropriate examinations of those foreign legal systems. Comparative law methodology is the decisive tool in those efforts.

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[33] Trachtman, *supra* note 16 at 43.

[34] Broude, *supra* note 14 at 26.

[35] *See*, *e.g.*, Philip. M. Nichols, *Forgotten Linkages-Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19(2) U. PENN. J. INT'L ECON. L. 461 (1998); Andrew T.F. Lang, *Some Sociological Perspectives on International Institutions and the Trading System*, in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (Oxford: Hart Publishing) (2008).

[36] John H. Merryman, David S. Clark, & John O. Haley, COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA (1994) at 1.

[37] *See*, *e.g.*, William G Buss, *Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States*, 33 MELB. U. L. REV. 718 (2009).

[38] Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP L 43, 46 (1998).

There is, of course, no "one" comparative law methodology. Indeed, there are numerous, sometimes contradictory, methodologies—from functionalism to the post modern contextualism to the post-post modern approaches. These different methodologies have generated conflict and disagreement between the adherents of the different approaches. Despite the complexities suggested by those different approaches, comparative analyses are something humans perform numerous times a day, albeit usually subconsciously.[39] After all, when considering the differences between two people, we take into account the visible differences as well as their different abilities and characteristics—which in simplified form constitute the essential approaches of comparative analyses. But, even though it is an innate ability, a more formal consideration and application of the process both deserves attention and will improve any comparative analyses,[40] no matter how basic.

One of the primary comparative law methods is "functionalism"—which argues that comparisons only make sense when what are being compared are functionally equivalent.[41] In other words, that the legal issues compared are designed to address similar legal problems, regardless of differing names or other external characteristics.[42] For example, the concept of third party participation in WTO litigation, through its use of the phrase "third party" may incorrectly suggest the rights, liabilities and procedures that exist with respect to third party defendants or complainants in domestic litigations.[43] In some respects, functionalism addresses one of the more common comparative analytic errors, which is to compare things that appear similar but actually have different functions within the legal system.

It is especially difficult when working across legal systems that require linguistic and cultural translation as well as legal translation to ensure that comparable legal issues and problems are in fact being compared.[44] Of course, aside from linguistic difficulties it can be hard to know truly whether things are similar or different, for the divergence between the comparables may only appear when each is combined or employed with another legal device. In other words, the function may only be understood in the context of the

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[39] The above discussion on comparative law methodologies in general is drawn from Colin B. Picker, *Comparative Civil Procedure: Opportunities and Pitfalls*, in THE FUTURE OF DISPUTE RESOLUTION (Michael Legg, ed.) (Lexis) (forthcoming 2012).

[40] Other non-functionalism errors and pitfalls that may ensue from comparative analyses are discussed in Chapter 2, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW AND INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS) (Publ. Of Swiss Instit. Comp. L) (Lukas Heckendorn & Colin Picker eds.) (forthcoming 2012) (hereinafter "Picker (IOs)").

[41] *See generally*, Ralf Michaels, *The Functionalist Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[42] W. J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L.COMP .L.Q. 485, 517 (1974).

[43] *See*, *e.g.*, Xiaoming Pan, D*eveloping Countries Participating As Third Parties in the WTO Dispute Settlement* (paper on file with author, presented at the Second Asia IEL Network Conference July 2011, University of Hong Kong Law Faculty) (suprisingly, the issue of third party rights in the WTO has received scant attention from scholars).

[44] *See* Curran, *supra* note 38 at 50 (1998); *see also* Janet E. Ainsworth, *Categories and Culture: on the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19 (1996).

complete legal system or field within which it operates. Common errors in functional analyses occur then there is a failure to understand:

> That a foreign law may have no tangible function (it may be enacted for symbolic reasons)[45];
> That the function no longer continues to exist[46];
> That the function is not as anticipated or has changed[47];
> That the function is supplanted by an overarching ideology that supplants the legal issue[48];
> That there may be many different functions[49].

In other words, functionalism can too easily be ethnocentric, viewing foreign legal issues through parochial lens. This is manifested in the basic expectation that functions can be similar and that problems in different legal systems are the same, felt the same, or understood the same way.[50] While not explicitly employed in the dissertation, functionalism, and the pitfalls noted above, form the backdrop against which some of the comparative analyses take place. Thus, for example, in Chapter 5, when governance at the WTO is being subject to a legal cultural analysis, an implicit functionalist analysis took place permitting the discussion of "governance" to take place across different legal systems—from domestic to that of the WTO.

Of course, there is no question that functionalism and the other comparative law methodologies engage in simplifications a great deal of the time. But, that is the norm in comparative law.[51] Nonetheless, comparative law methodologies can be quite sophisticated and like all fields, comparative law and its methodologies continue to develop in ever more sophisticated and complex ways. The development of comparative law methodologies does not, of course, take place in a vacuum. Changes within the larger world of the law away from doctrinal rules and towards legal realism contributed to the move within comparative law away from traditional approaches, even when they were not incompatible, towards consideration of such new approaches as legal culture.[52]

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[45] *See* Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOK. J. INT'L L. 405, 415 (2007).

[46] *Id.* at 419-20.

[47] *See* Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 B.Y.U. L. REV. 1879, 1890 (2009).

[48] *See* Brand, *supra* note 45 at 455.

[49] *Id.* at 416.

[50] *See* Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800, 820 (2000).

[51] *See* Reimann (Comparative Law), *supra* note 7 at 677. ("First, it is understood today that all classifications are mere approximations to, not accurate reflections of, reality. We mostly continue to divide the world into civil law, common law, and several other systems but we know that these are ideal types which merely serve our need to maintain a rough overview.")

[52] "Traditionally, the autonomy of the discipline of legal studies was located within the doctrinal rules, which were thought to be capable of generating solutions to every actual controversy." Paul W. Kahn, *Freedom, Autonomy and the Cultural Study of the Law*, in CULTURAL ANALYSIS, CULTURAL STUDIES AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathan Simon, eds) (2003) at pp 155-56.

Accordingly, and developed in some measure in response to comparative law's traditional reliance on functionalism, comparative analyses increasingly focused on the comparative context—comparative contextualism.[53]

Contextualism is easily explained by considering that archetype of comparison—"apples and oranges". The differences between these fruits are vast, or so they appear in our ordinary life and use of those fruits. One is green or red, the other is orange; one is citrus the other is sweet; one needs to be peeled, the other has edible skin; one can be baked into a pie, the other can be preserved as a marmalade; one grows in semi-tropical climates, the other in colder regions; and so on. Those differences certainly suggest the two are not comparable—as is suggested by the traditional phrase. But, both are fruits, both are healthy snacks, both cost roughly the same, both are easily available in stores, and from a scientific perspective, they are almost indistinguishable.[54] In those senses, they are similar. So, their comparability depends on the context in which the comparison is being made—whether for use in a pie or in a laboratory.

For IEL, the contexts that are, as an initial matter, critical for comparative consideration are the institutional, constitutional, historical, political, and sometimes sociological and legal cultural contexts. Thus, the context of IEL must include not only what is written down, but as it is applied and as it is informed by history and the institutions within which it operates. Specifically, as argued in this dissertation, IEL's context must also include consideration of the relevant and competing legal cultures—those of the international field, the international institutions and organizations, and those of the different domestic legal systems and communities involved in the IEL. Legal cultural analyses are thus critical to understanding IEL's context.

V. Legal Culture

Before discussing legal cultural analysis, the concept of legal culture itself must first be explored and explained—to the extent such an amorphous concept can be explained.

A. Legal Culture in the Literature

The relationship between law and culture has been the subject of inquiry and discussion for centuries:

> [Nineteenth century] scholars such as Maine and Savigny attributed the brilliance of Roman law to the fact that, for whatever reason, Roman culture

[53] Peters & Schwenke, *supra* note 50 at 827.

[54] *See* Scott A. Sanford, *Apples and Oranges--A Comparison*, 1 ANNALS OF IMPROBABLE RESEARCH, May/June 1995, available at http:// www.improbable.com/airchives/paperair/volume1/v1i3/air-1-3-apples.html (scientifically "apples and oranges are very similar"); *see also* Catherine Valcke, *Comparative Law as Comparative Jurisprudence--The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 720 (2004) (noting the comparability of apples and oranges in the context of comparing legal systems).

> glorified jurists who, for a long period of time, were dedicated to the aim of continually improving Rome's legal institutions."[55]

Similarly, legal culture is apparent in Montesquieu's eighteenth century declaration in *De l'Esprit des Lois* where he claimed that law depended on ~~l~~ocal conditions".[56] Also, as an expression of the role of legal culture, the highly influential nineteenth century German historical school:

> ~~[~~C]onsidered law to be the manifestation of the people's national spirit ("Volksgeist") and thereby particular to every nation--an organic product of society which has to be watched for and discovered, rather than made or tampered with.[57]

Nonetheless, despite its solid heritage, legal culture is an elusive concept.[58] While the notions associated with legal culture are to some scholars vague and close to impossible to use, they are critical and imperative for others. These differences, whether real or imagined,[59] exist despite the fact that there are no shortages of definitions of legal culture. For example:

> By ~~l~~egal culture," we mean the patterns of order that shape people, institutions, and the society in a jurisdiction.[60]

> [T]he most significant feature of legal cultures would be the styles of argumentation in jurisprudence.[61]

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[55]Kevin E. Davis, Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008).

[56] *See* Brand, *supra* note 45 at 430 (citing Montesquieu, THE SPIRIT OF LAWS 103-05 (David Wallace Carrithers trans., U. Cal. Press) (1977)).

[57] *Id*. at 430.

[58] *See* Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies and the Situation of Legal Studies*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathan Simon, eds.) (2003) at 12.

[59] Amy Cohen reports that Peter Fitzpatrick has argued that ~~t~~hat many definitional debates about culture split along the following lines: culture is claimed to be determinate, reified, and stable or foundationally indeterminate, dynamic, and riddled with fissures and internal dissent. Fitzpatrick, however, reasons that _[d]espite the seeming opposition between these [two dimensions], culture has to be in a sense both.' He is moved to this conclusion by the myriad ways in which people interact with their own and other _cultures,' producing both consistency and change." Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 543 (2009) (quoting from a paper in Cohen's records, entitled Peter Fitzpatrick, Costs of Culture 1 (unpublished paper prepared for the Law and Society Annual Meeting, Humboldt University, Berlin (July 28, 2007)) and also quoting from Peter Fitzpatrick, *"The damned word": Culture and its (In)compatibility with Law*, 1 LAW, CULTURE, & HUMAN. 2, 11 (2005).

[60] Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291, 292 (2003).

[61] Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 40 (1998) (citing René David, in INTRODUCTION, II INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1972)).

> Anthropologists . . . interpret legal culture as a local phenomenon, shaped by local knowledge and practice, through which symbols such as 'law' or 'court,' understandings of 'rights' and 'wrongs,' and concepts of 'crime,' of 'normal trouble' or of complaining and dispute take on particular, locally relevant meanings. In an interpretive account, legal culture not only differs in different contexts, but law is 'invented,' negotiated, or 'made' in local settings. [62]

> Cultural studies of the law fulfil the ~~"n~~need to investigate the ways in which law is constitutive of group and individual identities and values"[63]

> Legal culture "refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds."[64]

> By ~~"l~~egal culture" is meant those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society. [65]

> [C]ulturalists essentially contend that legal rules are embedded in local dimensions of the law. Each legal culture is a unique, culturally contingent product, which is incommensurable and untranslatable except through a deep understanding of the surrounding social context.[66]

> Much of the cultural studies of law movement has been an effort to shift the location at which we study law from the opinions of the appellate courts to the expressions of ordinary people carrying out the tasks of everyday life.[67]

> [T]he creation of legal meaning—"jurisgenesis'—takes place always through an essentially cultural medium.[68]

While not defined explicitly as legal culture, comparatist Ed Eberle describes what is otherwise legal culture:

> [N]ot all external law is written. A second, deeper part of law lies beneath the surface and is less visible. These are the underlying forces that operate within a society to help form and influence law and give it substance. We might call this the "invisible" dimension of law. Not that this dimension is wholly unknown or

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[62] Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1690 (1989).

[63] Kahn, *supra* note 52 at 162.

[64] Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in COMPARING LEGAL CULTURES 34 (David Nelken ed., 1997).

[65] Merryman, *supra* note 36 at 51.

[66] Brand, *supra* note 45 at 428.

[67] Kahn, *supra* note 52 at 155.

[68] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV 4, 11 (1983).

> unrecognizable, but more that this dimension of law is one we tend to assume, take for granted, or perceive just dimly. Or we might think of these invisible patterns as underlying crypto types-" the pattern to be revealed" - or legal formants-" non-verbalized rule[s]" - or "implicit patterns." Or we might think of this dimension as "substructural, often unarticulated, categorizations. . . ." We might refer to this dimension of law as internal: forces that operate beneath the surface of external law, but which infuse the law with meaningful content.[69]

Clearly the concept of legal culture has a rich and long history in the literature, and yet falls short in fully explaining the concept in a tangible and manageable fashion.

B. Legal Culture as Employed in this Dissertation

In the publications that form part of this dissertation, I articulate my own definition of legal culture—a simple and functional definition, grounded in comparative law, which runs throughout those publications in the dissertation which explicitly employ a legal cultural analysis:

> I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories,[70] see the world differently, and project different visions.[71]

Legal culture is also further expressed in the following from Chapter 2.

> [T]he humans that work in and shape [international institutions] are not blank slates. [They] are shaped by those very people, domestic legal culture –and all". Furthermore, the legal side of those institutions will include people trained in domestic law schools, which, despite increasing international content, remain firmly anchored in domestic legal systems . . . they cannot stop the influence of their underlying legal cultures permeating the [institutions] in which they work. Thus, all those associated with [those institutions]—the lawyers, officials,

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[69] Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WILLIAMS U. L. REV. 51, 63 (2011).

[70] *See* Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (Harvard 1987) at 8.

[71] Colin B. Picker, *China, Global Governance & Legal Culture: The Example of China & the WTO* (PUBL. UNIV. TOKYO INSTIT. SOC. SCI) (J. Nakagawa, ed.) at 72-73 (citations omitted).

> member's of state missions, scholars and even the interns—will, often without even knowing it, come to work, bringing with them their legal culture.[72]

Their legal culture will include their conscious and subconscious responses and behaviours with respect to legal matters, including their behaviour in dispute resolution settings, negotiations, policy development, selection and employment of legal sources, attitudes to other legal and non-legal participants, and so on. Below and in the case-studies further examples of other and more specific legal culture responses and behaviours are provided.

Legal culture must also be differentiated from legal traditions and legal systems. Although dealt with in the dissertation's case studies, it helps to restate the differences here.

> Legal systems are
>
> > ~~"t~~he composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[--and] have largely the same characteristics[,] the same rules and organizations."
>
> Legal traditions, in contrast, are:
>
> > families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[73]
>
> One can see that while similar, and often confused and at times interchangeable in some comparative analyses, [a major] issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. In contrast, legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally describe broad groupings and more typically reflect formal sources of law.[74]

Perhaps most critically, in contrast to the concept of legal traditions, legal culture reflects the "~~li~~ving law" in one legal system or community, focusing on the behaviour of the participants. Legal traditions may set the environmental factors for those participants, but how those participants behave within those legal settings is a matter of legal culture, not legal tradition, though legal tradition may play a role in shaping that legal culture.

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[72] Picker (IOs), *supra* note 40 at 4 (citations omitted).

[73] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TULANE LAW REVIEW. 1053 (2001) (text at fn 68) (citations omitted).

[74] *See* Chapter 2, Part II.

Indeed, as Erhard Blankenburg notes "[t]he comparison of Dutch and German legal institutions has shown that similarities of formal legal systems are bad predictors of how legal cultures actually work."[75] A similar example showing the lack of congruence between tradition and culture are the very different legal cultures in England and the United States—both members of the Common Law tradition.

Thus, legal systems belong to overarching legal traditions, while legal cultures exist within, and sometimes across, legal systems, completely or partially within the overarching legal traditions. There are thus legal cultures associated with legal traditions, geographic regions, legal systems, legal fields, and even associated with communities, large and small. For example, we can talk about the legal culture of the Socialist legal tradition, of Western Europe, of the WTO, of international investment law, of France, of family law, of the Amish community, or even of the Hell's Angels. The discussion of those legal cultures will be different, varying at each level, likely to be more generalized, diffuse and vague for the larger bodies or fields, yet likely to be very specific and detailed for the smaller focused communities or fields. But, whatever the legal or geographic jurisdiction to which the legal culture applies, it will be the case that the legal culture resides in the conscious and subconscious behaviours and attitudes of the many different participants within that jurisdiction—from clients to lawyers, from judges to jurors, from citizens to politicians, from bike gang leader to family law lecturer.

It should be noted, however, that complete legal cultures should be differentiated from the more specific legal cultural characteristics found within those legal cultures, and which comprise the data in legal cultural analyses. It is the latter therefore, the legal cultural characteristics, which are typically at issue in legal cultural analyses—the heart of this dissertation. After all, it is rare for an entire legal culture to be in opposition to another legal culture or to an international policy initiative. The relevant issues are thus the specific legal cultural characteristics within the larger legal culture. The case-studies provide many examples of legal cultures and legal cultural characteristics,[76] even though legal cultures as a whole would typically be too large, amorphous and unwieldy to be very helpful when considered in the aggregate. Nonetheless, as an example to ensure the concepts are sufficiently clear, this introductory chapter will briefly discuss the American legal culture as a concrete, albeit generalized example of a legal culture. The dissertation's case studies, however, typically explore the legal cultures of specific international organizations and fields, though focusing on their legal cultural characteristics.

Regardless of its utility or accuracy, we can speak of the legal culture that exists as a general matter across the entire United States—as an overlay under which the many legal subcultures are found and through which the American legal system operates. But, that legal culture is really just an aggregation of the many different, sometimes contradictory,

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[75] Blankenburg, *supra* note 61 at 39.

[76] *See*, *e.g.*, Chapter 2, Part II ("By way of example, the American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the issue is visible when considering the role/behaviour/activities of American judges versus those in France; the role/behaviour/activities of American attorneys in negotiations versus those in Japan; and the role/character of legal sources in America versus those in Islamic law in Iran.").

sometimes connected, legal cultural characteristics found throughout the United States. That legal culture may be said to include, among many others, the following legal cultural characteristics: individualism; pragmatism; parochialism; localism; nationalism; exceptionalism; messianism; legal minimalism; public participation; legal scepticism; legal realism; market force orientation; positivism; religious overtones; constitutional cultism; instrumentalism; utilitarianism; extreme adversarialism; and so on.[77] The extent of these legal cultural characteristics is, of course, debatable. While, many of them may be found in other legal cultures, it is the aggregate of these and other American legal cultural characteristics that comprises the American legal culture. Furthermore, in keeping with the definition of legal culture, those characteristics are not mandated by the formal parts of the American legal system or by the legacy of the common law tradition. Statute, regulations, case law, or the overarching legal tradition are not the determinates of the legal culture, though they may reflect and influence the legal culture and hence may help to maintain that legal culture. For example, in America the rules of discovery create the conditions for the abusive discovery that has become a part of the American legal cultural landscape, yet those rules do not mandate that sort of behaviour.[78] The legal culture leads to those patterns of behaviour.

Typically, that American legal culture is not instilled through formal means—through regulation or other official means. In significant respects, it is transmitted through American popular culture and through the American people's collective observations of the way members of the public and the legal profession behave and respond to legal issues. The professionals within the legal system are further exposed to the overarching legal culture during their legal education and subsequent legal practice. Thus, American law students early on "pick up" that there is an expectation, not mandated by law, that as practitioners they will provide free, pro bono, legal service to worthy causes.[79] Similarly, once in practice, new American lawyers find out that despite stringent state bar rules to the contrary, they can be expected as a de facto matter to practice the law of other state jurisdictions—to be "American" and not just local lawyers.[80] Thus, legal culture while highly informal can be very powerful in creating the "living law" of a legal system.

VI. Legal Cultural Analysis

Legal cultural analysis is the crux of this dissertation—its application within the international legal order forms the basis of the thesis. Put simply, a legal cultural analysis of a legal system or community involves identifying those legal cultural characteristics

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[77] These observed legal cultural characteristics are based on my experiences in America as a law student, judicial clerk, attorney and as an academic, teaching American law (in America and overseas). *See also*, Kimberlianne Podlas, *Homerus Lex: Investigating American Legal Culture Through the Lens of the Simpsons*, 17 SETON HALL J. SPORTS & ENT. L. 93 (2007) (humorous but very insightful examination of American legal culture).

[78] *See*, *e.g.,* FED. R. CIV. PRO. Rule 26 et seq.; *see especially* Rule 26(b)(2)(C) (rules suggesting limits when abusive).

[79] *See*, *e.g.*, Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 703 (2009).

[80] Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 -- An Interim Assessment*, 43 AKRON L. REV. 729 (2010).

which play a significant role in the development of that legal system or community, both internally and in its interactions with outside legal systems and/or communities.

In considering the non-mandated behaviours of legal participants, legal cultural analysis overlaps to some extent with some other realist legal analyses, including "socio-legal" analyses, such as that undertaken by Moshe Hirsch.[81] There may also be some overlap with legal anthropology, especially when the legal cultural analysis is more descriptive.[82] While the legal cultural analysis applied in the publications in this dissertation does not engage in ethnography, it is nonetheless akin to those analyses that seek a "thick description" of the relationship between culture and law.[83] A "thick description" gives

> a complex account of the slippage between the production and reception of law and legal meanings, of the ways in which specific cultural practices or identities coincide or collide with specific legal rules or conventions thereby altering the meaning of both.[84]

But, in this dissertation legal culture it is not used just in a thick descriptive or thin interpretive manner, as is the case in cultural anthropology.[85] The goal here is additionally the eventual application and utility of the underlying law related to the legal cultures at issue. Thus, this dissertation focuses not just on legal culture and its role in legal conflicts and disputes, but also on the relationship of legal culture with the other tangible work of the law, from transactions to the creation of international economic realities in trade, investment or other IEL fields.

Furthermore, the legal cultural analyses in this dissertation are not the same as these other methodologies for there is a greater connection to comparative law within the legal cultural analyses, which would not have been the case for these other methodologies. Throughout the publications that make up the dissertation there is no shortage of comparative examples of legal culture and its relationship to different parts of the international economic legal order. Nonetheless, a few examples here help to illustrate the point.

> For example, the manner in which disputes have been resolved between the members of the Association of Southeast Asian Nations very strongly reflects certain common legal cultural characteristics, such as "finessing' and

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[81] *See*, *e.g.*, Moshe Hirsch, *The Sociology of International Economic Law*, 19 EUR. J. OF INT'L L. 277 (2008).

[82] *See* Naomi Mezey, *Law as Culture*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathan Simon, eds.) (2003) at 58.

[83] *See* Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURE: SELECTED ESSAYS (1973).

[84] *See* Mezey, *supra* note 82 at 54.

[85] *Id*. at 56. Nor are Paul Kahn's four methodological approaches applied here, for they concern other aspects of the cultural study of the law, more theoretical than utilitarian in the direct manner applied throughout this disertation. *See Chapter 3, Methodological Rules* in Paul W. Khan, THE CULTURAL STUDY OF THE LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999) (hereinafter "Khn (Book)") at 91-127.

> defusing‘‘” being preferred to adversarialism and confrontation”.[86] The reference to adversarialism can immediately tie into many concepts within comparative law,[87] thus leading to numerous additional insights related to those legal cultural characteristics and legal systems and institutions.
>
> Similarly, the litigiousness of a state, a key legal cultural characteristic, has been found to be reflected in the state‘s tendency to file cases at the WTO.[88] Litigiousness has been examined extensively in comparative law[89] and employing the lessons from those examinations can lead to insights relevant to that legal cultural characteristic and used to expand our understanding of that legal culture and the WTO.

Nonetheless, legal cultural analyses are difficult and awkward—hence their general absence from IEL research. Indeed, despite the previous section‘s numerous attempts to define and categorize legal culture and the many examples proffered, there remains a great deal of scepticism about the concept, even outside of the international and IEL context. Roger Cotterrell, for example, notes that: "[t]he imprecision of these formulations makes it hard to see what exactly the concept covers and what the relationship is between the various elements said to be included within its scope."[90] But, Cotterrell concedes that it is nonetheless useful "for its emphasis on the sheer complexity and diversity of the social matrix in which contemporary state legal systems exist.”[91] Of course, legal culture analysis shares many of the same vagueness problems as exists with studies involving culture in general. As Oscar Chase notes: “The principal difficulties spring from the inherent vagueness of the concept, its potentially misleading message of immutability of practice and belief, and its failure to acknowledge individual departures from, and even opposition to, a social orthodoxy”.[92] Chase then does acknowledge that “these problems do not trump the utility of the concept of culture as a short-hand way of acknowledging commonalities in practices, values, symbols and beliefs of groups of people that form some sort of collectivity.”[93]

Nonetheless, legal cultural analyses are difficult and infrequently employed. Indeed, outside domestic law contexts, comparative law in general is rarely applied to

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[86] Lisa Toohey, *When „Failure" Indicates Success: Understanding Trade Disputes Between ASEAN Members* in EAST ASIAN INTEGRATION: FINANCE, LAW AND TRADE, (Ross Buckley, Richard Weixing Hu & Douglas W. Arner (eds)) (2011) at 178.

[87] *See*, *e.g.*, Picker (WTO), *supra* note 11.

[88] Ji Li, *"See You in Court!" to "See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L. 485 (2007) (while an excellent empirical analysis, this particular study would have been greatly improved through inclusion of comparative and specifically legal cultural analyses).

[89] *See*, *e.g.*, J. Mark Ramseyer, *The Costs of the Consensual Myth: Anti-Trust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 610 (1985).

[90] Roger Cotterrell, *The Concept of Legal Culture*, in COMPARING LEGAL CULTURES 13, 15 (David Nelken ed., 1997).

[91] *Id*. at 29.

[92] Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278-79 (2002))

[93] *Id*. at 278-79.

transnational and international law fields.[94] In part that is because there are a whole host of contentious issues surrounding the use of the different comparative methodologies that can chill the application of the methodology outside its usual arena.[95] But, those disagreements should not stand in the way of new applications of comparative law analyses. Those disagreements are often not relevant outside the very academic arguments in which they are found. As discussed in detail below, with respect to this dissertation they are for the most part simply not relevant—they are academic.

As an initial matter, this dissertation does not enter into the debate concerning the post modern critique that true comparative law is not possible due to the fact that comparatists cannot escape their own legal culture in order to sufficiently ~~"e~~nter" that of another legal system.[96] After all, ~~"a~~ valid examination of another legal culture requires immersion into the political, historical, economic and linguistic contexts that moulded the legal system, and in which the legal system operates."[97] Whether impossible or not with respect to comparative analyses of domestic legal systems, the subject of this dissertation is an international legal system—IEL. Immersion into a field of international law is not contemplated by those comparatists arguing this issue and may not even be relevant to the discussion! After all, international law fields occupy a space across all legal systems and are everywhere, including within the many different domestic legal systems. They are fundamentally different to the geographically and politically bounded domestic systems typically considered by those seeking immersion into a foreign legal culture. To the extent international legal fields and institutions include a legal culture, which this dissertation does indeed suggest, then those legal cultures are not closed, but open to participants from all systems equally, with each contributing to the formation of the legal culture of the international institution or field. As such, the outsider comparatist has the ability to immerse herself into the subject legal culture as easily as any of the many different participants from the numerous different domestic legal systems that participate in the institution or field. True, there are factors, accessible to all with sufficient preparation, that will assist in that immersion. They include language, educational experience, legal tradition background and so on—all factors discussed at length in the dissertation and the other background works that have led to this dissertation.[98]

Furthermore, the publications within this dissertation do not fit well with the extreme positions found among some of the post-modernists, such as those associated with epistemic and moral relativism positions.[99] Rather, this work may best fit with the post-post modernists within comparative law.

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[94] The identification of ~~"g~~eneral principles of law recognized by civilized nations" is perhaps the main use of comparative law in international law. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179; s*ee generally* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963).

[95] *See* Peters & Schwenke, *supra* note 50.

[96] Curran, supra note 38 at 48-49.

[97] *Id*. at 51.

[98] *See*, *e.g.*, Picker (WTO), *supra* note 11.

[99] Peters & Schwenke, *supra* note 50 at 813.

> A post-post-modernist approach to comparative law will retain the (self-)critical impetus of the post-modernist critique, reject the postmodernist assertion that objectivity is not attainable in comparative law, and synthesise old and new demands for interdisciplinarity and thoughtful hermeneutics.[100]

Nonetheless, this thesis is not concerned with the validity or otherwise of one comparative methodology over another. This thesis assumes that the traditional, modern and post-modern methodologies and bases of comparative law, especially that of functionalism, are important and insightful approaches. The debates about methodology within comparative law are simply not relevant to this dissertation.

Similarly, this dissertation does not enter the great arguments about the impossibility of legal transplantation, a position well argued by Pierre Legrande in numerous works.[101] As an initial matter, this dissertation and thesis is not primarily concerned with the transplantation of law from one domestic system to another. Rather, here the concern is with the relationships between international law, international organizations and domestic legal systems—but only insofar as that domestic law is relevant to the international organization, the international law, or the domestically implemented international law. Nonetheless, transplantation is relevant to some aspects of the dissertation, but the fact that legal cultural analyses are involved serves to mitigate Legrande's critique of the typical academic discussions of transplantation. His essential argument is that transplantation efforts are inherently flawed, for imported law that is itself culturally anchored to a foreign system cannot be imported into a legal system that is itself also intrinsically linked to a necessarily different context.[102] But, the very issues that Legrande raises, are the very issues examined here even as they are usually ignored in the typical works involving legal transplantation. As such, there is no need for the dissertation to confront Legrande's critique, for that critique is already a part of the very fabric of the dissertation.

Comparative law can be difficult and rife with substantive, methodological and theoretical pitfalls. Furthermore, because of the definitional and vagueness issues, the methodological subset that comprises legal culture analyses are frequently misunderstood, ignored or minimized within that already contentious comparative law. It is thus no surprise that comparative and legal cultural analyses are hardly applied outside the usual domestic legal system subjects of comparative law. As such, this dissertation's application of comparative and legal cultural analyses to an international law field, IEL, pushes the bounds of those methodologies and removes many, if not all, of the ambiguities through the actual application of the methodology in the case-studies.

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[100] *Id*. at 829-32, 829

[101] *See*, *e.g.*, Pierre Legrande, *What "Legal Transplants"?* in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001) at 55.

[102] *Id*. at 60-65.

VII. Comparative and Legal Cultural Analysis of International Law and International Economic Law

Trachtman rightly notes that ―[e]ach research method has a domain in which it is illuminating. Outside that domain, it may be misleading."[103] Throughout the publications that comprise this dissertation, there are numerous warnings about the mistakes that can ensue from comparative methodologies incorrectly applied. But, the domain of comparative law methodologies can, as this dissertation seeks to show, fruitfully include international fields.

Indeed, some scholars at the micro level have with some success employed aspects of comparative law to examine discreet areas of international law.[104] Though, for the most part, scholars either ignore or fail to use comparative methodologies to examine international law fields—especially at a macro level.[105] But, it is possible—and potentially fruitful. For example, one of my earlier works provided a unique comparative analysis of public international law as a whole.[106] That examination approached international law through the classic western comparative law taxonomy, identifying common and civil law characteristics that exist within international law. That examination came to the conclusion that public international law is predominantly a mix of characteristics that derive from the civilian and common law traditions, and furthermore that the nature of the mix bears substantial similarity to those jurisdictions known as ―mixed jurisdictions".[107] That conclusion suggests that the ongoing development of public international law may benefit from consideration of how the similar mixed jurisdictions have successfully handled the mix of common and civil law components of their legal systems.

Nonetheless, despite the utility of such works there is scepticism within the public international law field that comparative law drawn from the domestic arena is relevant to what is often considered to be the unique international law system.[108] Even aside from any notions of uniqueness, international law research tends to shy away from comparative law.[109] An uncharitable explanation could be that it is due in part to

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[103] Trachtman, *supra* note 16 at 44.

[104] *See, e.g.,* Picker (International Law), *supra* note 11 (citing such works).

[105] *See* Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67 (2010) (―Comparativists and internationalists alike have almost entirely neglected the interaction between international law and comparative law.").

[106] *See* Picker (International Law), *supra* note 10.

[107] Mixed jurisdictions were first defined more than one hundred years ago as ―legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law." William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000) (citations omitted); *see also* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Valentine Palmer ed., 2001).

[108] *See* Aleksandar Momirov & Andria Naudé Fourie, *Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law*, 2 ERASMUS L. REV. 291, 296 (2009).

[109] *See* Jaye Ellis, *General Principles and Comparative Law*, 22 E.J.I.L. 949-971 (2011); *but see* Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1 (2003) (though, the article is more focused on identifying some future collective global legal culture).

international law's parochial and superior nature.[110] Indeed, while referring to domestic systems, and there is little to suggest it is not as applicable to international systems, Karl Llewellyn noted that:

> "Nowhere more than in law do you need armor against . . . ethnocentric and chronocentric snobbery-the smugness of [one's] own tribe and [one's] own time: We are the Greeks, all others are barbarians."[111]

As such, international law research will too often see little value in domestic legal systems—despite the clear domestic law heritage of much of international law.[112]

If there has been little use of comparative law methodologies within general international law research it should not then be surprising that the relatively more hard-nosed economics-based field of IEL also typically fails to utilize comparative law methodologies.[113] Also, legal cultural analyses, the methodology suggested here, as a more difficult and unusual comparative method, is even more rarely considered within international law,[114] and while sometimes noted,[115] is rarely considered in depth, despite research that points to the need for such legal cultural analyses.[116] More specific reasons for IEL fields' failure to employ comparative analyses, and specifically legal cultural analyses are explored within many of the publications included in the dissertation.

But, the blame for the lack of comparative and legal cultural analyses of international law, to the extent blame is relevant, cannot just be laid at the feet of international law scholars. Comparatists have also been reluctant to apply themselves to international issues.[117] Indeed, traditional comparative analyses are often attacked "for isolationism vis-á-vis related legal subjects (such as jurisprudence or international law) and for lack of

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[110] *See*, *e.g.*, *id*. at 4. Such attitudes are found in other large legal (and small) legal systems as well. *See also* Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles And Opportunities*, 16 ROGER WILLIAMS UNIV L. REV 86 (2011).

[111] K. N. Llewellyn, The Bramble Bush 42-43 (7th prtg. 1981).

[112] *See* Picker (International Law), *supra* note 11.

[113] *See* Section III above.

[114] David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 633 (1997) ("[i]nternationalists seem comfortable with power and uncomfortable with culture, while comparativists are eager for cultural understanding and wary of involvement with governance."). *See also* Kahn (Book), *supra* note 85 at 109-10 (suggesting there is something axiomatic in international law's approach to its field that makes it difficult if not almost impossible for them to employ the legal cultural approaches as described by Khan).

[115] Vadi, *supra* note 105 at 104 ("Like any other kind of adjudication, consistent patterns, attitudes, values and opinions characterize investment treaty arbitration. All these elements form what may be called a legal culture." – but the article goes no further.).

[116] *See*, *e.g.*, Li, *supra* note 88 at 487 (providing empirical data supporting the need for studies such as would be covered under legal cultural analyses).

[117] *See generally*, Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 Tul. L. Rev. 1103 (2001). Also, as Demleitner notes: "comparative law focused on contrasting national legal systems rather than examining the non-dominant or informal sub-systems within the dominant legal structure or the developing international system." Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 738 (1999).

interdisciplinary efforts" and —for persistent Eurocentrism and obsession with private law; as well as for lack of attention to international regimes".[118] Though there are some efforts, especially within the last few years, when comparatists have tackled international law issues, most often those works relate to those times when international and national have concurrent jurisdiction.[119] But, it is clear that there is a need for more comparatists to consider international legal fields and institutions, and within their comparative analyses to apply some of the less traditional methodologies, such as legal cultural analyses.[120] Though, even within comparative law's consideration of domestic systems, legal cultures are not always formally acknowledged. After all, legal cultural analyses has often been carried out —sub silentio", without explicit methodological exposition.[121] Though this may have been more the case in the previous generation of comparatists. Vivian Curran argues that the —elder statesmen" of American constitutional law, as émigrés from Europe, —[b]eing of two countries, and sometimes more, the comparatist scholars of the last generation understood that translating from one legal discourse to another requires an understanding of the respective legal cultures."[122] Today's generation less typically has that innate understanding. Though, in some ways we cannot fault comparative (and international law scholars) for their failure to use legal cultural analyses, for legal academics in general have themselves been —relative latecomers to cultural analysis and cultural studies."[123]

Despite the general failure to consider legal culture within the legal academy, comparatists should know better, for they are confronted with it more often and starkly than is likely the case for legal academics focused within domestic legal systems. Indeed, Nora Demleitner has noted that while —the original purpose of comparative law was to facilitate European cross-border trade through a comparison of legal rules, today it can assist in mediating conflicts that may arise from the cross border movement of persons who are imbued with the values of the legal culture into which they were born [and] can reveal how another person perceives the world, and how law contributes to and reflects the culture of a country."[124] Clearly, comparative law can go further and extend into helping international legal regimes handle their interactions with domestic systems and

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[118] Reimann (Comparative Law), *supra* note 7 at 680.

[119] *See* Momirov & Fourie, *supra* note 108.

[120] As Demleitner notes, —national and international legal systems, driven by economic globalization, migration and the advancement of human rights, have begun to mix, intersect and cross-fertilize. The resulting overlap of different normative orders in space and time leads to legal pluralism and intersectionality, the intersection of different legal orders which are —non-synchronic and thus result in uneven and unstable mixings of legal codes." Demleitner, *supra* note 117 at 746-47.

[121] Curran, *supra* note 38 at 52.

[122] *Id*. at 53.

[123] *See* Sarat & Simon, *supra* note 58 at 13 (quoting Robert Post: —We have long been accustomed to think of law as something apart. The grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary disordered paths of life. For this reason efforts to unearth connections between law and culture have appeared vaguely tinged with expose, as though the idol were revealed to have merely human feet. In recent years, with a firmer sense of the encompassing inevitability of cultue, the scandal has diminished, and the enterprise of actually tracing the uneasy relationship of law to culture has begin in earnest." From LAW AND THE ORDER OF CULTURE, at vii (Robert Post, ed. 1991)).

[124] Demleitner, *supra* note 117 at 745 (footnotes omitted).

peoples with different legal cultures. Demleitner further suggests the employment of what I would call a legal cultural analysis for human rights, and says, if it were to be done, then ~~–e~~omparative law could finally also live up to its promise and goal of becoming ~~–a~~ worldwide legal discipline."[125] It is the hope that this dissertation will help lead to that goal through the benefits that result from the legal cultural analyses in the dissertation's case-study publications.

VIII. Conclusion

While not nearly so grand or momentous, an apt analogy that helps to understand the contribution of the dissertation to the field would be when the telescope which had only been used to see distant objects at sea or on land was improved by Galileo, permitting him to turn it on the night sky for the first time. That new use revealed that the Milky Way was composed of stars, that the surface of the moon had craters and mountains, and that Jupiter had moons.[126] While that early telescope did not provide many answers, it raised new and important questions and provided insights into our understandings of the Earth, the night sky and the universe. Similarly, while many answers are not provided by this dissertation, novel insights are illuminated that will lead to new questions and lines of inquiry, and eventually, through later similar studies, will lead to greater understandings of the international legal order.

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[125] *Id*. at 758 (citing Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 511 (1998)).

[126] ENCYCLOPEDIA BRITANICA (15th edition), vol. 7 (1990), at 640.

An Introduction to Comparative Legal Cultural Analyses of International Organizations

by Colin B. Picker*

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I. Introduction

Legal systems, institutions and organizations comprise more than just rules, regulations and laws. They are also made up of individuals that create, implement and regulate those systems, institutions and organizations. Humans themselves, however, are not so easily compartmentalized and will tend to bring their home legal cultures into the international legal order. Additionally, they will tend to create new legal cultures within those international intergovernmental organizations ("IOs") and fields. But, the interactions and operations of those legal cultures—be they domestic or international, new or old, competing or complementing—will often have significant implications for the processes and functions of those different legal cultures, individually or together. Accordingly, examination of those legal cultures and their interactions is necessary to really understand the international legal order, on its own or in its interactions with domestic systems. This article will thus introduce the idea of applying comparative legal cultural analyses to the international legal order, and specifically to IOs—the backbone of the international legal order. Because such analyses are somewhat unusual and little known, this paper will also provide a methodological toolbox for those analyses.

It should be noted that this paper is part of a larger research project of the author that considers comparative legal cultural analyses from many perspectives, including from that of IOs, in which the World Trade Organization ("WTO") is employed as an example of such organizations.[1] As part of that project, and complementary to the work of the Swiss Institute of Comparative Law ("SICL"), this paper, in an earlier form was delivered at a conference entitled "Comparative Law and International Organizations: Cooperation, Competition and Connections" at the SICL in Lausanne, Switzerland.[2] Switzerland was an ideal location for such a conference given that it is

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* Associate Professor, Law Faculty of the University of New South Wales, Sydney, Australia. A.B. Bowdoin College, J.D. Yale Law School.

[1] The research here is part of a larger study by the author that will be part of the author"s PhD thesis. Some of it has already been published. *See*, *e.g.*, Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine , Seán Patrick Donlan & Martin Sychold , eds.)) (Publ. of Swiss Instit. Comp. L) (2010) (hereinafter "Picker (WTO)"); Colin B. Picker, China, Global Governance & Legal Culture: in CHINA AND GLOBAL ECONOMIC GOVERNANCE: IDEAS AND CONCEPTS (ISS Research Series No.45, Tokyo: Institute of Social Science, University of Tokyo.) (Junji Nakagawa, ed.) (2011) (hereinafter "Picker (China)"); Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles and Opportunities*, 16 ROGER WILLIAMS UNIV L. REV. 86 (2011) (hereinafter "Picker (America)"); Colin B. Picker, International Trade and Development Law: A Legal Cultural Critique, 4 LAW & DEV. REV. NO 2: 4 (2011).

[2] Swiss Institute of Comparative Law, 10-11 September 2009, Lausanne, Switzerland.

home to twenty five IOs and hundreds of non-governmental organizations that work with the United Nations.[3] Indeed, while traditionally the subject of IOs has focused on the 250 or so international intergovernmental organizations,[4] there are also thousands of international non-governmental organizations that play important roles in the international legal order.[5] Many of those international non-governmental organizations ("INGOs"), such as the International Olympic Committee, headquartered in Lausanne, are considered to have international personality, whereby they can "speak" with states and enter into agreements with them.[6] Some, as a direct result of their inclusion in treaties, may even be considered quasi-intergovernmental organizations, such as the International Committee of the Red Cross.[7] For the most part, this paper will not be concerned with those INGOs, but with the 250-plus IOs. Nonetheless, much of this paper may be as applicable to the INGOs, as to the IOs. Furthermore, given the increasingly important role of the INGOs in the formation of international law,[8] application of the analyses suggested here may be as applicable to INGOs, with such analyses also being very valuable for the international legal order.

II. Comparative Legal Cultural Analyses

A comparative legal cultural analysis can be applied to international law in general, IOs, substantive fields within international law, and to states' domestic participation and implementation of international law and organizations.[9] While this paper's title suggests it is only introducing the methodology for purposes of comparative examinations of IOs, the fact is that the methodology, with some slight modifications, could apply to those other aspects of the international legal order. Nonetheless, throughout this paper's presentation of the methodology the paper will still use IOs in the general examples that highlight the methodology, in order to enrich the overall discussion of the comparative legal cultural analysis of IOs.

A comparative legal cultural analysis is a comparative method of understanding the legal culture of a legal system. Having previously defined "legal culture", I will here simply reproduce that definition:

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system,

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[3] See the website for the Swiss Federal Department of Foreign Affairs at http://www.eda.admin.ch/eda/en/home/topics/intorg/inorch.html (last checked 28 Dec., 2010).
[4] A. LeRoy Bennett & James K. Oliver, INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES, 7th Edition (Prentice Hall) (2002) at 282.
[5] *Id*. at 282-83.
[6] *See* David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97, 103-104 (1992).
[7] Finn Seyersted, COMMON LAW OF INTERNATIONAL ORGANIZATIONS (Martinus Nijhoff Publishers) (2008) at 6-8.
[8] *Id*.
[9] *See generally* Picker (China), *supra* note 1; Picker (America), *supra* note 1; *see also* Ljiljana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan*, 11 J. INT'L ECON. L. 803 (2008).

> reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions.[10] It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.[11]

Typically, however, comparative law focuses on legal systems and legal traditions, and not on legal cultures. Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations."[12] Legal traditions, in contrast, are:

> families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[13]

Thus, one can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just

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[10] *See* Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (Harvard 1987) at 8.
[11] *See* Picker (China), *supra* note 1 (some citations omitted).
[12] Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093, 1094 (2008) (hereinafter "Picker (International)").
[13] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053 (2001) (text at fn 68) (citations omitted).

one system‟s legal actors. In contrast legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally typically describe broad groupings and more typically reflect formal sources of law. Consequently, a comparative legal systems analysis of IOs would focus on the formal rules within and across the organizations. Whereas a comparative analysis of the legal traditions of IOs, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an IO would usually analyze just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, the overlap. Consequently, this paper‟s suggested methodologies and approaches may also be a very useful first step before embarking on those other analyses, each of which is itself a critical method of inquiry in an examination of an IO.

III. The Employment of Legal Cultural Analysis in International Law

International organizations, as the backbone of the international legal order, have been a central part of the international legal order for almost two hundred years.[14] But, with the exception of occasional efforts to identify "general principles of law recognized by civilized nations",[15] IO scholars and practitioners rarely employ a comparative or legal cultural analysis, with the few exceptions being quite notable for their rarity.[16] This all the more perplexing given that the humans that work in and shape those institutions are not blank slates. IOs are shaped by those very people, domestic legal culture "and all". Furthermore, the legal side of those institutions will include people trained in domestic law schools, which, despite increasing international content, remain firmly anchored in domestic legal systems. Accordingly, despite the IOs‟ civil servants‟ duty of neutrality and "international loyalty"[17] they can not stop the influence of their underlying legal cultures permeating the IO‟s in which they work. Thus, all those associated with IOs—the lawyers, officials, member‟s of state missions, scholars and even the interns—will, often without even knowing it, come to work, bringing with them their legal culture. Yet that legal culture, their own and their colleagues, is almost always ignored or not noticed by those very same individuals.

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[14] *See* James P. Muldoon, Jr., THE ARCHITECTURE OF GLOBAL GOVERNANCE (Westview Press) (2004) at 102, 107, 120; C.F. Amerasinghe, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (Cambridge Univ. Press) (1996) at 4.

[15] *See* Statute of the International Court of Justice art. 38(1)(c); *See generally* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963).

[16] Typically the analyses deal with international criminal law, and in particular the International Criminal Court. *See*, *e.g.*, Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010); Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (2002); *see also* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule Of Law"*, 101 MICH. L. REV. 2275 (2003).

[17] Bennet & Oliver, *supra* note 4 at 416-17.

The fact that this methodology has also essentially been ignored by IO scholars is all the more surprising given that IOs command a great deal of scholarly interest. Indeed, within international academic law societies there are individual sections on IO.[18] Today, in law faculties all over the world there are classes[19] and associated textbooks on the subject.[20] IOs have been the subject of study for a very long time.[21] Yet, a review of a large sample of those books and law journals found few comparative considerations of the role of legal traditions, systems and cultures in understanding IOs. Instead, scholars and others have considered, among other things:

The organizational structures of IOs;
The IO as corporation;
IOs‟ interactions with other IOs;
IOs‟ dispute settlement regimes;
IOs‟ interactions with international, regional and domestic law;
IOs‟ financial structures;
The theoretical underpinnings of IOs; and
Internal and organic law of IOs

Of these, only the dispute settlement analysis occasionally comes close to discussing issues that may be related to legal culture and traditions, but for the most part the analyses have been superficial.[22] In other words, a great deal of thought and energy has been spent exploring the workings, powers, competencies and internal administration of the large numbers of increasingly important IOs, but very little consideration has been given to the role of legal cultures and traditions in the creation, operation and development of IOs.

Understanding why this method of analysis is not applied to international law and its organizations by both international law and comparative law scholars, practitioners and officials is in fact a critical part of this introduction to the methodology. After all, the reasons why a methodology that is so beneficial can be effectively ignored for so long provides insights into potential obstacles to its application—now and in the future. One basic reason may be that IO scholars lack sufficient knowledge about or comfort with comparative law. It may also be that for those that are knowledgeable they would not even think to consider IOs through a comparative lens. Similarly, it may be that comparatists lack knowledge about or comfort with international law, and IOs in particular. Furthermore, even if they did have the knowledge, they would typically not apply their comparative law expertise to a consideration of IOs.[23]

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[18] *See*, *e.g.*, the American Society of International Law‟s International Organization Interest Group website at http://www.asil.org/interest-groups-view.cfm?groupid=25 (last checked Jan. 6, 2011).
[19] A brief Google search for courses on international organizations turns up numerous such courses offered at institutions all around the world.
[20] *See*, *e.g.*, Bennett & Oliver, *supra* note 4.
[21] *See*, *e.g.*, THE YEARBOOK OF INTERNATIONAL ORGANIZATIONS, founded in 1910 (see http://www.uia.be/yearbook).
[22] *See*, *e.g.*, Pablo Zapatero, *Modern International Law and the Advent of Special Legal Systems*, 23 ARIZ. J. INT'L & COMP. L. 55, 67 (2005) (focus on dispute settlement, and while excellent, too sparse on the issue of legal culture and traditions).
[23] *See generally*, Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 Tul. L. Rev. 1103 (2001).

A major source of these parochial behaviors lies in the fact that the "domain of things global" is artificially segmented into too many supposedly separate fields, including among others: public international law; transnational litigation; international arbitration; international economic law; comparative law; private international law, international human rights, and so on. Each of those is then further segmented into subfields, so, for example, within public international law there are such areas as: international organizations; Space Law; and the Law of the Sea.[24] Within international economic law there is, among other subfields: international trade; international financial and monetary law; and international investment. Within comparative law there will be country specialists such as specialists on Japanese or German law, and there will be legal field specialists such, as experts on comparative commercial law or property law.[25] This specialization is not unique to comparative or international law. It is a phenomenon present throughout the law, and other academic fields. This trend is all the more disconcerting for non-domestic law fields given that modern movements inside and outside the law, such as "globalization", increasingly tie the different fields together. Nonetheless, there are simply too few attempts to span multiple fields—few wish to become the modern legal renaissance man or woman.[26]

With respect to legal academia, and to international and comparative law in particular, the possible reasons for this specialization are quite clear. As an initial matter, it is a long and hard educational process to become a legal polymath, with costs in terms of early recognition as an expert, both by failure to stake out a field and by the lost research productivity as time is employed in learning new fields.[27] Those stresses are compounded by the trend within academia, as in practice, towards rewarding increasing specialization—as a result of hiring and promotion practices that too often select new hires with proven expertise within but one field. The push towards specialization is even present in law schools which now face competitive pressures to offer students the opportunity to graduate with emphasis or certificates of specialization in discrete fields. It is often informally suggested to students that such specialization will lead to more job opportunities in the law firms that themselves increasingly force their attorneys into specialized practice.[28] All these factors reinforce the barriers to research that spans comparative and international law.

Another reason that international law fields will not have comparative law methodologies applied to them is the perception that international law's *sui generis* character precludes the relevance of a comparative analysis involving methods and

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[24] For a larger list just consider the number of interest groups in the American Society of International Law. *See* http://www.asil.org/interest-groups.cfm (almost 30 sections, most of which reflect substantive subfields).

[25] Another on-going research project of the author suggests that within comparative law there is a strong preponderance of private law specialists, which means even fewer will then have knowledge of "public" international law, even as many comparatists are also experts in private international law (conflicts of laws).

[26] The better term is a "polymath".

[27] I, in contrast, at great cost, am in the process of trying to become a transnational law polymath, through teaching and writing across the broad legal field that encompasses matters international and transnational.

[28] *See generally* Larry Catá Backer, *Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 PENN ST. INT'L L. REV. 67 (2001) (see especially footnotes 1 and 2).

examples from domestic legal traditions and systems.[29] While international law clearly has some elements that are unique, that in and of itself is not sufficient to rule out application of comparative law methodologies to international law. After all, every legal system is unique in that they do not exactly resemble any other legal system. But, if the *sui generis* characterization simply means it is unlike other legal systems in all respects, that is evidently not true. For sure, there are some characteristics and traits in international law that will not be found in other legal systems. For example, that the traditional subjects of international law are states and that individuals, traditionally, were merely the objects of international law. But then that is not so radically different from domestic systems as domestic systems do have states as subjects—either in the context of such issues as sovereign immunity or, quite frequently, through the regulation of foreign parastatals‟ business activities. Similarly, international law today does have individuals as the subjects of international law in such fields as human rights and international economic law, though it is still not quite the same relationship as is the case between citizens and their states. So, in fact in those two cases we can easily point to some level of comparability between domestic legal systems and international law—dispelling the idea that international law is so radically different as to be incapable of being subject to a comparative examination.

More specifically with respect to legal culture, part of the reason that comparative legal cultural analyses of international law issues have failed to garner much interest is that, as noted before, legal culture is frequently exhibited and expressed behind closed doors.[30] It is also all too often executed at the subconscious level—out of view.[31] Legal culture often takes place as a result of subliminal or reflexive actions by the negotiators, IO civil servants, state parties, dispute settlement arbitrators and so on. This will occur when a legally trained IO participant reaches into their mind to create or fix some issue—and employs a device or idea that is there as a result of their legal training or experience. That training and experience will be derived from a person‟s domestic as well as international law past, thereby further complicating the issue. Even non-legally trained participants in IOs will employ ideas and solutions that stem from the legal culture of their society or past experiences. Sometimes, as a result of the impact of foreign mass media, individuals may suggest ideas based on other legal cultures and not even realize those ideas are alien to their own legal culture.[32] Thus, importation of domestic legal culture may often take place without serious thought. There are, of course, some notable exceptions, such as the conscious consideration and use of law from different legal traditions and cultures that was employed to create the substance and procedure of the International Criminal Court.[33] But even in that case there are some concerns about the "fit" of the many legal devices imported from different traditions. Unfortunately it will take some years

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[29] *See* Picker (International), *supra* note 12 at 1090.

[30] *See*, *e.g.*, J. Paulsson, *Cultural Differences in Advocacy in International Arbitration*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, 2nd edition (Bishop/Kehoe eds) (Juris Publishing) (2010) at 16 (available at TRANSNATIONAL DISPUTE MANAGEMENT (Nov. 2010))

[31] *See* Picker (WTO), *supra* note 1.

[32] Thus it may be that after having been exposed to American and British law-based television programs that constantly portray the use of juries in courts someone in a jurisdiction that does not employ the jury will think that juries are typically used in all legal proceedings, even in their own courts.

[33] *See*, *e.g.*, Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 705-06 (2010).

before that "fit" is fully understood. Nonetheless, for IOs in general, rarely is the issue of legal culture directly noted and confronted.

The fact that international law subjects have typically not been considered under comparative law analyses is hence no indication that such approaches are inappropriate. Rather, it is simply an indication of the historic myopia and parochialism present in both the international and comparative law fields. Critically, the lack of experience of such analyses does suggest that caution should be taken in the event scholars attempt to employ comparative methodologies to international law. The potential pitfalls are numerous. In addition to the usual ones that undermine normal comparative law analyses, there will also be unique snares related to the fact that international law fields are different to the domestic systems that are normally the subject of inquiry in comparative analyses.

IV. Likely Pitfalls in a Legal Cultural Analyses of IOs

As powerful a methodology as it is, a comparative legal cultural analysis may also be subject to tremendous hazards—the novice comparatist or international law scholar must beware. In addition to the general or usual mistakes that can be made in any comparative legal cultural analysis, there are also ones specific to a legal cultural analysis of IOs. Each will be discussed briefly below.

A. General Errors in a Legal Cultural Analysis

Comparative law, essentially and simply, involves consideration of more than one legal system, tradition or legal culture. Even when the comparatist appears to just be discussing one legal system there is an intrinsic comparison going on between that legal system and other systems, whether the one under consideration is foreign or native to the comparatist. For the manner in which the examination develops, the issues chosen for focus, and the conclusions derived will all flow, consciously or subconsciously, from the difference between the system under observation and some other system or systems. Accordingly, in all cases comparability is critical. The things being compared, be they substantive law, legal actors, or institutions must be comparable or the comparison will fail. A common phrase in English denoting failed comparisons is that the two things are "like apples and oranges". But, along with the demand for comparability is an equally strong need for context to be taken into account. Thus, while certain external appearances may suggest radical differences between apples and oranges, they are in fact essentially the same thing from a scientific standpoint.[34] But, when being selected as a healthy snack, they are indeed quite different. So, their comparability depends on the context in which the comparison is being made. A more scholarly example was provided by the great comparatist and legal historian John Langbein when critiquing a comparative study of

[34] *See* Scott A. Sanford, *Apples and Oranges--A Comparison*, 1 ANNALS OF IMPROBABLE RESEARCH, May/June 1995, available at http:// www.improbable.com/airchives/paperair/volume1/v1i3/air-1-3-apples.html (scientifically "apples and oranges are very similar"); *see also* Catherine Valcke, *Comparative Law as Comparative Jurisprudence--The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 720 (2004) (noting the comparability of apples and oranges in the context of comparing legal systems).

the number of judges in the United States and Germany.[35] In that critique he noted the failure of the comparatists to take into account the fact that the vastly different roles of the judges in each system explained the relative need for fewer judges in the United States than in Germany. In the United States the parties‟ lawyers handle many of the tasks that in Germany would be handled by the judge, resulting in the need for fewer judges.[36] Thus true comparability, taking into account context, is essential to a successful comparative analysis.

Context, however, includes many different issues, including the relevant history, language, ordinary culture, constitutional structure, politics, and so on. All very important, yet difficult to include in all cases and for all issues. Indeed, the fear of not taking everything into account can itself also lead to failure—the failure of the analysis to even be undertaken. In this case the methodological hazard is in the failure to engage in the analysis for a paralyzing fear of lack of expertise in the field, a failing which could deprive the field of many helpful insights. But, so long as it is understood that the analysis is preliminary, valuable lessons may still be learned from even superficial comparisons, though the superficiality must be noted. Indeed, it may even be the case that a comparatist‟s relative lack of expertise of a system may be a benefit, allowing the comparatist to see issues obscured to the expert that is swamped with too much information. This methodology has been described as the "*See the Forest, Not the Trees*" methodology.[37] Of course, such a macro consideration, such an examination from 40,000 meters (or even feet), will necessarily imply the use of simplifications and an end result that may itself be a generalization, but one that will nonetheless be of some value, so long as it is clear that the examination is based on generalizations. After all, characteristics at the simplified and generalized level still play a large role in "creating the overall legal culture which then wields its „invisible hand‟ to shape the legal environment".[38]

Relatedly, another pitfall lies in wait for those that may not be aware of the larger and interconnected legal structure of either the foreign or home legal system, and in particular may not be aware of the relevant safeguards in each system. A safeguard is a device which offsets potential failings or inadequacies of other legal devices, procedures and rules in the same legal system. Safeguards are often hidden or not clearly tied to the device requiring the safeguard. An example is the role of evidentiary rules as a safeguard to offset some of the inadequacies of jury systems.[39] Similarly, and more visible, is the safeguard abilities of a judge to overturn a jury verdict or reduce damages in civil cases.[40] Any critique of the civil jury system without including consideration of those safeguards might lead to potentially erroneous insights. Similarly, any comparative analysis that recommends importation

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[35] *See* John H. Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, 18 JUDGES J. 4 (1979) (hereinafter "Langbein (Judges)").
[36] *Id*. at 50.
[37] *See* Picker (China), *supra* note 1, text at fn 3. The name of this methodology is a paraphrase of the saying that one may not be able to see the "forest for the trees", which has been explained as describing "someone who is too involved in the details of a problem to look at the situation as a whole", *see* Dictionary.com at http://dictionary.reference.com/browse/can't+see+the+forest+for+the+trees (last checked Dec.31, 2010)).
[38] Picker (WTO), *supra* note 1 at 119.
[39] John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 273 (1978).
[40] *See*, *e.g.*, Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 688-89 (1995).

of legal concepts and ideas must ensure that the safeguards are imported as well, or that their safeguards‟ functions or the failings of the imported devices are otherwise addressed in the importing system.

Finally, though there are many other pitfalls not discussed here, another common comparative law problem is a failure to understand the vital role of perspective in comparative analysis—that two people may not see things the same way. This is a reflection of the idea that there may not be objective realities on which to base grand comparative analytical conclusions.[41] This is particularly true when members of one legal culture are working in another and often alien legal culture. Similarly, there may not be one correct methodological approach to a comparative law issue. Thus, the position that the researcher must be fluent in the language of the legal systems under examination may be overly strict and undermine good work that can be done by those lacking such language fluency. If linguistic fluency was a requirement for good comparative work then most comparative work would merely span two, rarely three jurisdictions, for it will be a rare comparatist that has working fluency in more than three languages. Also, an approach that required language fluency would also lock comparatists for their professional life into only those jurisdictions for which they had linguistic fluency, a likely inefficient use of skilled comparatists. Also, some perspectives would be lost, as typically most people‟s second language is likely to be one of Chinese, English, French, German, Hindi, Russian or Spanish, with English as the one most likely to be a second language among scholars.[42] Consequently, the chances are that a Spanish comparatist would not have working fluency in Russian and would then be unable to consider the Russian legal system, yet they may have some insights of great value. Methodological and substantive perspective are accordingly two approaches that should be bought to bear in both comparative analyses of domestic systems as well as in those of systems in the international legal order.

B. Errors Unique to the Analysis of IOs

In addition to the usual comparative methodological errors, comparative analyses within the international legal order must be careful of some special issues not normally encountered in domestic comparative examinations. Indeed, despite earlier comments in this paper concerning the *sui generis* nature of international law, there are some different realities associated with the international legal order and with its studies that must be considered. Those realities are, however, amenable to many of the standard comparative approaches, albeit with some modifications.

Some of the problems likely to be encountered will arise when IO specialists engage in comparative analyses, while other difficulties apply when comparatists enter the world of IOs. One issue that applies to the IO specialist that seeks to use domestic systems for insights into an IO is the likely lack of comparative law training or experience of that specialist. Similarly, the comparatist seeking to consider an IO may not have the insiders‟ knowledge of the organization, and, given the lack of transparency in many IOs, that may be a serious handicap. These are far from

[41] *See* Picker (America), *supra* note 1.
[42] *See Vistawide: World Languages and Cultures* webpage, available at http://www.vistawide.com/languages/top_30_languages.htm.

insurmountable obstacles, but do need to be considered at the beginning of a comparative examination on an IO. The IO specialist, therefore, may need to consult with comparatists in order to learn comparative law methodologies,[43] while perhaps a little harder, the comparatist will need to develop contacts within the IO.

Another problem with a comparative analysis of IOs that is different from traditional comparative analyses is that the primary subjects of international law are states and states are not easily comparable to the primary subjects of domestic systems—humans. Indeed, even when domestic systems deal with foreign states they typically employ special rules and accord states special treatment, particularly when the state is acting in its public capacity.[44] For example, while individual punishment may make sense in a domestic system, when applied to individuals, it is considerably more complicated, conceptually and physically, when applied to states. Furthermore, there are major theoretical, qualitative and quantitative differences between the relationship of individuals to states and that of states to international law. For example, the international legal order includes only a few hundred state subjects, compared to the millions of subject citizens in each state—a significant quantitative difference between the two. Furthermore, the correspondingly closer connection of the state to the international legal order leads to a very strong positivistic element in international law. Thus, unlike the case for citizens in states, specific and clear state consent is typically required for an international law to apply to a state.[45] Reflecting that reality, diplomacy, often in a form that is akin to extra-legal process, is still the main mechanism of state-to-state interaction and dispute resolution. Domestic "rule of law" systems are, for the most part, not like that though that suggests perhaps a greater comparability between international law and those legal cultures that are less litigious and more meditative.

Another issue of comparability between the international legal order and domestic systems relates to differences in the divisions, sources and fields of law within each legal system. International law is both narrower and broader. It is narrower in the sense that most of international law is public law—hence the name "public international law." Indeed, much of public international law might be thought of as similar to domestic state"s "constitutional law" or administrative law, both in the sense that it regulates the international legal order"s governmental structure and in the sense that it often concerns fundamental legal norms. That strong public nature suggests that comparability with non-public elements of domestic systems can be difficult. After all, in order to consider domestic system"s "private law" in a comparative analysis of a part of the international legal order, one has to be creative, using imagination, analogy and lateral thinking. For example, the law of treaties may be with some imagination compared to contract law, while international economic law could be compared to commercial law.[46] While these are not exact matches, they may work well enough to provide interesting and potentially quite helpful insights.[47]

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[43] *See* Picker (America), *supra* note 1 (discussing comparative law training for non-comparatist academics, practitioners and officials).
[44] *See*, *e.g.*, the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.), and the U.S. judicially created Act of State Doctrine, first annunciated in *Underhill v. Hernandez*, 168 U.S. 250 (1897) .
[45] Though there are exceptions, such as for jus cogens.
[46] *See* Picker (International), *supra* note 12 at 1117-18, 1126, 1130-33.
[47] *Id*.

But, even as the public nature of international law may suggest it is more narrow than domestic systems, international law may employ greater use of other types of law than is often found in domestic legal systems, especially western legal systems. This is specifically the case with respect to the significant employment of customary law in international law.[48] Also, the explicit use of fundamental law, jus cogens, is also somewhat alien in western domestic legal systems. While there are natural law and fundamental principles within western domestic legal systems, they tend to figure rarely and less explicitly in those systems. But luckily for comparative analyses, jus cogens are not that large a part of international law, mainly comprising "prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and „the principles of the United Nations Charter prohibiting the use of force.""[49]

Another methodological problem relates to the fact that the international legal order is qualitatively different from most developed western legal systems. It is substantively diffuse and its lacks institutional centralization. It does not have an overarching authority (aside from the dysfunctional and generally ineffectual UN Security Council). Also, it may be relatively poorly funded and resourced when compared to developed western legal systems.[50] International law is also substantively uneven, making holistic analyses difficult. Parts of it are ancient,[51] while others of very modern vintage.[52] Some international law may be considered rather well developed,[53] while other parts are significantly underdeveloped.[54] Indeed, international law can be very slow to develop, especially when customary international law is being created (though on occasion that may be very fast indeed).[55] It is visibly robust in some

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[48] Customary law is found in western legal systems, but in most, though not all of those states, it is quite carefully circumscribed and easily displaced by the ever growing body of statutory law. *See* COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW, 3rd Edition (American Casebook Series) (Thomson West Publishing 2007) (Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker) at 226 n.2, 241, 632-34.

[49] Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331-32 (2009) (citing Restatement (Third) of Foreign Relations of the United States § 702 cmts. d-i, § 102 cmt. k (1987)).

[50] Given the size of the justice establishments in developed countries, it is hard to believe that, outside the international law work carried out by those same civil servants in domestic jurisdictions, there is in any way an equivalent or proportionate number of international civil servants working directly with international law in the international organizations.

[51] *See* David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 EMORY INT'L L. REV. 1, 12-15, 21, 24 (1996) (describing Greek and Roman recognition of the rights of embassies and envoys and treaties).

[52] For example, the birth of outerspace law with the launch of the Sputnik satellite in 1957. *See* Barton Beebe, *Note, Law's Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis,* 108 YALE L.J. 1737, 1738 (1999).

[53] Consular relations is a rather well developed part of international law. *See*, *e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261, TIAS No. 6820.

[54] International environmental law is still quite immature and un- or under-developed. *See* David M. Driesen, *Thirty Years Of International Environmental Law: A Retrospective And Plea For Reinvigoration*, 30 SYRACUSE J. INT'L L. & COM. 353 (2003).

[55] *See* Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 183-84 (2001). For example, it took only fifteen years for the development of the customary international law concerning continental shelf submarine resources. David J. Bederman, INTERNATIONAL LAW FRAMEWORKS 3, 18 (2001)

regions and quite absent in other regions of the world.[56] It strongly regulates some fields,[57] and leaves other fields relatively untouched.[58] Further confusing any analysis is that it may be interpreted differently in different international tribunals and in different national courts.[59]

Finally, because international law and its organizations have grown in an ad hoc and inorganic manner it is the case that different parts of international law reflect different legal traditions and legal cultures.[60] International law includes within it characteristics found in many different legal traditions, It is, however, for the most part solidly within the western legal tradition, with strong civil law aspects, but with increasing facets of Anglo-American/Common Law.[61] Indeed, it has been argued that the manner of that distribution is similar to those legal systems identified as "Mixed Jurisdictions", such as Scotland, Louisiana and Quebec.[62] Accordingly, comparatists and IO scholars engaged in a comparative analysis of international law should take into account international law‟s mixed nature, and consider the Mixed Jurisdiction legal systems as the comparable domestic systems.

The above are just a few examples of the ordinary and special considerations that must be taken into account when engaged in comparative analyses of aspects of the international legal order. Clearly there are many more, some will be specific to individual fields within the international legal order, while others will be of more general application. But, what not to do or what are the pitfalls is merely one part of what it is necessary to know when engaged in these analyses. Another significant part comprises the measures and approaches that should be undertaken in such analyses. The next section will provide some examples of such recommended actions.

V. Some General Approaches for Legal Cultural Analyses of IOs

In many respects, the pitfalls noted above can be viewed as the mirror image of those tactics that should be employed in a comparative analysis of international organizations. Thus, the mistake of failing to take context into example, suggests context should be employed. Similarly, and as was explicitly noted above, the erroneous fear of simplification directly led to the "See the Forest, Not the Trees" approach. Nonetheless, those inferred methodologies are quite general and somewhat

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[56] Compare the role and application of international law in the European Union and in the Horn of Africa.

[57] For example, international trade is heavily regulated through the World Trade Organization and hundreds of preferential and regional trade agreements.

[58] Competition law is relatively untouched by international law, despite its inclusion in the ill-fated Havana Charter, an attempted agreement to create an international trade organization in the immediate post-war period. *See* Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and The Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189 (2009).

[59] *See* Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 385-86 (1998). *Compare* E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) (finding no cover for emotional damages under the Warsaw Convention), with *id*. at 551 (referring to the only decision from another jurisdiction that held that the Convention should be read to include psychic injury damages (*citing* Air France v. Teichner, 38 (III) P.D. 785, 788 (1984) (Isr.)))

[60] *See generally* Picker (International), *supra* note 12.

[61] *Id*.

[62] *Id*.; *see also* Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 3 J. OF COMP. L. 160 (2008).

vague. This section will therefore suggest a few examples of concrete and specific approaches to a comparative legal cultural analysis of IOs.

While employment of simplification and generalization was suggested above, there was no specific direction provided as to how to employ a simplification and generalization method. As an initial matter, one helpful simplification in a legal cultural comparative analysis is to start with a focus on the primary legal tradition characteristics that may be present in the international legal issue under consideration.[63] That simplification is made just a little easier by the fact that most parts of the international legal order have been most strongly influenced by the legal cultures associated with the two dominant legal traditions of the world—the common and the civil law traditions.[64] Even as the differences between those two traditions may appear to be disappearing, their conventional characteristics and associated legal cultures still exert a fundamental influence on the international legal order.

But, one must at some point consider the role of other traditions. Indeed, for some parts of the international legal order it may make sense to very quickly turn to non-western legal traditions. For example, international development law, a part of international law, will need to consider the role on non-western legal traditions and cultures for many reasons.[65] In particular, this is because many of the states most impacted by development law will have non-western legal cultural aspects, despite, for the most part, formally employing a variant of the civil or common law traditions. That non-western content will have an impact on the legal culture of international development law through those states‟ engagements with the field in the diplomatic and dispute resolution arena. It will also be an issue when those states implement international development law into their domestic legal systems.[66]

Non-western legal traditions and cultures also should be considered when the IO handles issues related to family law, which is very often non-western in many countries, developed and developing.[67] Additionally, there are regions of the world with very strong formal as well as informal non-western traditions and legal cultures, and they should be taken into account. For example, the very strong presence of Islamic law, formally and informally in countries in the Middle East and Asia, should not be ignored. Finally, there are some very influential states in the international legal order, great powers one might say, that have exceptionally strong but informal non-western legal cultures. That non-western legal culture will likely impact those states‟ interaction with the international legal order, and consequently help to shape the legal culture of the different parts of the international legal order. For example, China has very strong non-western legal cultural characteristics, such as an enduring role for Confucianism.[68] That part of China‟s legal culture will likely have impacts on a whole host of China‟s understandings and interactions with IOs and will likely shape China‟s future contributions to the international legal order.[69]

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[63] *See*, *e.g.*, Picker (WTO), supra note 1 at 119.
[64] *See* Picker (International), *supra* note 12 at 1104-07.
[65] *See* Picker (Development), *supra* note 1.
[66] *Id*.
[67] *See*, *e.g.*, Josh Goodman, *Divine Judgment: Judicial Review Of Religious Legal Systems In India And Israel*, 32 HASTINGS INT'L & COMP. L. REV. 477 (2009); Lama Abu-Odeh, *Egyptian Feminism: Trapped In The Identity Debate*, 16 YALE J.L. & FEMINISM 145 (2004).
[68] Jianfu Chen, CHINESE LAW: CONTEXT AND TRANSFORMATIONS (Martinus Nijhoff) (2008) at 19.
[69] *See* Picker (China), *supra* note 1.

Whether approaching the comparative legal cultural analysis of an IO from a civil, common or non-western legal tradition and cultural perspective, it should be borne in mind that some parts of a legal system may be more amenable than other parts to comparative analyses. For example, substantive characteristics may often be less relevant for comparative analyses than organizational, structural or systemic features. This is because domestic legal systems" substantive law are very often tailored to the specific domestic regulatory concerns of states and may not be as translatable to international law systems, and in particular may be inapplicable to IOs, which typically have quite different substantive concerns. As always, there are exceptions such as the U.S. dormant commerce clause, which may be highly relevant to the underlying substantive law of the WTO.[70]

Sometimes, identification of congruence of the IO with a systemic or organizational feature of another legal system suggests a broader legal cultural or tradition affinity between the two. For example, the primacy of codes, theory or doctrine within the substantive law of the IO may suggest a legal cultural affinity with the civil law systems, as those systems traditionally have elevated those features more than is typically the case for the "pragmatic" common law legal systems.[71] The same would be the case if in the IO there was a significant role for scholars and scholarship in the development and operation of the IO as historically the role of scholar has been greater in the civil than in the common law systems.[72] Similarly, divining the nature of dispute decisions (such as case law) can be insightful, for it will suggest a common law character it they are akin to the common law"s de jure precedential effect, as opposed to the typically de facto precedential effect of the civil law.[73] Likewise, if the IO has such a formal dispute settlement process the character and background of the arbitrators or judges may be instructive. For if the "judges" are civil servant-like and inquisitorial, then perhaps the IO is in those respects closer to the traditional character of civil law judges, as opposed to the more passive and practice-orientation characteristics of the common law judges.[74] Relatedly, one can infer a common or civil law like character from the role and behavior of the attorneys in dispute resolution—with traditionally a more aggressive and proactive style in the common law systems and a more passive and responsive behavior by attorney in civil law systems.[75] Recognition of these congruencies can be very helpful in the ultimate identification of the IOs legal culture.

Of course, there may be a place for a broad legal cultural analysis of the complete set of IOs across the international legal order. Yet, each of the IOs is different, perchance *sui generis*—with different constitutions, competences, and structures. There is, however, an acceptance of a common set of principles and concepts that are broadly applicable to IOs. Those include privileges and immunities, textual interpretations,

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[70] *See*, *e.g.*, Daniel A. Farber & Robert Hudec, *Free Trade and the Regulatory State: A GATT's Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994).
[71] *See*, *e.g.*, Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240 (1999).
[72] Glendon (Traditions), *supra* note 48 at 179, 432.
[73] *Id*. at 244.
[74] *See* Picker (WTO), *supra* note 1 at 126-127; Glendon (Traditions), *supra* note 48 at 167, 490.
[75] *See* Picker (WTO), *supra* note 1 at 129; *see also* Langbein (Judges), *supra* note 35.

responsibility and employment relations.[76] It has even been referred to as being "common to all IGOs (unless they exceptionally have deviating provisions) and is thus „common law", both in the literal sense and in the Anglo-Saxon sense of customary law."[77] Those common principles, mechanisms and substantive laws would likely benefit from a comparative analysis with domestic systems, traditions and cultures. As such, the same concerns and approaches discussed above with respect to an examination of just one IO should also be considered with respect to IOs as a whole.

The above sections on methodological pitfalls and tactics represent just a few of the dangers and lines of attack that should be considered when undertaking a comparative legal cultural analysis of international organizations. Application of these lessons should facilitate identification of insights, questions and further lines of inquiry with respect to the legal culture(s) of the IO under examination. Those perceptions should provide greater understanding of the IO and its interactions with domestic systems as well as with the rest of the international legal order—particularly if the present and future legal cultural characteristics of the IO can be identified.

VI. Identification of Legal Tradition & Culture Trends within IOs

While many insights can be gleaned from a comparative or legal cultural analysis of an IO, there is one critical issue that is worth identifying in each case—whether there is a noticeable trend or drift towards a particular type of legal tradition or culture. Indeed, such trends will be likely for IOs, for IO, like domestic legal systems, are not static and are in a constant state of development and change, with correspondingly important changes in legal culture. While these issues may seem more relevant to the older IOs, they are clearly relevant to the new IOs as they too grow and mature. Furthermore, it will also be relevant to the extent an IO is a successor organization, formally or informally, to a prior IO, as the WTO was to the GATT. For example, among other changes in legal culture that took place when the WTO succeeded the GATT was a change from a diplomacy-based to a rule-based organization. There is little question that change has had tremendous impact on the legal culture of the WTO. Plainly, the issue of transformation and change of an IO's legal culture is important to an understanding of the IO, today and in the future.

In my previous work I have argued that the legal traditions in international law have been undergoing substantial transformation.[78] I argued that while the international legal order historically was strongly civilian in character, it has over time, and particular during the last century, become ever more common law-like.[79] Identification of a trend for IOs should also be possible, though that trend may be different from that of the over-arching international legal order, and each IO will likely have its own unique legal cultural trend. Identification of the trend or direction of movement of the legal culture of an IO is critical for it will, among other things, permit states with similar legal cultures easier access to that IO, for there will be less

[76] *See generally*, Seyersted, *supra* note 7.
[77] *Id*. at 4.
[78] *See* Picker (International), *supra* note 12.
[79] *Id*. at 1105-08; *see also* Picker (WTO) *supra* note 1 at 133.

cultural disconnects between those states and the IOs. For example, if the IO"s dispute settlement panels become more common law-like then perhaps this will provide an advantage to the common law countries and their law firms, helping to solidify their already dominant position in the provision of global legal services.[80] Similarly, if the civil law becomes more dominant in an organization then that would provide an advantage to civil law system countries and their law firms.[81] Relatedly, the legal culture that emerges within the IO will also have an impact on the development of the organization"s substantive law, favoring importation of ideas and doctrine from those traditions and legal cultures most similar to the IO"s resultant legal culture.

My past research into these issues has suggested that there are some common factors that can have a decisive impact of the development of an IO"s legal culture. The discussion below will draw from that work[82] and further expand on it. The first is the fact that large numbers of IO officials, practitioners or scholars have pursued legal studies in law schools in common law countries.[83] Furthermore, even when law students do not attend common law system law schools, it will often be the case that their lecturers and advisors studied or have spent considerable time at universities in common law countries.[84] But, education institutions outside the common law world have now entered into competition with the common law universities for the valuable foreign student market—even going so far as to teach in English.[85] Indeed, there was a long history of civil law universities dominating western legal education and thought.[86] Furthermore, it is debatable just how much those civil law institutions can influence the common law scholars, practitioners, officials and students that attend those organizations. It is likely that there will not be the same large influence, due as much to the issue of language as anything else (more on the very important role of language below). Consequently the common law countries" education institutions" current domination may not be so easily displaced.[87]

Language, as noted above, is a critical factor in the development and sustenance of a legal culture. Language and legal tradition are closely tied together, with, for example, English associated with the common law and French, German, Spanish and Italian tied to the civil law tradition.[88] Furthermore, Chinese and Arabic are also typically associated with non-common law legal systems—be they civilian, socialist, or Islamic legal systems. Indeed, any major western language employed other than English will

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[80] *See*, *e.g.*, James R. Faulconbridge, Jonathan V. Beaverstock & Daniel Muzio, *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT"L L. & BUS. 455, 457 (2008); Roger P. Alford, *The American Influence On International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 81-82 (2003)

[81] *See* Picker (WTO), *supra* note 1 at 135.

[82] *Id*. at 133-35.

[83] *Id*. at 133; David S. Clark, *American Law Schools In The Age Of Globalization: A Comparative Perspective*, 61 RUTGERS L. REV. 1037, 1061 (2009)*See generally* Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006).

[84] Many will also submit articles to the numerous and less demanding student run law reviews in the United States and thus will, to some extent, be forced to adopt to American legal culture in order to have their scholarship accepted.

[85] *See* Clark, *supra* note 83 at 1075.

[86] *See* Glendon (Foundations), *supra* note 48 at 56-57; *see also* Clark, *supra* note 83 at 1075 n. 165 (noting the dominance of German legal education as recently as the nineteenth century)

[87] *See* Clark, *supra* note 83 at 1075.

[88] *See* Picker (International), *supra* note 12 at 1124.

tend to end up reflecting more civilian, or rather, less Anglo-American and hence common law legal culture within the institution.[89] Whereas the use of English will tend to strengthen the emergence and perhaps dominance of a common law legal culture.[90] Of course, the ever increasing role of English, as the common second language of the world, suggests a continuing and potentially expanding influence of common law legal cultural characteristics. Though, with more civil law-origin authors writing in English, there is always the possibility that their writings may gradually ameliorate the impact of English as a vehicle for common law infusion. It may be wondered, however, whether the very use of English might not have the opposite impact and cause those civilians to employ ever increasing common law legal cultural attributes in their writings. There is also very little countervailing use of non-English languages by Anglophone scholars, practitioners and officials—a reflection of the foreign language deficit in common law countries.[91] Thus, language is visibly a very strong factor in predicting the trend and eventual legal culture and tradition of an IO.

Relatedly, another factor that may suggest a long term legal cultural trend in an IO will be the composition of the legal cultural background and legal education of the officials within the IOs. Of course, as noted above, given the potentially dominant role of common law legal system‟s post graduate training of civil law origin officials, there may be a built-in bias towards the common law legal culture despite the specific geographic composition of the IO. But, those factors will also be impacted by internal organization issues within the IOs. For example, it may be necessary to examine geographic quotas to see whether there is a bias towards officials from one or the other legal cultures.[92] Also, the entrance examinations or interview procedures within the IOs should be examined to determine whether they may favor one of the traditions or some of its specific legal cultural traits.[93] Similarly, internal style should be considered to see whether it may promote one of the legal cultures over the others. For example, an internal writing and presentation style guide that requires writing and analysis that is closer to the Anglo-American than the civilian legal cultures would be such an internal style. But, too often a lack of transparency in IOs means that internal processes in IOs are not visible to outside examination.

Internal workings are among the characteristics that may be apparent or derived from a consideration of the negotiations that set up the IO. So, if the organization was created as a subpart or under the aegis of another IO, that parent organization may have transferred its legal culture into the new IO. Or the overall trend towards a specific legal culture may have been foreordained by the role and imbedded influence of one or more countries or a region that dominated the original negotiations. It may even be that the supposedly “neutral” international civil servants or NGOs that staffed the negotiations could have, intentionally or unintentionally, influenced the subsequent legal cultural trend of the IO. Indeed, the location of the negotiations, as well as the eventual location of the headquarters can be vital clues, particularly if they

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[89] *Id*. at 1123-25; *see also* Max Loubser, *Linguistic Factors into the Mix: The South African Experience of Language and the Law*, 78 TUL. L. REV. 105, 144-47 (2003).
[90] *Id*. at 107-08; *see also* Esin Örücü, *The Judge and Jurist in Scotland: On the Verge of a Second Renaissance*, 78 TUL. L. REV 89, 102 (2003).
[91] *See* Clark, *supra* note 83 at 1076-77
[92] *See* William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 354-60 (2001).
[93] *See* Picker (WTO), *supra* note 1 at 134.

are located in places with "over bearing" legal cultures.[94] After all, the international civil servant will be living in that environment, and it is not unlikely that some of that legal culture will be absorbed. This may be especially the case for those international civil servants whose whole professional life is in the international arena. Also, those civil servants are likely not to have much, if any, practice experience in their home jurisdiction and so it may be that their knowledge and experience with their home legal culture is more academic and theoretical than practical. Also, given their career choice it may very have been the case that their training and interests were more public law and constitutional law than in those areas in which one may more typically find the heart of the legal culture. Thus, their legal background may be insufficient to ward off the infection of a strong foreign legal culture.

There may also visible trends towards a resultant legal culture discernible from the IO"s substantive law—visible from both its internal and external law. If the IO"s external law, the law related to its mission within the international legal order, is similar to the law of specific legal systems it may in the long term succumb to the influence of the legal culture in those systems.[95] Furthermore, some IOs work so closely with or in a state or region, they may necessarily absorb some of that local legal culture. It may also be worth considering whether the internal law of the IO is based on or related to national laws which would be infused with the legal culture of that state.[96] Indeed, headquarters agreements, while nominally unconcerned with the mission and substantive activities of the IOs, may be worth reviewing as well, for they can form the basis for very close relationships between the host state and the IO.[97]

Politics and power, of course, can not be ignored. The role of dominant players, and their legal cultures, within an IO can have a very profound impact on the eventual legal culture of that organization.[98] Those states" impacts may be detected through greater than expected involvements in the IO"s policy development and implementation, as well as through greater than expected levels of participation in the IO"s dispute settlement process. Specifically, the dominance and its impact within the dispute settlement process may be exhibited through the state"s choice of cases (to prosecute or defend) as well as through the substantive arguments presented, all of which may then insert a legal cultural influence on the growth of the organization and its law. Those dominant players will often, but not always, be great or regional

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[94] The American legal culture could be described quite fairly as being "over bearing", which may be due to, among other things, the exceptionally strong role that law has in ordinary American society.

[95] For example, did the World Bank"s post-war mission track the foreign policy goals of the United States quite closely, and if so might that have led to some infusion of American legal culture?

[96] It has been suggested that the internal law of IOs are "in substance more parallel to (public) national law of States than to public international law, but writers falsely apply principles of international law also to internal IGO law, instead of drawing them from national (public) law." Seyersted, *supra* note 7 at 74.

[97] HQ Agreements can lead to close interaction between the IO staff and the host, often at the level of interpreting what constitutes local law. *See*, *e.g.*, Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, (Adoption: 07.06.2007, Entry into Force: 01.03.2008), Article 6 (5) ("The Court shall prevent its premises from being used as a refuge by persons who are avoiding arrest or the proper administration of justice under any law of the host State.").

[98] *See*, *e.g.*, Picker (International), *supra* note 12 at 1133 (discussing the role of the United States and Great Britain in the creation of the Bretton Woods institutions); *see also* Armand Van Dormael, BRETTON WOODS: BIRTH OF A MONETARY SYSTEM (1978) .

powers—with their own unique legal cultures.[99] China in particular will clearly continue to increase its position within international governance and as such will correspondingly increase its unique legal cultural influence.[100]

Finally, a critical issue to consider is whether there is a legal culture or tradition which may be more suitable to the needs of the IOs at issue.[101] For example, and just considering the general competition between the common and civil law traditions and their associated legal cultures, in some cases it might be that common law legal cultural characteristics, such as its pragmatism, may be more suitable to an IO's needs. Or, in some cases, it could be that a systematic, principled and code-based approach would fit an IO better, in which case legal cultural characteristics from the civilian legal traditions would be more suitable. Or as a general matter, it might be that a civil law legal culture is better suited to a diplomacy-based style of international law, while the common law might be more suited to a "rule of law" style of international law.[102] If the answers were known for each IO, or perhaps for IOs in general, perhaps there might be an effort to steer them towards the "better" tradition.[103]

VII. Conclusion

While a comparative legal cultural analysis is a difficult task, involving numerous factors and pitfalls, the insights it can provide will be of great help in understanding IOs as they develop and mature. More concretely, identification of an IO's legal culture is important because knowledge of a system's legal culture allows one to understand the underlying fit of that IO with other legal systems—be they IOs or domestic, regional or international legal systems. It is then possible to identify which legal systems are similar or different to the IO, or which parts of different systems may be similar or different to specific aspects of the IO. Crucially, that knowledge then permits the organization the capability to import legal devices from those legal cultures that are similar, with a correspondingly better chance that the importation would work well within the organization. Indeed, that knowledge might even permit successful importation from dissimilar legal systems with different cultures, as the knowledge of the differences allows possible identification of any "fit" issues that can then be ameliorated.

The importance of identification of legal cultural characteristics within international legal systems is further accentuated when a system is a blend or mixture of different and sometimes competing systems, a situation that is all too common within the international legal order.[104] Additionally, understanding the legal cultural characteristics of a mixed system IO permits a better understanding of how or whether the system fits together within itself. In other words, whether different parts of the system have legal cultural characteristics that may be discordant or work in harmony

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[99] Among those powers one may find the EU (specifically the United Kingdom, Germany and France, as part of the EU or separately), the United States, Russia, China, Japan, India, Brazil, South Africa, Nigeria, Australia, Japan, Egypt, Saudi Arabia, Israel, Indonesia, and so on.
[100] *See* Picker (China) *supra* note 1.
[101] *See* Picker (WTO), *supra* note 1 at 135.
[102] *Id*.
[103] *Id*.
[104] *See generally* Picker (International), *supra* note 12.

together. Furthermore, if there are internal fit issues, or parts that are known not to work well, a knowledge of the legal culture may assist in determining whether and what replacement legal devices, including safeguards, should be imported and from which legal systems.

Another source of "mixity" comes from the fact that IOs comprise individuals from numerous and different legal cultural backgrounds. The resultant "Tower of legal Babel" will invariably result in miscommunication and misunderstandings.[105] But, an awareness of the issues of legal culture within an IO would facilitate better internal communications between the different legal cultures of the organization"s officials and civil servants. It would also help communications between the IO and NGOs and state members" delegations, and between the different state members as they interact within the context of their IO obligations.[106] Additionally, the more IOs that understand legal cultural issues, then the better the communication between different IOs. All that improved communication should assist in the reduction in conflict that may be caused by legal cultural disconnects.

In conclusion, as international law becomes ever more "real", as international organizations take on more responsibility for the governance of the international legal order, the role of legal culture becomes ever more vital. Understanding an IO"s legal culture and those of competing legal systems, be they of other IOs or state legal cultures, should be an essential requirement for IO officials, practitioners and IO scholars. As such, the methods and approaches and the issues and questions raised here are ones that should be studied and further developed, in general and for specific international organizations and fields of international law.

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[105] Interviews with officials from IOs repeatedly turned up the constant miscommunication and misunderstandings that took place. *See also*, Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 91 (2001).

[106] *See*, Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 521 (2008) (discussing the legal cultural clash between European and U.S. view on the precautionary principle).

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Colin Picker, *University of New South Wales*

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International Trade and Development Law: A Legal Cultural Critique

Colin Picker

Abstract

To the extent that international trade and development policy employs legal methods, institutions and participants, there is a need to take into account the role of legal culture. There are many different legal cultures in the world, including the widely found common and civil law traditions, as well as the many non-western legal traditions and sub-traditions found within the hundreds of different legal systems spread across the globe. International law has, however, traditionally eschewed consideration of legal culture—arguing that international law is unique, is sui generis, and as such domestic legal traditions were not relevant. Yet, the humans involved in creating and nurturing international legal fields and institutions will themselves reflect the legal culture of their home states, and will often import aspects of those legal cultures into international law. The same must be true of international development law. In addition, international legal fields, such as international development law, must often work within domestic legal systems, and as such they will directly interact with the domestic legal traditions. It is thus important to understand the interaction between the legal cultures reflected in the relevant part of that international law and in that of the domestic legal system. Such an understanding can be useful in ensuring the effective interaction of the two systems. This paper explores these themes, continuing the author's past and ongoing consideration of the role of legal culture in international law, including its role within institutions such as the World Trade Organization.

KEYWORDS: international development law, World Trade Organization

Author Notes: Professor Picker is an Associate Professor at the Law Faculty of the University of New South Wales.

I. INTRODUCTION

The goal of this paper is to present a methodology, a legal cultural analysis, through application of that methodology to a specific issue—international development law. As an initial matter, this paper will engage in a brief legal cultural analysis of the field as a whole. The paper will then present a more detailed legal cultural analysis of one of the institutions involved in international development law—the WTO. Finally, the paper will then undertake an analysis of the legal cultural issues that may arise during domestic implementation of international development law. Nonetheless, this paper is as much about suggesting a way of thinking about international development law as it is intended to convey content. Indeed, the nature of the underlying subject matter, international development law, is so often the source of disagreement and controversy that the substantive analysis may itself in some cases be so contested as to rule out its general utility.[1] The neutral methodology, in contrast, that is showcased in this paper should prove to be a highly beneficial methodology for international development law and other international fields. Indeed, this paper is really part of an ongoing larger body of work of the author—a more comprehensive trial of the legal cultural methodology within international law, focusing on the World Trade Organization (the "WTO"). As such, many of the examples in this paper will be taken from the WTO context.[2] That work is itself a continuation of previous comparative analyses of international law as a whole.[3] To the extent that international development law employs legal methods, institutions, and participants, then it is also a field for which this legal cultural methodology may be usefully employed.

There are many different legal cultures in the world, including those found in the dominant western common and civil law traditions. In addition, there are

[1] Daniel D. Bradlow, *Development Decision Making and the Content of International Development Law*, 27 Boston College International and Comparative Law Review (2004), 195.

[2] The research here is part of a larger study by the author that will be part of the author's PhD thesis. Some of it has already been published. See, for example, Colin B. Picker (Picker (WTO)), "A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization", in E.C. Ritaine, S.P. Donlan and M. Sychold (eds.), *Comparative Law and Hybrid Legal systems* (Swiss Institute of Comp. Law, 2010); Colin B. Picker (Picker (China)), *China, Global Governance & Legal Culture: The Example of China & the WTO, Parts 1 of 4*, Proceedings of the University of Tokyo Institute of Social Science. (forthcoming January 2011); Colin B. Picker (Picker (Methodology)), *Comparative Law Methodology & American Legal Culture: Obstacles and Opportunities*, Roger Williams University of Law Review (forthcoming, January 2011).

[3] See, for example, Colin B. Picker (Picker (International Law)), *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law (2008), 1093; Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 3 Journal of Comparative Law (2008), 160.

many non-western legal traditions and sub-traditions found within the hundreds of different legal systems spread across the globe. International law and its subfields have, however, traditionally eschewed consideration of legal culture—arguing that international law is unique, is *sui generis*, and as such domestic legal traditions and cultures are essentially not relevant.[4] Yet, the humans involved in creating and nurturing international legal fields and institutions will themselves reflect the legal culture of their home states, and will often import aspects of those legal cultures into international law and its institutions. Furthermore, they will, subconsciously for the most part, slowly and incrementally work together to create a legal culture for their institutions and fields. For those international law institutions and fields that have existed for decades, one would expect such a legal culture to be relatively well developed. That legal culture will then manifest itself in particular in its interactions with the state-based legal systems and cultures with which the international institution or field operates.[5] The same must be true of international development law, for it too comprises individuals, working to a common purpose, building up institutional and substantive experience and knowledge, and in the process creating a legal culture for international development law.

As an initial matter, let me define international development law. It is "the branch of international law dealing with the rights and responsibilities of states and other actors in the [economic] development process."[6] Admittedly, the term has too often been employed with little exactitude. Indeed, when this paper was presented at the Law & Development Institute Inaugural Conference,[7] there were questions from the audience suggesting that it is not does not exist as a separate field and that even if it does exist it merely comprises a collection of unrelated "soft law." Compounding these definitional issues are the significant differences within the field based on ideology. Those ideological differences typically fall into one of two camps—those within the "traditionalist" and those within the "modern" (or the "new international economic order" (the "NIEO").[8] The traditional view:

> [A]ssumes that development is primarily an economic process that consists of discrete projects (e.g., building a dam, a road, a school, a factory, a mine, or a telecommunications system) and specific economic policies. It recognizes that development has social, environmental, and political

[4] See, for example, Picker (International Law) (2008), *supra* note 3, p. 1090.
[5] *Ibid.*
[6] Bradlow (2004), *supra* note 1, p. 195.
[7] See Law & Development Institute Inaugural Conference (Sydney, Australia, 16 October, 2010), available at: <http://www.lawanddevelopment.net/program.php>.
[8] See Bradlow (2004), *supra* note 1, pp. 199-210.

> implications but argues that these should be dealt with separately from the economic aspects.[9]

The modern or NIEO view:

> [P]osits that the economic aspects of development cannot be separated from its social, political, environmental, and cultural aspects and that development should be seen as a holistic, integrated process. From this perspective, development projects and policies should be treated not so much as discrete economic events but as episodes of social, economic, and environmental transformation that are part of an ongoing process of change.[10]

Given the disagreements about the existence and scope of the field, international development law is clearly a controversial subject for which any assistance, or indeed attention, that can therefore be brought to bear on the field would be of great service to it. Presenting a new methodology, the legal cultural analysis, will hopefully help the field.

One valuable benefit of the methodology is that it can help to close the gap between the two perspectives in that both are, for the most part, irrelevant to development of the analysis in this paper. This is because the issues of whether international development law includes only economic factors, or the social context, or whether the field's law is soft or hard or declaratory or obligatory, are merely a few of the many legal factors that will be considered in a legal cultural context. Without elevating any of these factors above the others, they are all a part of the analysis. In other words, whether the scope of development law includes environmental, social, or human rights or purely economic factors makes little difference when what is being considered is the legal cultural context—the legal outlook of the substantive law, actors, and institutions in the field. Though, understanding the legal culture of the different participants in international development law will also provide insights into why the modern or traditional perspectives might have been better received in some places and by some groups than by others.

Having defined international development law, it then just remains to define legal culture and legal cultural analysis. I have previously defined legal culture:

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part

[9] *Id.*, p. 200.
[10] *Id.*, p. 207.

> this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, institutions, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international institutions and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions. It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law . . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture."[11]

The power of this method can be tremendous. Typically, when considering conflicts and other issues between states, the legal analyses of international interactions will tend to focus on the formal legal exchanges between the states. Such a focus misses a vital layer of interaction—the legal cultural interaction. Indeed, the legal cultural disconnects, for there will always be such divides, may often be the root causes of enduring and repeated problems between states. This may be true even between two supposedly close and similar neighbors. For

[11] See Picker (China) (2011), *supra* note 2.

example, the past dispute between the United States and Canada, two countries that are exceptionally close by most indicators, over the use of the law to protect culture, is itself exacerbated by legal cultures with opposing views on the role of law in, ironically, protecting culture and competition.[12]

Furthermore, legal cultural obstacles to good relations are unlike formal obstacles such as statutes, case law, and regulations that can be changed through the political process—albeit often at great difficulty, though formally possible in democratic systems.[13] In other words, a simple legal issue concerning imperfect domestic implementation or even lack of transparency can be remedied by action of the government or appropriate political arrangement. But, matters of legal culture can be sticky obstacles—they are less easily overcome. For example, the European legal cultural attitude towards risk, exemplified through the precautionary principle, has proven remarkably difficult to budge despite repeated loss in cases involving that principle.[14] At a more fundamental level, cultural obstacles, such as the legal culture of the judiciary that makes it subservient to the executive despite constitutional principles suggesting judicial independence, are more deeply imbedded, and thus, to the extent they serve as an obstacle, may be more problematic in the long run than simple legal conflicts. Too often such legal cultural characteristics are hard to see, hidden behind the formalism present in every legal system. Accordingly, identification of the legal cultural issues is the first step to dealing with such legal cultural conflicts.

Identification of the legal cultural issues in international development law is not an easy task. It can be done in many ways, but here it will be tackled in two broad but different approaches: (a) a holistic and (b) an atomistical approach.[15] The holistic approach requires taking a look at international development law and legal culture from above. The atomistical approach requires taking a look from below. For each of the approaches there are benefits and detriments, but they are a good start for this initial foray into a legal cultural analysis of international development law. Though each will be discussed below, with conclusions and insights derived from each approach, there will always be the constraint that this

[12] See J. R. Paul, *Cultural Resistance to Global Governance*, 22 Michigan Journal of International Law (2000), 48.

[13] Even case law, so long as it does not touch on constitutional matters (and even then in some systems), can be changed through the political process — for there is almost always executive or parliamentary/legislative supremacy over the judiciary in all democratic systems for all non-constitutional matters.

[14] See, for example, *European Communities - Measures Affecting Meat Products (Hormones)*, WT/DS26/AB/R (16 January 1998).

[15] This is the first of many binary analytical approaches in this paper. A binary analysis, while often a simplification, is fundamentally the basic analysis one can perform – "something either is one thing or it is not" – to say it is between the two merely means that initial "something" was not originally identified with sufficient precision.

is but one paper and the essential goal here is to demonstrate a novel and useful methodology.

II. A HOLISTIC ANALYSIS OF INTERNATIONAL DEVELOPMENT LAW AND LEGAL CULTURE

At the holistic level, from 40,000 meters (or feet) international development law, to the extent it involves law—legal obligations, rights and duties—exists within international law. International law is defined to be those "[r]ules and principles of general application dealing with the conduct of nations and of international organizations and with their relations *inter se* as well as with some of their relations with persons, whether natural or juridical."[16] All transnational and international development activities, policies, obligations, and liabilities clearly fall within the ambit of international law. Of course, there is a great deal of development work that takes place solely in the domestic context of states. But, to the extent that domestic-based policy is not related to international rights and obligations, such as through the domestic implementation of international legal obligations related to development, then it is simply domestic policy. As such, it would not then be within the direct ambit of international law or even international development law. Of course, such independent domestic development law should be taken into account when considering the field of development as a whole. After all, the domestic development policy is likely to interact with those parts of international development law that take place within or demand resources or attention from states. It thus may conflict with or complement international development law. Nonetheless, when conducting a legal cultural analysis of international development law, the domestic development policy can be put aside, especially for that part of the analysis that is from a holistic perspective.

The holistic analysis of the legal culture of international development law can be elucidated through, once again, a binary approach. Namely, (a) that international development law is sufficiently similar to international law as to share the legal cultural issues of international law or (b) that it is *sui generis* within international law, and hence will have some different legal cultural issues.

[16] Restatement (Third) Foreign Relations §101 (American Law Institute) (1986).

A. The Legal Cultural Analysis: Similarities between International Development Law and International Law

The first approach considered here is that international development law is sufficiently similar to general international law as to share its legal cultural issues. That position is quite defensible—for both the "hard" and "soft" international development law. Thus, Article XVIII of the GATT, which provides explicit ability for developing countries to engage in otherwise prohibited trade practices, such as employing tariff barriers to protect infant industries, is clearly "hard" law.[17] Furthermore, as a rule that regulates state behavior within the international legal order, Article XVIII is without a doubt a solid part of international law—just as much a part of international law as are international rules concerning treaty interpretation. Similarly, with respect to the "soft" law within international development law, one can see a similar congruence with international law. For example, Part IV of the GATT is as much a part of international law, despite its inherent "softness" [18] as are the many other examples of accepted soft law within international law. One of the greatest examples of "soft law" in international law was the Kellogg-Briand Pact.[19] While clearly soft in its early years, it was ignored by everyone, and was later employed as one of the sources of law to support the Nuremberg prosecutions.[20] Accordingly, even though Part IV of the GATT has had little impact on states, if accorded sufficient time and perhaps some minor procedural modifications, it might also be transformed into "hard law".[21] In the meantime, it is no less a part of international law than was the Kellogg-Briand Pact prior to Nuremberg. Given these realities, the consideration of international development law as being clearly within, and hence similar to, international law is not unjustified.

If international development law is similar to general international law, then one can credibly argue that the legal culture of international development law will be comparable to that of international law. Of course, this approach assumes that one can identify legal cultural characteristics for international law. Such a task is obviously difficult and not one typically undertaken by either international or comparative law scholars. After all, international law covers a tremendous

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[17] See Yong-Shik Lee, "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO", in Yong-Shik Lee (eds.), *Economic Development through World Trade: A Developing World Perspective* (The Hague: Klumer Law International, 2008), p. 6.

[18] *Id*., p. 8-9.

[19] General Treaty for Renunciation of War as an Instrument of National Policy (the "Kellogg-Briand Peace Pact of 1928"), 46 Stat. 2343, 94 L.N.T.S. 57 (27 August 1928), art. I.

[20] Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 Yale Journal of International Law (2010), 71, 73.

[21] See Lee (2008), *supra* note 17, p. 15.

number of different subfields and issues, while comparative law does not normally handle international law fields. But, through the use of generalizations and simplifications, which are necessary evils in many comparative law examinations, an overarching legal culture of international law has been identified.[22] That analysis, admittedly not a definitive analysis, has nonetheless identified some salient characteristics and insights that may be highly relevant to an international development law that is itself a part of that international law.

Condensing that analysis, it was found that the legal culture of international law comprises some unique legal cultural elements; after all, the subjects of international law are sovereign states, but international law also draws heavily from both the civil law and common law traditions—but in a specific style and composition. Indeed, in the basic mix of those two traditions, in which parts they are strong and weak and in how they have been employed, the analysis suggested that they resemble the classical mixed jurisdiction systems of the world (such as Quebec, Scotland, etc).[23] In other words, that:

> The "basic building blocks" of these systems derive from the civil and common law traditions.
>
> That, as a general matter, the public law is common law in style, while the private law, to the extent one can identify such within public international law, is more like civil law.
>
> In addition to these overarching general characteristics, international law shares with the mixed jurisdictions similar:
>
> (1) origins,
> (2) judicial characters,
> (3) linguistic issues,
> (4) approaches to precedent and legal sources,
> (5) receptions of the common law,
> (6) receptions of Anglo-American procedure, and
> (7) styles of commercial law."[24]

Thus, to the extent that international development law is comparable to general international law, then it too is likely mixed in some similar fashion. Of course, one would expect some differences due to the more specific focus of international development law, as well as some differences related to the history

[22] See generally Picker (International Law) (2008), *supra* note 3.
[23] *Id*., p. 1102.
[24] *Id*., pp. 1103-1104.

of international development law. But where different from international law, the legal cultural analysis of international development law will be as provided in the next section.

Regardless of the precision of the analysis, and reflecting the methodology's value even in a very preliminary and generalized investigation, one is able to immediately identify initial questions, conclusions, and insights. For example, there is a question as to whether it is appropriate that the basic building blocks of international development law should come from the civil law and common law traditions. This question is especially pertinent given the presence of formal and informal non-western legal cultural elements in a vast number of developing countries. Another insight relates to the possibility that international development law, like international law and the Mixed Jurisdiction systems, will have to consider concerns related to language.[25] For example, the possibility that the increasing use of English in the field might accentuate the role within international development law of the United States, Britain, and the other English-speaking countries. Relatedly, that the common law, through its strong connections to Anglophone states and English language legal materials, would also become increasingly influential in the field. Indeed, it might then be the case that those developing countries that include common law legal cultures or have significant facility in English would have a greater influence or be able to take advantage of international development law more than the other developing countries. All these possibilities are probably not in the best interests of the non-common law and non-English language world—which are, in fact, the majority of the world.[26]

Other insights that can be derived from the comparative analysis of international law and applied to international development law include some technical legal cultural issues. Perhaps less obvious than linguistic imperialism is the issue of what law is imported into the system, the so called "path of reception".[27] In other words, in the mixed jurisdiction analyses that were found to be applicable to international law, adoption of other legal devices, including legal cultural characteristics, often took place "when the civil law field is, relatively speaking, both general and vague."[28] If applicable to international development

[25] See Mary Ann Glendon, Paolo G. Carozza, & Colin B. Picker, *Comparative Legal Traditions: Texts, Materials And Cases On Western Law* (3rd ed., Thomson West Publishing, 2007), pp. 972-82.

[26] There are 51 common law system states (which includes 35% of the population of the world), and there are 115 civil law system states (which includes 59% of the population of the world). See Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. Law Review (2005), 677, 685.

[27] Picker (International Law) (2008), *supra* note 3, p. 1126.

[28] *Ibid*. (citing Vernon Valentine Palmer, "A Descriptive and Comparative Overview", in Vernon Valentine Palmer (eds.), *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge

law, then it could be the case that there would be a similar trend of increasing or decreasing presence of western or Anglo-American or civil law concepts where international development law is not so well-defined or specific. Another way to think about it would be that where international development law is more amorphous, and hence not directly reflective of other legal cultures such as non-western ones, then Western legal culture will once again dominate—be it civil or common law in style.[29]

Furthermore, as international development law matures and becomes ever more "real", these issues will be even more apparent and the analysis ever more applicable. For example, when dispute resolution finally becomes a more common part of the international law of development, there will be a need to consider, as has been observed in the international law context, the character of the relevant litigation culture and whether it might conform to the trend in international law, like that in the mixed jurisdiction systems, where it tends to be common law-like.[30] Also, the role of precedent will need to be more specifically considered in the context of the field.[31]

While necessarily brief, this analysis, predicated on a similarity between international law and international development law, can be powerful at fleshing out insights and questions. This is particularly helpful for the relatively less mature international development law as it may then be possible to predict and anticipate, and then to avoid, some of the issues that may arise as the field grows. Indeed, even if one were to argue that the field as a whole is not sufficiently comparable to international law, the above analysis and insights might be applicable to those parts of international development law that are similar to international law.

B. Legal Cultural Analysis: International Development *Sui Generis*

The question here is to identify the factors that would lead international development law to diverge from the general legal culture of international law, and then, if possible, to try to identify the character of those divergent legal cultural characteristics. This is no easy task, for while international law is a broad

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University Press, 2001). ("Consequently, within mixed jurisdictions one finds greater common law intrusion in areas such as negligence. Another trend, at the opposite end of the spectrum, is that common law less commonly gains traction in those fields where the civil and common law concepts are diametrically opposed, such as in property law. Similarly, common law is not well received in areas of law with strong cultural aspects, such as family law." *Id*. (citations omitted)).

[29] The issues associated with the western versus non-western legal cultures will be discussed in greater detail below.

[30] *Id.*, p. 1127.

[31] *Id*., p. 1125.

field including within it radically different subfields (from the law of the sea to the law of war), international development law is also tremendously broad (covering everything from regulation of "infant industries"[32] to public health concerns).[33] One should then expect that there may be large parts of international development law that are not sufficiently similar to international law, itself a broad field not easily amenable to legal cultural generalizations. Indeed, international development law in particular may be more likely than many other parts of international law to be different from the rest of international law, for there is much in it that is dissimilar to international law in substance, style, origins, and objectives.

As an initial matter, and outside the context of the civil and common law, it is likely that international development law will have a much greater presence of non-western legal culture as its objectives are most likely to be carried out in or concerning non-western countries than is the case for the rest of international law. This is further reinforced due to the consequently greater role of non-western origin scholars, jurists, and international law negotiators that will then work in the field. Indeed, the presence of non-western legal culture may be the single largest factor influencing the uniqueness of international development law. While those non-western countries will typically have significant western legal cultural components,[34] there is no question that their legal systems will, in one way or another, include legal cultural issues that are not western and, as discussed below, they may consequently be different in ways that help or hinder development policy. Perhaps here is a good place to define western legal culture, hence to get a feel for what may be implied by a legal culture described as non-western. Western legal culture, existing not as a result of statute or case law, will have, among others, the following characteristics:

> (1) [A] distinction between legal and other institutions, with law having an independent existence and identity from the other institutions;
> (2) a theoretical separation of politics and morals from law;
> (3) administration of the law by trained specialists--lawyers and judges;
> (4) legitimate contributions of legal scholarship to the development of law;
> (5) growth and change of law as part of a pattern of development;
> (6) supremacy of law over political authorities;
> (7) a view of the competing legal systems and jurisdictions as independently legitimate; and

[32] See GATT, art. XVIII.
[33] See World Development Indicators, *World Banks reports*, available at: <http://data.worldbank.org/indicator>.
[34] *See* Barnes (2005), *supra* note 26.

(8) endurance of the legal tradition even when legal systems are overthrown."[35]

It should be noted that many legal cultural characteristics of the western legal tradition can also be found in non-western systems, but it is the full package together which defines the western legal tradition. International law does, at least as a formal matter, satisfy all these criteria and is hence solidly within the western legal tradition.[36] But, to the extent that international development law does not include any of the above significant western legal tradition criteria, then its legal culture will depart ever further from international law's legal culture. As a *de jure* matter, international development law will satisfy these characteristics. It is when one gets down to the more direct interaction with individuals and domestic systems that there will be the greatest influence of non-western legal culture, usually at the *de facto* level. Accordingly, when domestic implementation is discussed below, the impact of non-western legal cultures will be discussed in greater detail.

Another legal cultural factor that may distinguish international development law from international law is that international development law is designed, among other things, to regulate asymmetric relations—from developed to developing and vice versa. International law, in contrast, usually applies between equals or deemed equals. The legal cultural reflections of the concepts of state equality and sovereignty are thus likely to be different for international development law. Another distinction is that there may be a normative content to international development law, not as typically recognized or accepted for other parts of international law. International law is, after all, a strongly positivistic legal system focused on states, while international development law is at times quite focused on the human condition. While international law will include non-positivistic concepts, they are rare and confined to *jus cogens* and perhaps the fields of human rights and humanitarian law—fields that also typically focus on the human condition. It may be that the legal culture in those areas is also different from general international law.

These few examples show that at a generalized level there is a strong basis to believe that the legal culture of international development law is different in many respects to that of general international law. Nonetheless, in order to really identify the specific legal cultural characteristics that ensue from any similarity or difference to international law, it is necessary to delve into a more particularized examination, an atomistic examination. As is shown below, when that more detailed analysis is undertaken, using the examples of the interaction of

[35] Picker (International Law) (2008), *supra* note 3, pp. 1095-96, citing Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 7-10 (1983).
[36] *Id*., p. 1096.

international development law and the WTO and domestic implementations, the legal cultural issues are more clearly laid bare, and one is then able to more effectively use those insights for the benefit of the field and as an example of the utility of the methodology.

III. AN ATOMISTIC LEGAL CULTURAL ANALYSES OF INTERNATIONAL DEVELOPMENT LAW

The general insights derived from a brief holistic consideration of the legal culture of international development law must be reinforced by a more detailed atamostic consideration. An atomistic approach is typically more complicated and detailed than a holistic approach. However, it is also likely to be more accurate. A thorough atamostic analysis, however, would require significantly more coverage than can be provided here, which is not a problem given that the goal of this paper is merely to suggest a methodology rather than get hard results. In any event, such an atomistic analysis requires, as an initial matter, a review: (a) of the legal cultural issues of both the relevant international development law institutions and their substantive laws, and (b) of the many different legal cultural issues associated with domestic implementation of international development law in the hundreds of different legal cultures of the world.

A. Legal Cultural Analysis of the WTO & International Development Law

A legal cultural analysis of an institution should consider which legal cultures predominate within that institution.[37] In other words, is the institution dominated by western or non-western legal cultural characteristics, or by Anglo-American legal cultural characteristics versus those present in continental legal cultures. More specifically, it is also necessary to identify which aspects of the institution reflect which characteristics of the different legal cultures. Those aspects include the dispute resolution mechanisms, the participants' behaviors, the institution's secretariat, and so on. Similarly, substantive fields, when cohesive and well developed, can also be considered under a legal cultural analysis. The questions are then somewhat similar to those applied to international institutions: whether the field employs aspects from specific traditions and cultures, and whether the field is implemented in a way reminiscent of one of the traditions.

[37] See Colin B. Picker, "An Introduction to Comparative Analyses of International Organizations," *Comparative Law and International Organizations: Cooperation, Competition and Connections*, (Proceedings of the Swiss Institute of Comp. Law, forthcoming March 2011).

Unfortunately, international development law has no one international institution or well defined substantive body of law in which it can be solely located. This is in contrast to other subfields of international law. For example, we can point to the WTO for trade; increasingly to the International Criminal Court for international criminal law; to the UN Convention on the Law of the Sea and its institutions for the oceans; and to the CISG/Unidroit for commercial law. While it might be argued that this "failing" of international development law is one of the strongest indicators for why there is really no such thing as "international development law", the lack of a central institution or body of law, while awkward, is not unusual in international law. Thus, even within the very sophisticated area of international investment law, we can see a similar situation, with a host of disparate institutions involved and with the law scattered throughout fora around the world. Indeed, the move to institutionalize and codify the fields comprising international law is of rather recent vintage. The role of the UN's International Law Commission over the last sixty years has been to identify, agree on, and then to codify parts of international law that exist in many different sources and about which there are often conflicting views.[38]

International development law does, however, exist as part of the work and objectives of numerous institutions and substantive fields. Those institutions include: international governmental organizations, non-governmental organizations, amorphous groupings of states and organizations, and a whole host of domestic participants, including the national and sub-federal governments as well as numerous domestic non-governmental organizations. Specifically, these bodies include: the WTO, the UN in general, more specific parts of the UN such as the UNCTAD, the International Chamber of Commerce (ICC), the OECD, the G7, the G8, the G20, the regional development banks, the EU, ASEAN, OAS, and many more international acronyms.

Substantively, it is the same story. International development law is not really a cohesive body of law so much as an unsystematic collection of hard and soft rules and regulations found across numerous systems. It exists within the law of other international fields and institutions, for the law of international development spans and penetrates many other discrete fields and systems. It also exists within States as a result of implementation of the various above international development laws, including through the Generalized System of Preferences (the "GSP") in developed countries, and numerous pro-development laws and institutions in developing countries themselves, such as efforts at development for indigenous groups or depressed areas. Not surprisingly, international development law does not apply monolithically. It impacts its different constituencies in different ways depending on who and what they are.

[38] See International Law Commission, available at: <http://www.un.org/law/ilc/>.

For example, states are impacted differently depending on their level of development and their economic model, such as whether they are market or non-market economies. International development law also impacts people differently, depending on ethnicity, race, tribe, religion, social class, geographic region, and so on.

Having described all that would go into an atomistical analysis, it is clear that a complete and atomistic legal cultural analysis of international development law would require legal cultural analyses across all international and other constituent parts. That is clearly too much for this present work. Accordingly, the only way then to conduct an atomistic legal cultural analysis of international development law is like all massive projects—with small steps, one step at a time. In this case, the steps are made up of those parts of international development law that are found in, implemented by, and under specific institutions, as assessed one institution at a time. In this paper, the institution chosen for the first step is the WTO.[39]

Like the analysis of international development law in international law above, the legal cultural analysis of the WTO's development law can be considered in one of two (binary) ways: (a) that it is like the rest of the WTO with respect to legal culture, or (b) that it is *sui generis* within the WTO with respect to legal culture. Of course, there will be parts of the WTO's development law that are unique and parts that are similar to the rest of the WTO. For those parts that are similar to the rest of the WTO, one can then apply the analysis conducted in part 1 below, and for those parts that are unique, we apply the analysis in part 2 below.

1. WTO's development law is akin to the rest of the WTO

If international development law within the WTO is akin to the rest of the WTO, then it should share legal cultural characteristics with the WTO. It has been argued that the WTO appears to be like a mixed system, with some characteristics closer to the common law and some closer to the civil law.[40] While that research is still in process, some tentative conclusions have been drawn. In order to keep the length of this paper in check, only a few of those conclusions will be considered. They include, among other things, that:

[39] In any event, an atomistic examination of the WTO may end up constituting a significant part of any eventual definitive atomistic analysis, for the role of the WTO is quite significant for international development. Furthermore, its role in the growth of international development law will likely increase over the years, especially if the current "development" Round of the WTO is ever completed.

[40] See Picker (WTO) (2010), *supra* note 2.

> The WTO is more akin to the civil law in the large and significant role of scholars in guiding and creating the field.
>
> The WTO is a bit of a "mixed bag" with respect to the civil law versus common law difference as to whether it exhibits greater evidence of doctrine (civil law) or pragmaticism (common law). The WTO contains some elements of system and theory, and some elements reflecting an ad hoc and pragmatic approach, with perhaps the latter increasingly tending to dominate.
>
> The WTO employs strong *de facto stare decisis*, with the role of dispute settlement becoming ever more central to its law making!
>
> The influence of Anglo-American law firms and legal education is significant.
>
> The WTO Secretariat may be increasingly Anglo-American in character and style.[41]

So, if the WTO's development policy largely falls in legal cultural line with the overall WTO, then we can say that, among other things:

> The WTO's development law should reflect a mix of civil law and common law legal culture;
>
> The role of scholars, largely from or trained in the western and developed world, may help determine the eventual legal culture of the field, and will correspondingly marginalize the contributions from the non-western developing world;
>
> That its development policy may likely be subject to development through decisions of the WTO's Dispute Settlement Body (the "DSB") with all the legal cultural consequences that go with case driven legal development, or that little development law will take place due to the few development law cases handled by the law-creating DSB;

[41] *Ibid*.

That it may likely develop as a result of pragmatic response to issues as opposed to development through doctrine and theory, though doctrine and principle may very well be present as an undercurrent; and

That we may see a disproportionate role for Anglo-American legal culture within the WTO, both at the DSB and within the Secretariat.

Using these initial inferences, one can then ask whether such legal cultural characteristics would prove to be beneficial or detrimental to the role of international development law within the WTO. The answer is likely to be that some of the characteristics might prove to be supportive while others might prove to be obstacles—indeed, some characteristics may be both supportive and be obstacles! For example, the likely growth of development law within the WTO through the DSB may be supportive, for the field is well served by the consistency of jurisprudence constante. Yet, the rationality of that consistency is not always assured, especially if only some cases make it to the dispute settlement system and not all cases proceed to the Appellate Body. Similarly, the field is also well served by the pragmatism that may be present in the WTO's development law, as opposed to holding up progress for the sake of ideal yet potentially unattainable goals. But, sacrificing principle for pragmatism may undermine the "correct" development of international development law. Finally, while the system seems to have permitted Anglo-American lawyers to assume a dominant position through their law firms gaining expertise in WTO litigation and through the Anglo-American method within the Secretariat and global legal education, perhaps highly efficient developments, those influences clearly provide too much power to one legal culture and may come at the cost of capacity building and diversity of perspectives in the development of the field.

2. WTO's Development Law is different from the rest of the WTO

It is quite likely that the WTO's development law has many legal cultural characteristics different from the rest of the WTO. As an initial matter, most of those parts within the WTO dealing with development, certainly those parts that are not merely aspirational, take the form of exceptions to WTO obligations and liabilities as opposed to positive requirements.[42] Another difference is that unlike much of the WTO, development is a central goal in its own right,[43] not merely a device to achieve another goal. An example of the latter might be the Agreement

[42] See, for example, GATT, art. XVIII.
[43] See Marrakesh Agreement Establishing the WTO, preamble.

on Article VI, whose goal is to minimize discriminatory treatment caused by WTO members manipulating anti-dumping and countervailing duty regulations.

Furthermore, perhaps more so than other parts of the WTO, there is a general division among the WTO members with respect to their positions on development policy that largely tracks the traditional power structure of the international legal order, and particularly of the international economic system.[44] That divide is, of course, largely between those members that are developed versus those developing. In contrast, such divisions are not so applicable for the other parts of the WTO. For example, for the Agreement on Article VI, there will be a wide diversity among WTO members of responses and opinions, often changing over time depending on domestic politics.

Compounding the developed-developing member division within the WTO is the fact that most of the interested parties on the developing country side will have strong non-western legal tradition elements that may very well be reflected in their work on development within the WTO. Indeed, to the extent that the civilian/common law legal cultural characteristics are factors, as described earlier in the paper, there is even a developing country division there, for most of the "major" players from the developing world (e.g., Brazil and China) are not even part of the common law world. The one major exception is India, which has a codified common law and very strong non-western legal cultural components.[45]

Another issue that differentiates the development part of the WTO from the rest of the WTO is that non-economic factors may loom larger with respect to the goals of development policy than might be the case in the other policy areas of the WTO—regardless of application of the "traditional" or "modern" perspectives in international development law. For example, for trade remedies, MFN and national treatment, the measurement of success will be more closely tied to classical economic factors and indicators. In contrast, development, while for sure concerned with such economic indicators in its goals, must also be focused on a wide variety of other non-economic goals, such as those identified by the World Bank.[46] Those goals include consideration of economic as well as non-economic criteria, such as reductions in infant mortality, access to potable water, and so on.[47] Relatedly, one may see a higher level of normative considerations, even

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[44] See An Chen, "A Reflection on the South-South Coalition in the Last Half-Century from the Perspective of International Economic Law-Making: From Bandung, Doha and Cancun to Hong Kong", in Yong-Shik Lee (eds.), *Economic Development through World Trade: A Developing World Perspective* (Kluwer Law International, 2008).

[45] See John Armour and Priya Lele, *Law, Finance and Politics: the Case of India*, 43 Law & Society Review (2009), 491, 499.

[46] See World Bank, *supra* note 33.

[47] *Id*. See also Colin B. Picker (Picker (Developing)), *Neither Here Nor There—Countries that Fall Between the Developed and the Developing World in the WTO*, 36 George Washington International Law Review (2004), 147, 150.

morality, in the development law debate within the WTO. While there is disagreement over trade remedies and regional trade agreements, the discussion rarely leads to discussions of what is the "moral thing to do" as may be the case when infant mortality is at stake! Accordingly, the legal cultural consequence may be a relatively smaller role for economics and a greater role for morality in the legal culture of that part of the WTO dealing with development. This may perhaps further isolate development policy from the normatively neutral and economically focused legal culture of the WTO.

Ironically, even as development law's goals look beyond trade and economics, another difference between the development part of the WTO and the rest of the WTO is that it is an area, more than others, held hostage to non-trade and often non-economic goals, albeit different ones than discussed above! This issue is most clearly seen in the context of GSP conditionality, where that preferential access is very often conditioned upon the developing country satisfying western and developed world conditions, such as the condition of not being designated a "supporter of terrorism".[48] Sometimes that conditionality does have a tenuous relationship to international economic matters, albeit those matters of particular high priority to developed and western states. In those cases the conditionality is based upon the developing country being considered, among other things, an enforcer of international arbitral awards, intellectual property rights, and labor rights.[49] Very often those issues are simply inapplicable in the developing country or of relatively low priority given the conditions within that country.[50] Yet, most other areas of the WTO, for GSP exists as an authorized exemption to MFN,[51] are not similarly conditioned. While it is unclear exactly what might be the legal cultural consequences of this issue, it is clear that there will be some. Perhaps the legal cultural consequence may be, among other issues, the creation of a siege mentality, in which even useful foreign legal cultural issues, such as enforcement of arbitral awards, may be rejected or resented.

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[48] See, for example, *U.S. Generalized System of Preferences Guidebook*, at 20, available at: <http://www.ustr.gov/webfm_send/1597>.

[49] *Id.*, pp. 20-21.

[50] See Picker (Developing) (2004), *supra* note 47, pp. 157-158.

[51] "(T)he provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties . . . to accord preferential tariff treatment to products originating in (DCs) . . . without according such treatment to like products of other contracting parties." Generalized System of Preferences, GATT Doc. L/3545 (25 June 1971). These preferences were made permanent in 1979 through the "enabling clause" of the Tokyo Round's Texts Concerning a Framework for the Conduct of World Trade. This GATT act was later affirmed by the WTO, see *General Agreement On Tariffs And Trade - Multilateral Trade Negotiations (The Uruguay Round): Ministerial Decisions And Declarations* 33 I.L.M. (1994), 136.

History also differentiates the WTO's development policy from the rest of the WTO, with concomitant legal cultural consequences. While all of the WTO is closely associated with the historical developments of the last one hundred years, and in particular that of the interwar period, it may be the case that the development part of the WTO is more closely tied to recent or different histories. Clearly, the history and legacy of colonialism (neo and otherwise) and decolonization is more relevant to the GATT's and then the WTO's development provisions than to other parts of the WTO.[52] Indeed, history may be more relevant to development than is the case for trade law in general. Thus, the legacy of colonization continues to reverberate through the present development trade policy in a more significant manner than is the case of such historically significant events for the WTO as the Smoot Hawley Tariff Act of 1930. True, that Act and other economic historic events of the 1930s were talked about during the recent recession, but the trade system has already addressed the problems that led to those historic events in Article II's tariff bindings and in other parts of the GATT/WTO.[53] In contrast, the continuing impact of neo-colonialism and the post colonial legacy continue to haunt development policy within the WTO. Perhaps the legal cultural consequence for development law in the WTO is to cast a backward looking sheen onto the legal culture, thereby undermining any forward thinking or growth in the legal culture and field.

The legal culture of development law within the WTO is bound to be impacted by the fact that development law within the WTO is now part of a major realignment and power shift within the WTO. The previous dominant members, developed and western members, are now finding their power challenged by a developing country bloc within the WTO.[54] That bloc is now demanding that the WTO resolve developing country needs before it agrees to any changes to the WTO. The Doha Round, otherwise named the "Development Round" was launched with that very goal, and its failure to meet those demands is one of the major obstacles to completion of the Round. After all, given the consensus method for approving change in the WTO, the developing countries essentially have a veto over any future changes within the WTO. Thus, development law in the WTO has now assumed a very high level of significance and priority, and until it is resolved to the satisfaction of the developing countries, progress of all

[52] See, for example, Ruth Gordon, *Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime*, 8 Berkeley Journal of African-American Policy Review (2006), 79, 86.
[53]Additionally, within the United States, the Congress realized that it should not be involved when it came to setting line item tariffs, and has ever since delegated that authority to executives who are more immune to the pressures that led to the Congressional "pork barrel" and "log rolling" that created that infamous tariff act. *See* Sungjoon Cho, *Toward a New Economic Constitution: Judicial Disciplines on Trade Politics*, 42 Wake Forest Law Review (2007), 167, 174.
[54] *See* Lee (2008), *supra* note 17, pp. 5-6.

other areas of trade negotiation may be held hostage.[55] It is hard to predict what impact this elevation of WTO development law and developing countries will have on the legal culture. Perhaps it will give strength to that part of the legal culture experiencing pressure from the developed and western world. Perhaps it will lead to greater isolation as attitudes harden and positions form at opposite ends of the arguments. It is too early to really discern the impact, but it is hard to believe it will not impact the legal culture of international development law.

Finally, a major area in which the legal culture of the WTO's development law will be different is in the fact that there is a relatively diminished role for the dispute settlement system both in creating development law within the WTO and in handling the WTO issues of developing countries.[56] There are many reasons to explain this deficit, including that there have been relatively few disputes directly related to the specific substantive law of development within the WTO. In part that is because much of the law of development within the WTO is aspirational or discretionary and there then is less opportunity for those disputes to rise to an actionable level. Additionally, leaving the large countries of Brazil, China, and India aside, the asymmetric relationships between developed and developing countries, between whom the development law disputes would take place, militates against disputes being brought to the dispute settlement body, and hence the opportunity for development law to be heard at the DSB. Developed countries have little to gain (economically) and much to lose (politically) by bringing cases against developing countries in most cases. Developing countries, on the other hand, have few resources in which to bring disputes against often vastly better resourced developed countries.[57] Additionally, even if they prevail, there may be political, and hence economic, costs. Finally, their ability to use authorized retaliation against developed countries would appear to be very limited, though this may be changing.[58] The consequences of this situation will be visible in WTO development law legal culture in many ways—from less litigiousness to a diminished role for common law and western legal culture in development law in the WTO. The latter is a consequence of less employment of Anglo-American law firms. Similarly, due to less disputes on development law, there will consequently be less involvement of the developed countries, with a correspondingly smaller impact of those countries on the development of the law through the DSB. The

[55] *Id*.
[56] See Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2009--A Statistical Analysis*, 13 Journal of International Economic Law Review (2010), 205, 207-10; see also Chad P. Bown, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings, 2009) at Chapter 4.
[57] *Id*., pp. 93-97.
[58] *Id*., pp. 134-35.

law may therefore remain closer to the treaties and principles. In that way, it may be more civilian in content.

These few insights, from both the analysis of the WTO's development law as similar to and as different from the WTO, suggest that the legal cultural characteristics of the WTO and its development law will clearly have an impact on development policy within the WTO. In order to understand the full impact, however, it is necessary to wait for the completion of the legal cultural analysis of the WTO that is in process, and of which this paper is but one small part. Furthermore, without consideration of the domestic implementation of WTO development law, discussed below, the story is necessarily incomplete. Much of the WTO policy, development or otherwise, takes place within the member states, through domestic implementation of WTO rights and obligations. Hence the atomistic analysis, and the presentation of the methodology, next requires a legal cultural analysis of the domestic implementation of international development law.

B. Domestic Implementation of International Development Law

An atamostic legal cultural analysis of international development law requires a consideration of how it is applied by and within states. This is necessary because international legal fields, such as international development law, must often work within domestic legal systems, and as such they will directly interact with those domestic legal traditions. Even leaving aside the issue of legal culture, domestic implementation is highly problematic, with issues ranging from partial implementation to inconsistent and often opposite interpretations of the international obligations by national courts.[59]

Many of the problems with implementation may, however, be caused by legal cultural disconnects. Needless to say, there are numerous domestic legal cultural issues that will present positive or negative issues for implementation of international development law. Indeed, within every state's legal system, regardless of the level of development or legal tradition background, there will be legal cultural characteristics with an impact on the implementation of international development law. Furthermore, because the legal culture is different in all states, sometimes radically different, consideration of all the legal cultures is

[59] See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 Boston University International Law Journal (1998), 331, 385-86. Compare *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991), holding that the Warsaw Convention does not cover damages for emotional distress; *id*., p. 551, noting the sole decision from a sister signatory court concerning recovery for mental damages found that Article 17 should be read expansively to include damages for psychic injuries (citing *Air France v. Teichner*, 38 (III) P.D. 785, 788 (1984) (Isr.)).

simply not possible here. Accordingly, this paper will only discuss some of the common issues that apply in many of the developing countries. Clearly, however, an aggregation of country specific studies and surveys is the best method for seeing the complete picture.[60]

As an initial matter, the discussion earlier in the paper concerning the civilian and common law characteristics of international development law may prove to be a source of legal cultural disconnect or concordance for domestic implementation, depending on whether the domestic system employs a similar characteristic. Thus, if international development law develops pragmatically, then there would likely be problems for those domestic legal cultures that exist within a logical, principled and scientific legal system. Similarly, there will be a legal cultural disconnect between domestic legal cultures that exist within a common law system and those parts of international development law that are civilian-like.

Regardless of its civil or common law components, international development law is for the most part western. This is necessarily so, as it is a part of international law operating within international institutions and usually created on the developed western world's terms. As such, there are few formal parts of international development law that will not be western, despite a clear need to take non-western legal culture into account. Therefore, the single largest disconnect at the domestic state level, outside the civil/common law issues described above, will be the result of western international development law attempting to fit with or being implemented within non-western systems or those parts of domestic law which reflect non-western legal cultural characteristics. Given that a great majority of the developing world will reflect non-western legal cultural issues in their legal culture, this source for cultural disconnects may be rather significant. This is not to suggest that in developing countries the western legal culture is absent, so much as to say it may be significantly less present than in the developed countries. Though even in western systems, sometimes non-western legal cultural issues will be present. For example, religious legal traditions and cultures may be present in western systems, very often in the areas of family law and inheritance.[61]

Part of the explanation for the presence of the non-western legal cultural characteristics is that while most developed states have either adopted the common law or civil law traditions (via direct or legal colonialism/imperialism),[62]

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[60] See, for example, Picker (China) (2011), *supra* note 2. The author is also presently working on one focused study of the United States legal culture and its interaction/implementation with the WTO, but an initial idea of some of the ideas may be found at Picker (Methodology) (2011), *supra* note 2.

[61] See Glendon (2007), *supra* note 25, pp. 968-70.

[62] See Barnes (2005), note 26. See also Glendon (2007), *supra* note 25, pp. 68 and 320.

they still retained vestiges of their own pre-western systems—either as explicit legal characteristics that survived as unwritten law or exist through the western legal cultural characteristic being filtered through non-western filters. As a result, many of the western legal cultural criteria (see above) are absent in the legal culture of developing countries, either as a formal or informal matter. This issue is easily demonstrated by consideration of a few examples from African legal culture, where in many cases these criteria are absent or severely weakened. Of course, any employment of the generalization of Africa as one unit, whether of legal culture or otherwise, is clearly problematic, for there are numerous legal cultures within that continent.[63] But that generalization is one that has been used by others in the past, including experts on African cultures and on whose work I now rely.[64] Also, rather than it being a generalization, the examples here are merely ones that are not uncommon throughout much of African legal culture and are ones selected precisely because they are relevant to the paper. For example, the Western legal cultural characteristic of change and dynamism within the law may be culturally less present in Africa, in which the past may figure larger in minds.[65] Given the dynamic nature of international development law, this may present a significant legal cultural obstacle to its implementation. Similarly, the role of religion is a significant force throughout Africa, even going so far as to imbue secular law with "religious or transcendent" significance.[66] That role of religion may likely impact the place of positivism within the legal culture.[67] International development law, despite its heavy normative basis, must still rely on positive law to achieve its goals. Anything which undermines the role of positive law may necessarily undermine the implementation of international development law. Thus, these few examples from African legal culture clearly show the clash with international development law that may arise as a result of some of the non-western characteristics within legal cultures in the developing world.

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[63] The diversity within Africa is immense, with classifications including: Black Africa, White Africa, Saharan Africa, sub-Saharan Africa, Nile Delta Africa, Western Africa, Southern Africa, Francophone Africa, Anglophone Africa, Arabophone Africa, Lusophone Africa, tribal Africa, and so on. The list is endless. See Daniel Etounga-Manguelle, "Does Africa Need a Cultural Adjustment Program", in Lawrence E. Harrison & Samuel P. Huntington, (eds.), *Culture Matters How Values Shape Human Progress* (Basic Books, 2000), p. 67.

[64] *Id*. See John Henry Merryman, David S. Clark, and John Owen Haley, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (LexisNexis, 2010), p. 16.

[65] Etounga-Manguelle (2000), *supra* note 63, p. 69.

[66] Merryman (2010), *supra* note 64, p. 19.

[67] Etounga-Manguelle (2000), *supra* note 63, p. 70.

A specific, but large, subset of non-western legal culture is that of indigenous peoples.[68] Indigenous peoples' legal heritage has been described as chthonic, keeping with the earth and its rhythms.[69] As such, there is a possibility that states where chthonic legal culture remains may be more open to the "modern" or NIEO form of international development law, with its holistic approach. To the extent that international development law focuses solely on individual projects from an economic perspective alone, leaving states to handle separately the environmental and social policies otherwise involved, there may be a disconnect between a legal culture that views all these things as related and not divisible.[70] In addition, chthonic legal culture in some cases has also been opposed to the writing down of laws, as it is believed that oral transmission is superior and appropriate.[71] To the extent transparency is a part of international development law, this may present some implementation issues. Similarly, in chthonic legal cultures, as in communal legal cultures, the adjudication and law are accessible to all, with no barriers.[72] That open access characteristic may clash with those parts of international development law that are less open. Indeed, international development law may exist and be developed within the relatively closed WTO, closed in adjudication and closed in access to sources, both confidential sources and ones so complex as to essentially not be available. Similarly, some chthonic legal cultures, while open to trade, have some highly restrictive characteristics with respect to commercial activities, including some that might be thought to stand in the way of development, though it is more likely that they simply need to be managed differently.[73] Finally, and perhaps quite crucially, the role of the state does not fit well with chthonic tradition.[74] This is evident in the revival in Africa and central Asia of "community-clan institutions".[75] Relatedly, there may be a cultural disconnect as a result of the top-down decision making in domestic law, which inevitably arises as a result of the fact that international law implementation is typically handled by national governments, and not sub-federal entities, regions, or even peoples.[76] Finally,

[68] "There are over 370 million indigenous people in some 90 countries, living in all regions of the world." UN Permanent Forum of Indigenous Peoples, *State of the World's Indigenous Peoples*, available at: <http://www.un.org/esa/socdev/unpfii/en/sowip.html>.
[69] *See* H. Patrick Glenn, *Legal Traditions of the World* (4th ed., Oxford, 2010), p. 63.
[70] Bradlow (2004), *supra* note 1, pp. 200-201.
[71] Glen (2010), *supra* note 69, p. 64.
[72] *Id*., pp. 67-68.
[73] *See* Glen (2010), *supra* note 69, pp. 68-69 & n. 29.
[74] *Id*., p. 86.
[75] *Id*.
[76] See Colin B. Picker, "Islands of Prosperity and Poverty: A Rational Trade Development Policy for Economically Heterogeneous States", in Yong-Shik Lee, Won-Mog Choi, Tomer Broude, & Gary Horlick (eds.), *Law and Development Perspective on International Trade Law*, (Cambridge University Press, forthcoming 2011).

there may be conflicts with respect to individual property rights obligations and community or tribal notions of collective property within international development law implementation, specifically in the intellectual property and investment contexts.[77]

Of course, in part because international development law already includes or should include more non-western legal cultural characteristics, there will also be non-western legal cultural characteristics that might support the implementation of international development law within developing countries. For example, and continuing with African examples, there are greater communal and tribal law legal cultural characteristics in Africa.[78] This may support development law which often requires community involvement, although this communal legal cultural characteristic must be balanced against the corresponding diminishment of individualism that may exist within African legal culture. [79] This then presents a legal cultural disconnect with international development law to the extent that individualism, via western legal culture, is a part of international development law. [80] Thus, it really then depends on the specific part of international development law at issue as to whether greater communal legal cultural characteristics will help or hinder international development law. Indeed, because the present international development law is so very western in character, one may wonder whether it will be possible to find an unambiguous case of a non-western legal cultural characteristic that clearly supports international development law.

Further complicating the issue, there may also be aspects of Western law that inhibit the implementation of international development law! This may be especially so for implementation in western states, when or if they ever are forced to deal with aspects of international development law which are non-western, such as support for community property rights. Also, there may be a legal cultural clash with western legal cultures that may result from attempted application of the "modern view" of international development law—which may help to explain the hostility of the developed and western world to the "modern" perspective on international development law. After all, application of that view may require a consideration of non-economic matters associated with environmental, social, historical, and other non-law considerations. Furthermore, any effort to bring consideration of matters of justice into international development law

[77] See, for example, Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 Washington University Journal of Law and Policy (2005), 313.
[78] Etounga-Manguelle (2000), *supra* note 63, p. 71.
[79] *Id*., p. 71.
[80] See Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 International Comparative Law Quarterly (1998), 495, 503.

implemented in western states may prove equally unpalatable. Western legal culture more easily accepts the notion of "justice under law" as opposed to other notions of justice that are thought to be outside the context of law. All of these issues could easily lead to legal cultural disconnects for western legal culture—where law is, as a theoretical matter, separate from politics and morality.

IV. CONCLUSION

While this paper is mainly concerned with presenting an example of a methodology in action, it also identifies some issues and insights about international development law. Perhaps the single largest conclusion is the critical interaction of non-western legal cultures with international development law. Additionally, it appears that regardless of which analysis of international development law within international law or within the WTO was applied (whether akin to international law/WTO or *sui generis*), the results were surprisingly similar—suggesting that the legal cultural issues may be widespread and deeply imbedded.

Even the preliminary analysis provided in this paper helps to explain the relative lack of success and ineffective application of international development law within international law, within the WTO, and within domestic systems. That analysis clearly identifies many examples where the legal culture of international development law simply does not fit with international law or the WTO and has difficulties being implemented within domestic systems. But, as serious as some of these legal cultural disconnects appear, the fact is that while "sticky", many of them can be managed if identified and confronted. Indeed, one of the central goals of the proposed methodology is to assist in such identifications and suggest ways of how those legal cultural obstacles can be managed. Typically, the solution will be based on the legal cultural characteristic itself or will be molded to deal with the foreign legal cultural characteristics with which it clashes. Furthermore, as international development law grows, in order to proactively deal with potential legal cultural clashes, the specific areas of growth should be considered under a legal cultural analyses. They should then be examined against comparable legal cultural issues within general international law and within the WTO, and any lessons derived from those comparative examinations should be applied early in the formation of the new development policies.

Finally, because this paper is part of a larger project that is presently in process, it should, when that work is completed, be read in conjunction with those other papers. Doing so will provide a more detailed and broader picture of the issues involved, thus providing a better picture of the operation and effectiveness of the proposed legal cultural methodology—a methodology that can be applied

beyond international development law into international law and its many subfields.

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Chapter 4

China, Global Governance and Legal Culture

Colin B. Picker[*]
(Faculty of Law, University of New South Wales)

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[*] Associate Professor, University of New South Wales, Sydney, Australia. A.B. Bowdoin College, J.D. Yale Law School. The research here is part of two larger studies by the author: one on China and Global Governance; and the other on legal culture and the WTO, that will be part of the author's PhD thesis.

I. Introduction

A study of the relationship between China and Global Governance should consider that relationship from all angles and perspectives. One perspective is through the combined prism of comparative and international law—through a legal cultural analysis of the international law relationships between China and the different parts that constitute "global governance". Indeed, one of the factors that shape the relations of a state with the international legal order is the interaction between that state's legal cultures and the legal cultures of the relevant international legal institutions.[1] To the extent that state's specific legal culture is close to or similar to the legal cultures present in the international legal order then that interaction is unlikely to be noteworthy—at least from a legal cultural perspective. To the extent the state's legal culture diverges from or is opposed to the dominant legal cultures within the international legal order one might then expect those differences to lead to difficulties—ones that will likely serve as obstacles to the smooth interaction between that state and the international legal order one would have expected if the legal culture were similar.

Given China's significant position in the world and its non-Western character, China would be an ideal and useful subject for this sort of examination. Indeed, such an examination of the legal cultural interaction between Chinese legal culture and global governance will likely identify points that complement, compete, or conflict. As such, there is therefore tremendous value in studying that relationship. That value would be of particular benefit to China's neighbours and close economic partners, such as Japan and Australia.

Such a study, however, would require considerable time and effort if it were to tackle the entirety of the interaction of Chinese legal culture and all of global governance. Accordingly, in order to keep this initial foray into the matter manageable this

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[1] This methodology has been applied in a series of related studies by the author, e.g., Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine , Seán Patrick Donlan & Martin Sychold , eds.)) (Publ. of Swiss Instit. Comp. L) (2010) (hereinafter "Picker (WTO)").

preliminary effort will merely consider the legal cultural interaction of China and that of just one of the many international institutions responsible for global governance. Given the dynamism and significance of the World Trade Organization, both globally and specifically for China, the legal culture of the WTO will be the institution against which the legal culture of China will be examined.

Numerous scholars have considered the interaction of China and the WTO—during and after China's long accession to the WTO. Typically, while valuable contributions, those scholars research and write on the issue from either too specialized an area or focus their legal cultural analysis solely on China, with essentially no consideration of the legal culture of the WTO itself.[2] This project, of which this paper only forms the first of four parts, will approach the issue quite differently by including the legal culture of the WTO in its analyses. This project's methodology is thus taken from the comparative law field—from a legal cultures perspective. As such the issues will be considered from above and from below. From above because holistic generalizations about the legal systems will perforce be required, but also from below because some of the legal cultural issues are to be found within the individual participants in the legal system—in their conscious and subconscious thoughts and actions, conditioned as they are by the legal culture within which they studied, live and work. This approach is as applicable to those participants within the WTO as within the Chinese legal system.

Additionally, this project will take advantage of a methodology from comparative law whereby a comparatist considers a legal system in which she is not an expert, and then brings to bear her comparative experience to see issues in the new-to-her system not always visible to those already expert in that system.[3] Thus, the author, while not an

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[2] *See also* Pitman B. Potter, THE CHINESE LEGAL SYSTEM: GLOABALIZATION AND LOCAL LEGAL CULTURE (ROUTLEDGE) (2001) (an excellent discussion of Chinese legal culture, but with little discussion of the legal culture of the WTO); *see also,* Shin-yi Peng , *The WTO Legalistic Approach & East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J. 13 (2000) (focusing just on the dispute settlement process and China's legal culture, but also not really discussing the legal culture of the WTO).

[3] I call this the "*See the Forest, not the Trees*" methodology, for the experts may not themselves, as the saying goes, be able to see the "forest for the trees" of the system of which they are an expert (the saying means "someone who is too involved in the details of a problem to look at the situation as a whole", *see* Dictionary.com at http://dictionary.reference.com/browse/can't+see+the+forest+for+the+trees (last checked Dec.20, 2010)).

expert on Chinese law, believes that useful insights might be gleaned, specifically on the issue of the interaction between the WTO and China, precisely because the author will be viewing the field through a non-expert comparative lens—as a stranger may see our home in an entirely new way than we see it. An additional benefit of the analysis undertaken in this project is that insights into the WTO may be elucidated from consideration of Chinese legal culture. Indeed, given the supposed differences between the two systems, any insights may be unique—for such cross-comparisons, of an IGO and a state, are exceptionally rare. The methodologies, however, must be carefully applied to ensure that errors are not made as a result of insufficient experience with the new legal system. Perhaps the most common concern will be one of over simplification. Yet, simplification is very often the preferred tool of the comparatist as she endeavours to isolate discrete phenomena for better study. That simplification must be even more carefully considered and noted when issues of legal culture, already a simplification itself, are employed.

The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, institutions, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share common legal traditions. Critically, legal culture is also to be found within international institutions and fields—for they too are legal systems.[4] Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions.[5] It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal

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[4] *See, e.g.*, Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093 (2008).

[5] *See* Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (Harvard 1987) at 8; *see also*, Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles And Opportunities*, __ ROGER WILLIAMS UNIV L. REV __ (2010) (forthcoming).

culture" should be a cultural issue of *legal* consequence. Too often one can drift into non-law. This work will endeavour to stay firmly rooted in the law. By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour);[6] the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter);[7] and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change).[8] Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.

This form of analysis proceeds on the assumption that legal culture operates at an informal, yet powerful level. Legal culture is a component of the participants in the law through their legal education, through their legal experiences in their home countries, and through the popular culture—though the last may also allow foreign legal cultures to intrude.[9] Thus, those human actors will both consciously and subconsciously allow these legal cultural characteristics to impact their actions, which in turn may colour the results of those actions—in the resultant institutions and substantive law.

A project exploring the legal cultural relationship between Chinese legal culture and the WTO lends itself to a multipart analysis. Accordingly, the first part of the project, this paper, is a consideration of how Chinese legal culture fits with the WTO in

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[6] See COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW, 3rd Edition (American Casebook Series) (Thomson West Publishing 2007) (Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker) (hereinafter "Glendon (Traditions)" at 168 and 490.

[7] Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiating Style: How to Negotiate with Japanese Companies*, 10 N.W. J. INT'L L & BUS 195, 196 (1989).

[8] *See* Glendon (Traditions), *supra* note 6 at 593 *et seq* and H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD, 4th edition, (Oxford) (2010) at 99 *et seq*, 181 *et seq*, 211.

[9] Foreign media may introduce alien legal culture into a legal system. For example, American television portrayal of trials and the use of the jury may introduce the idea that juries are part of the trial system, when indeed they may not be a part of the justice system of that country!

general. The other parts include: a consideration of the relationships between China and the legal culture of the WTO;[10] a comparative exploration of the relationship between China and the WTO, independent of legal culture, to set the context for the legal cultural analyses;[11] and, finally, a direct contemplation of the interaction between the two legal cultures—the legal cultures of China and of the WTO. The other parts will be handled in later papers.

Before starting the analysis, it should be noted that the papers in this project will make no judgements on the suitability of any legal cultural characteristics. Even leaving aside the lack of Chinese law expertise of the author, the goal of this analysis is not to suggest reform of any legal culture, even assuming such reform could be implemented. The analysis here accepts the cultures for what they are—a product of history. Moreover, the international system, despite its claim to universality, does not necessarily have objectively correct or good or appropriate characteristics. Its characteristics are, like China's legal cultural characteristics, a consequence of history, usually not anticipated or systematic in character. [12] Furthermore, the interactions between legal cultures and systems, be they conflictual or collaborative, are a normal result of difference and a natural consequence of the generally beneficial diversity of the law. Nonetheless, these different legal cultures will sometimes be in conflict, and thus identification of trans-legal cultural disconnects, as will be provided in this research, can assist in ensuring a smoother and more productive interaction between legal cultures.

II. Issues Arising between China's Legal Culture and the WTO

Chinese legal culture is, like so much about China, vast. It spans thousands of years of history and presently exists and is reflected in the minds and actions of over a billion people. It is thus no surprise that it is considered to be a particularly strong and

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[10] The totality of the WTO's legal culture is presently the subject of the author's PhD thesis.

[11] That "objective" examination will likely follow the methodology applied by the author in Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOKLYN J. INT'L L. 67 (2004) (hereinafter "Picker (Reputational)")

[12] *See, e.g.*, Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149 (2001) (exploring the history of international law and the impact of technology on that history).

vibrant legal culture.[13] Yet, consideration of historic Chinese legal cultures were out of vogue during much of the modern period, though there is now an understanding of their continuing vitality and relevance—an understanding that I will apply throughout this paper and the subsequent research.[14]

Adding to the complexity of this legal cultural analysis, is the fact that Chinese legal culture has both strong traditional and modern components.[15] Furthermore, many of its modern components remain in a state of flux, struggling to thrive in rather adverse conditions. They are also typically of foreign origin, though modified, in an ongoing process, when imported.[16] While it is the case that all legal cultures are in a constant state of development, the Chinese legal culture is considerably less fixed than is typically found in a world power. That instability is a result of the last one hundred, and particularly the last fifty years of turbulent Chinese history and its direct impacts on the Chinese legal landscape during that time.[17] Whatever will be that modern part of Chinese legal culture, it has not settled down yet. It is likely that the eventual legal culture, when it is eventually somewhat settled, will be something entirely new for the world.[18] In other words, Chinese legal culture is vast, ancient, modern, changing and possibly unique in ways not yet understood! This paper will consequently only focus on those legal cultural characteristics that are relevant to the relationship between China and the WTO.

While identification of a clear legal culture today may prove elusive, we can make progress by considering the identifiable underlying elements of that legal culture. For despite its inchoate nature, today's Chinese legal culture is a mix of many different and often contradictory modern and ancient strands that exist side-by-side in Chinese legal culture. Those elements include Confucianism, Legalism, Marxism, Soviet Socialism, Maoism, Rationalism, and significant legal cultural characteristics

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[13] Albert Hung-yee Chen, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (Butterworth) (1992) (hereinafter "Albert Chen") at 1.

[14] Jianfu Chen, CHINESE LAW: CONTEXT AND TRANSFORMATIONS (Martinus Nijhoff) (2008) (hereinafter "Jianfu Chen") at 10.

[15] Albert Chen, *supra* note 13 at 2

[16] Albert Chen, *supra* note 13 at 1

[17] Albert Chen, *supra* note 13 at 2

[18] *See* Ignazio Castellucci, *Chinese Law: a New Hybrid?* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine , Seán Patrick Donlan & Martin Sychold , eds.)) (Publ. of Swiss Instit. Comp. L) (2010) at 94.

imported from the German and Japanese strands of the Civilian legal tradition.[19] Each of those components is alive and well in China, albeit existing to different degrees in different legal fields and institutions. But, each has a role to play in what one might today describe as Chinese legal culture.[20] Nor is this mix of old and new unique to China. We see a similar situation in all legal systems. For example, in the Anglo-American legal systems, the legal cultures today reflect the role of historical legal cultural characteristics. Thus, the role of equity in historic legal culture, as a refuge from overly rigid "law" courts, continues to exist and reflect its ancient character in the legal culture of Anglo-American legal systems alongside contrary legal cultural characteristics derived from the modern common, statutory, constitutional and international laws.[21] All legal systems include many such diverse and hidden strands. So too, Chinese legal culture is not monolithic, but rather includes many different component, often operating out of sight, yet still having a serious impact on the legal culture and thus on China's interactions with external systems and institutions—such as the WTO.

A further complicating issue for this research in particular is that today one may view China as having two legal systems—one for international trade and investment and one for everything else.[22] Nonetheless, the same legal culture still permeates both systems, though perhaps not in the same way and not to the same degree. Relatedly, despite the incredible internationalization and harmonization with international legal conventions in the last thirty years in China, Chinese legal culture, ancient and modern, must still be taken into account.[23] Accordingly, despite the potential binary and international nature of Chinese law, the central thesis of this paper is still valid—that the disparate parts that constitute Chinese legal culture can be considered with respect to China's interaction with global governance, and specifically with respect to WTO governance.

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[19] Toohey, Lisa C. (2008). *Rule of Law Discourse and the Accession of Transitional Economies to the World Trade Organisation* PhD Thesis, Law, The University of Queensland, at 165. Other historic elements, though of lesser impact, included Daoism, Yin-Yang, Mohism, and the School of Names. *Id.*

[20] Jianfu Chen, *supra* note 14 at 10 (quoting Tu wei, that "the past . . . 'lives on in China, muted and transformed in certain ways, vital and persistent in others'"); Peng, *supra* note 2 at 9.

[21] *See generally*, Glendon (Traditions), *supra* note 6 at 672.

[22] Jianfu Chen, *supra* note 14 at 625.

[23] *See also* Potter, *supra* note 2 at 2 ("Despite the influence exerted by foreign legal norms, Chinese law remains denominated by local legal culture.").

I. Traditional Chinese Legal Culture - Confucianism & Legalism

The two main strands of traditional Chinese legal culture are Confucianism and Legalism. While today they are not overt parts of modern Chinese legal culture, they continue to shape the "traditional patterns of thinking (morality v. punishment), the structure of institutions (the family as the central unit), conceptions and assumptions about law (law as punishment), and the function of law (law as a political and administrative tool for maintaining social order)."[24] The question here is whether there be a part of these legal cultures that is relevant to China's interaction with the WTO.[25]

When one thinks of traditional Chinese culture, Confucianism normally comes first to mind. Confucianism, while far removed from today's China, and always subject to the counterweight of other ancient and modern Chinese legal cultural components and approaches, exists nonetheless in the background of legal culture today in China—as an interstitial presence. Confucianism, put simply, is legal "regulation" based on virtue, benevolence, social rightness and morality, with harmony as a central goal.[26] The question is then how this might fit or not fit with the WTO. For sure, much of the WTO can be viewed merely as a mechanism for wealth creation, for expanded materialism, at the individual as well as societal level. Similarly, the compromises and conflicts that make up the WTO can be traced to the deeply political context of the organization and its members' agendas—agendas typically shaped by domestic political pressures. To the extent the WTO is viewed as a political or economic organization and not one with overriding moral and virtuous objectives, and to the extent economics and politics is often viewed as at best being normatively neutral, then there may be a fundamental, albeit subconscious, Chinese legal cultural unease with and about the WTO.

Another aspect of Confucianism is the concept that rules may be applicable to

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[24] Jianfu Chen, *supra* note 14 at 19.

[25] *See* Peng, *supra* note 2.

[26] *But see* Albert H. Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 130 (2000) ("most contemporary Chinese legal scholars depicted the Confucian tradition negatively as depriving persons of their autonomy, freedom, individuality and claims to equality").

different people depending on their status within society.[27] The virtue, benevolence and morality requirements of Confucianism were typically aimed at those higher up the societal hierarchy, while rules and the application of Legalism's tenets were more often thought to apply to those lower down.[28] If China feels that in the WTO it is being scrutinized under exacting rules and regulations and is not among those for whom virtue is looked for, then it may suggest a lower position for China in the WTO hierarchy—a position in conflict with China's own or desired self image. Similarly, the Confucian idea that the "final goal of good government was the correct operation of hierarchical human relations" is also relevant to this issue.[29] Thus, it might very well be that China's perspective that it is not at the correct hierarchical position within the WTO would feed into any discomfort with WTO governance, contributing to any latent conflict in the WTO-China relationship.

While there appears to be some aspects of Confucianism that may create obstacles to China's smooth interaction with the WTO, there are also aspects that fit well with it. For example, the role of one's reputation for virtue and morality are important tools of compliance in Confucianism. So too in international law and the WTO, where reputation is a strong driver of compliance with obligations.[30] Similarly, punishment is viewed as a secondary means of control in Confucianism, for it will not "transform the inner character of the members of society".[31] That idea can also be found within the WTO, where punishment as a direct form of control is not allowed. Rather, prospective, not retrospective, suspension of benefits is the ultimate sanction, and is rarely employed.[32] Indeed, while possible, dispute settlement is disfavoured among WTO members. The 400-plus disputes already presented to the Dispute Settlement Body of the WTO represent a small fraction of the total trade disputes between

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[27] Randall Peerenboom, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002) at 38; Potter, *supra* note 2 at 9.

[28] Toohey, *supra* note 19 at 171; Poh-Ling Tan, ASIAN LEGAL SYSTEMS (1997) at 20

[29] Jianfu Chen, *supra* note 14 at 13.

[30] *See* Picker (Reputational), *supra* note 11.

[31] Peerenboom, *supra* note 27 at 28.

[32] Chad P. Bown, SELF ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT (Brookings) (2009) at 90 (between 1995 and 2007, only 19 cases ended with authorized retaliation); *See also* Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2009--A Statistical Analysis*, 13 J. INT'L ECON. L. 205, 213-215 (2010).

members.[33]

Along similar lines, there is another aspect of Confucianism that may be relevant—the belief within Confucianism that before one can punish, one must educate.[34] This idea, of not applying regulations until one has had a chance to reach the maturity or knowledge necessary to bear the responsibility fits well with the WTO's employment of transitions and capacity building for developing countries. Though, given the lack of such transitions when China acceded to the WTO, transitions China requested, we see yet another potential flashpoint.[35]

As discussed above, one of the significant components of traditional Chinese legal culture is Confucianism which believed that virtue and morality existed sufficiently within humans, sufficient even to serve a means of regulating life and ensuring order. On the other side of traditional Chinese legal culture, however, were the Legalists who believed that humans were intrinsically "evil" and that law was necessary to control that evil.[36] The legalists were thus associated with strict application of rules with correspondingly severe punishment for infractions of those rules. Further, legalism lent itself to the support of an authoritarian style of government. That authoritarian rule was possible through strict supervision and application of the law to the ruling class and the government officials.[37]

Legalism's employment of strict and harsh punishment does not seem to find much congruence with the WTO, even when one takes into account the WTO's much lauded dispute settlement system. That dispute settlement system was held up as a major accomplishment and the central component of the new "legal" character of the

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[33] *See* WTO website for the total list of disputes. For example, the United States publishes its National Trade Estimates Report each year, in which they recount thousands of different potential violations of trade obligations, involving almost the full membership of the WTO. *See* USTR website for the reports. Yet, only a handful of these will ever make it formal dispute settlement before the WTO.

[34] Alice Her-Son Tay, *From Confucianism to the socialist market economy: the rule of man vs the rule of law* in ASIA-PACIFIC HANDBOOK (Alice Tay & Gunther Doeker-Mach, eds) (1998) at 82; Jianfu Chen, *supra* note 14 at 14.

[35] *See, e.g.*, Marcia D. Harpaz, *China and the WTO: New Kid in The Developing Bloc?*, SSRN 961768, pp 20 (no subsidies transition), 23 (no TRIPs transition), 25 (no TRIMS transitions) and page 74-76 (table listing WTO-Plus and other lack of transitions).

[36] Jianfu Chen, *supra* note 14 at 14.

[37] *Id.* at 15.

WTO. But, the prior GATT system's method of securing compliance from its signatories was so weak that little was demanded of the new WTO's compliance mechanism for it to appear as a significant improvement over the GATT's system. Of course, by international standards the WTO's dispute settlement regime has proven to be perhaps the most effective of all international dispute settlement systems. That may be more of a comment on dispute resolution in international law than on the efficacy of the WTO's dispute settlement system. The reality is that with essentially no retrospective relief, institutional censure or even punishment, violating members of the WTO are permitted to either rectify their behaviour or eventually suffer some future lost benefits if they refuse to comply. But that "punishment" takes place often after the violating behaviour has achieved the results it was after.[38] To the extent legalism exists within modern Chinese culture, one would find that the WTO with its weak "punishment" system would stand in sharp contrast, perhaps engendering a cultural disconnect between Chinese legal culture and the WTO.

But, with respect to Legalism's belief that humans are intrinsically "evil" and strict law is necessary to control that evil, there may be some common ground with the WTO! After all, the behaviour of WTO member states is not left to the states' own virtue, but rather regulated and enforced through rules—with the very real understanding that states have strong protectionist and rule breaking instincts. Indeed, much of the substantive law of the WTO is in the form of regulations on state behaviour, often at a very detailed level.[39] In the sense that much of the WTO is about rules holding back expected bad behaviour, it may philosophically fit quite well with any latent Legalism existing within the Chinese culture.

One common theme across both Confucianism and legalism was that the law was generally not concerned with citizen to citizen issues, so much as citizen to state issues. Indeed, civil matters were viewed as "trivial" and regulated by custom.[40] The creation in China of private law, including commercial law, did not take place until the twentieth century, and its relative position vis a vis public law continues to be a source of concern.[41] Additionally, given the historic vacuum in private law it was no wonder then that it was and still is the subject of so much importation from outside

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[38] *See* WTO Dispute Settlement Understanding.

[39] *See, e.g.*, WTO Agreement on Subsidies and Countervailing Measures or the Agreement on Implementation of Article VI.

[40] Peerenboom, *supra* note 27 at 4, Jianfu Chen, *supra* note 14 at 22.

[41] *See* Albert Chen, *supra* note 13 at 143; Jianfu Chen, *supra* note 14 at 26

China. That importation then means that the private and commercial law are alien to Chinese legal culture. But, the fact that it is alien can be both positive and negative for private law. Positive in that it allows rapid development without the hindrance of pre-existing traditional Chinese legal cultural obstacles. Negative because its novelty suggests it may lack the heritage and associated respectability of those parts of Chinese legal culture of greater vintage, and hence it may be harder to assimilate into Chinese legal culture. Given the relationship between commerce and private law and the WTO, a question might then be raised whether commercial and private law's novelty in Chinese legal culture may itself colour the relationship between the WTO and Chinese legal culture. For example, one of the central issues for China upon entering the WTO was the issue of its status as a "market economy."[42] Private and commercial law may be thought of as being critical to the creation of a market economy, and yet they seem not to occupy such a central position within Chinese legal culture. That may perhaps be of some relevance for the debate about China and its market economy. Of course, the traditional legal cultural characteristics are but one part of the overall Chinese legal culture, albeit important characteristics, and as such they may be outweighed in the debate by other legal cultural issues.

Finally, it should be pointed out that in reality the two primary components of historic Chinese legal culture existed at the same time: "in state practice Legalism continued to provide its methods and solutions for government, while Confucianism was upheld as a desired and ideal order for the society."[43] As noted earlier, they also tended to govern different parts of society—Confucianism was for controlling and guiding the governing elite, while legalism was for the control of the masses.[44] Might the WTO also be viewed similarly. The mass of rules and requirements that exist within the WTO can be viewed as existing to regulate day-to-day state behaviour, even as other parts within the WTO, such as the Preamble and Part IV of the GATT, can be viewed as being aimed at the long term improvement of humanity and that may stand as guiding principles for the organization as a whole. As such, maybe the WTO as a whole may indeed fit well with China's historic legal traditions.

Of course, these are just a few observations on the potential issues that may arise when one considers together the WTO and the historic components of China's legal culture. They are, of course, more sophisticated and complicated than represented

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[42] *See, e.g.*, Harpaz, *supra* note 35 at 36.

[43] Jianfu Chen, *supra* note 14 at 19; *see also* Albert Chen, *supra* note 13 at 11.

[44] Toohey, *supra* note 19 at 171.

here. Additionally, there are many potential issues and lesser historic traditions not covered, but the length of this work does not permit more. Nonetheless, the brief discussion here clearly shows the value of such an analysis, an analysis that will be reinforced through consideration of the modern components of China's legal culture.

2. The Modern Period - Western (Continental) and Soviet Law

While some modernization occurred before, the modern period can be most accurately said to have started around the beginning of the twentieth century. Much of the modern period's development of Chinese legal culture developed against a backdrop of unrivalled demographic demands within a geographically difficult setting. Added to those challenges were a predominantly rural and agrarian economy and tumultuous political and civil instability for much of the modern period. Those factors permitted only little and localized development of the law through much of the first half of the modern period. Indeed, the policy of allowing officials and administrators tremendous discretion in implementing local governance, subject to their own regulation, continued during much of the period. For example, many of the Western law reforms, especially by the KMT, left tremendous leeway to local practice as a result of the size of the country and the tremendous change that would have been ensued if those reforms were applied to the whole country.[45] These factors led to a legal culture that occupied a middle ground between total westernization and the traditional legal culture. In addition, given that many of the early modern period's legal thinkers were themselves trained in the traditional legal culture, it is no wonder that they would have consciously and subconsciously brought that traditional Chinese legal culture into the modern period.[46] Accordingly, traditional Chinese legal culture remained a vibrant and official part of the legal culture far into the modern period.

Another significant, but quite different, component of the modern Chinese legal culture is the result of the importation of a specific type of Western law during the twentieth century. For the most part, that law was derived from the German branch of the continental system, directly and via importation from Japan.[47] In addition, during the communist period there was further importation of law, this time from the Soviet Union—which, to the extent it was law, was related to the continental system as

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[45] Jianfu Chen, *supra* note 14 at 35.

[46] Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP L. 711 (1994), reproduced in ASIA-PACIFIC HANDBOOK (Alice Tay & Gunther Doeker-Mach, eds) (1998) at 250.

[47] Jianfu Chen, *supra* note 14 at 25.

well.[48] One legal cultural consequence of this civilian character is that principles and not details are preferred even today.[49] In some respects, it was felt that the importation of the civilian part of the Western law fit well with the pre-existing Chinese legal culture. For example, there was a view that the early civilian focus on state over citizen and the role of the pater familias fit well with traditional Chinese legal culture, likely much better than would importations from the common law.[50] To the extent the WTO includes civilian characteristics, this may be an area where Chinese legal culture fits well with those parts of the WTO that remain civilian in character. But, as will be discussed in a later paper for this project, the WTO also includes aspects that are common law in style and hence with which Chinese legal culture and the WTO may experience a cultural disconnect.[51] But, a full discussion of the interaction of the two legal cultures must wait for that later paper.

Perhaps one of the most critical aspects of Chinese legal culture from this period, and for the most part continuing to this day, is the view of law from an instrumentalist perception. In other words, what can the law be made to do for China, for its development and modernization.[52] Law was not viewed as an independent goal and value in its own right. For example, law as borrowed and learned from the Soviet Union during part of the twentieth century led to "the use of law as a terrorising means for class struggle, with complete disregard for formal enactments and for formal procedures, but also the popularization of justice, to politicisation of law, and to the ad hoc nature of legal provisions."[53] To the extent there was law it was purely instrumental, its goal being creation of a socialist system. Indeed, it has been said that during much of this modern period, China was a country "without a law or legal system."[54] The post-Mao period, however, has seen a resurgence of respect for law. Yet, even with the rise of Deng, and the return of law to a position of greater vitality,

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[48] Castellucci, *supra* note 18 at 76.

[49] Jianfu Chen, *supra* note 14 at 70.

[50] Jianfu Chen, *supra* note 14 at 28.

[51] *See* Picker (WTO), *supra* note 1 at 120-33 .

[52] Jianfu Chen, *supra* note 14 at 38. Potter, *supra* note 2 at 2, 10. *But see* Peerenboom, *supra* note 27 at 23 & 219 (noting that the younger generation, especially those with legal training and exposure to the West may be less likely to view the law in this way).

[53] Jianfu Chen *supra* note 14 at 39.

[54] *Id.* at 51.

law was still used in an instrumental fashion.[55]

The question is then whether the instrumentalism present in Chinese legal culture fits with the WTO. In order to figure out that relationship, one must first consider the position of instrumentalism within the WTO. In other words, does the law in the WTO have an independent value of itself, or does it merely exist to serve other goals? There are some aspects of international trade law, of which the WTO is merely the embodiment, that may reflect general international law, such as the dispute settlement provisions as a form of internationally permitted countermeasure and as such belie an instrumentalist perspective within trade law.[56] But, the vast remainder of the field appears to be less august. One way to consider its role is to consider the international economic environment without those provisions. Likely, absent many of those international trade regulation law there would be greater uncertainty in global economic affairs, diminished development and perhaps even conflict between states. Indeed, the reasons for the existence of trade law in general, derived from the interwar experience, are those specific critical objectives. The question of instrumentalism in international trade law then depends on one's perceptions of those goals—whether they are fundamental or peripheral. If peripheral, then that implies that there is a greater likely instrumental presence in the WTO and perhaps a better fit with that part of Chinese legal culture. If fundamental, then it is less likely that they are instrumental. The answer probably lies somewhere in the middle and depends on the specific rules. Thus, the connection of Article I (MFN), II (tariff bindings) and III (national treatment) to economic certainty and conflict avoidance suggests they may not be considered instrumental. In contrast, Article VI's concern about antidumping and countervailing duties, while important, may be just one or more steps too far removed from the fundamental goals of the field. It may thus be a better candidate to be considered instrumental.

Another way to consider the complex issue of instrumentalism within the WTO is to consider the debate about employment of extrinsic law, even of international law, within the WTO. Some argue that WTO disputes should, for the most part, be decided from the pages and texts of the WTO Agreements, without recourse to "extrinsic"

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[55] Potter, *supra* note 2 at 11; Albert Chen, *supra* note 13 at 34-36 (providing detailed discussion of the different goals: to forestall a recurrence of anything like the Cultural Revolution; to support stability and order; and to support the economic policies).

[56] *See* Sherod Shadikhodjaev, RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM (Kluwer) (2009) at 181.

international law.[57] If that position prevails, then that turns the WTO into an isolated island of trade regulation, designed to promote the specific goals of the WTO, as opposed to the general goals of the international legal order. The former, with its tight focus on international economics, suggests much more of an instrumental character than the latter. In any event, despite the deep level of complexity of these issues, there seems to be sufficient instrumental aspects within the WTO so that the instrumentalism in Chinese legal culture should clash too sharply with the WTO.

In addition to an instrumental approach, the modern period from Deng onwards also introduced a strong pragmatic character to the law, and hence into the legal culture. The urgency of the need to enact laws to ensure quick economic development after the Mao period led to an ad hoc and pragmatic approach to law making. There was even an acceptance that the initial laws would be rough and an expectation that with experience they would be changed to make necessary improvements. In other words, that China "should [not] wait for a 'complete set of equipment'" before carrying out changes.[58] Adding to this shift to pragmatism was the reduction, if not elimination, of ideology as basis for legal reform.[59] Rationalism replaced ideology. As Deng noted "it does not matter whether the cat is black or white, as long as it catches mice"[60] That pragmatism, even as it may be less the case today, fits well with the WTO, an organization that easily may be described as pragmatic.[61] The WTO agreements were, after all, a result of complex negotiations, with give-and-take and compromise throughout. Like the early Deng period, in these early years of the WTO, trial and error has also been one of the methods for WTO development![62] True, there are fundamental principles and some code-like specifics within the WTO, but with so much left ambiguous and for future generations, one can easily see a style that may fit well with the pragmatism we may see within modern Chinese legal culture.

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[57] *See* Simon Lester, Bryan Mercurio, Arwel Davies & Kara Leitner, WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY (Hart) (2008) at 103, *et seq*.

[58] Jianfu Chen, *supra* note 14 at 54.

[59] *Id.* at 57.

[60] *Id.* at 70, fn 143. Though, eventually jurists started arguing for systemization of the law, and an abandonment to an ad hoc experimental approach. *Id.* at 58.

[61] *See* Picker (WTO), *supra* note 2 at 121-123.

[62] *Id.*

As with all legal cultures,[63] an additional source of modern Chinese legal culture can be traced to specific incidents in recent Chinese history. For example, a brief period of supposed relaxation, during the "100 Flowers" debates in 1956-57, and its subsequent crackdown on those legal scholars that spoke up, had a chilling effect on scholars and jurists when eventually there was a true thaw.[64] Similarly, the post-Tiananmen Square period and other crackdowns would also have had such a chilling effect. The question is then what impact does successive chilling of legal scholars have on a legal culture, one already coping with major transformations and pressures, and one in which respect for authority and seniority may already have tempered criticism. Do these aspect together lead to a legal culture in which there is significantly less critique and analysis than is necessary for development of the system? One response by the legal culture might be to then focus on technicalities, and less on more dangerous normative issues. Indeed, such a trend has been observed in Chinese legal culture, with a resultant focus on supposedly objective technical issues "common to the nations" , so-called "technical norms".[65] The question is then how those two issues, diminished critique and a technical approach to the law, correspond to the WTO. With respect to the latter, much of the WTO is technical and supposedly normatively neutral. As such, it fits well with this part of Chinese legal culture. But, the lack of critique may represent a significant difference between the two systems. Indeed, the role of scholars and critique in WTO and international trade law is long-established and significant.[66] That difference between the WTO and Chinese legal culture may suggest a potential cultural disconnect between the two. Furthermore, it may, as China assumes a greater role in the WTO, have an impact on the long term role of scholars in the WTO, though that is a larger issue than can be dealt with here.

So far this paper has considered that part of Chinese legal culture that is imbedded in the formal law. While not the subject of this project, however, there is a more "popular" legal culture, the one practiced by the people and not the officials. That legal culture relies more heavily on relations, "guanxi", in the operation and resolution of many matters that would otherwise have fallen into the more formal

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[63] Just as the OJ Simpson case had an impact on American legal culture, though that impact has over time receded. *See* Wayne J. Pitts, David Giacopassi & K. B. Turner, *The Legacy of the O.J. Simpson Trial*, 10 LOY. J. PUB. INT. L. 199 (2009)

[64] Peerenboom, *supra* note 27 at 45; Toohey, *supra* note 19 at 180; Albert Chen, *supra* note 13 at 28.

[65] Jianfu Chen, *supra* note 14 at 67

[66] *See* Picker (WTO), *supra* note 1 at 125-26

legal culture.[67] Perhaps it is here, in the informal law, that one can find greater support for commercial and private law that would then bolster China's "market status" claims. In any event, the idea of an informal system residing alongside the formal law may fit particularly well with the WTO, where the formal dispute settlement, the Secretariat and the multilateral negotiations exists alongside the traditional diplomatic and bilateral negotiations, the proliferating bilateral agreements, and the political mechanisms for resolving and developing legal issues. Indeed, in both cases, in China and in the WTO, that informal legal culture may constitute the larger and more dynamic of the two legal cultures in each system.

After consideration of just these few characteristics within the modern parts of Chinese legal culture one is left with the not surprising conclusion that perhaps those modern components of the Chinese legal system may in fact fit more closely with the WTO than may be the case for the historical components of the WTO. Though these conclusions are, of course, quite preliminary and necessarily a result of simplification.

III. Conclusion

Just as the historical components of Chinese legal culture were relevant to understanding the relationship between China and the WTO, so too the modern components of Chinese legal culture are clearly relevant. Unfortunately, the vastness of the subject denies the brief consideration possible here beyond anything more than the role of showing the relevance of the greater idea—that a deep understanding of the interaction between China and the WTO can be significantly enhanced through considerations of legal culture. In the subsequent parts of this project, the issues will be further refined and developed. At this point, it is sufficient to show the relevance of the underlying idea—that legal culture may be usefully considered when examining relationships between different systems, even when one is an international and one a domestic legal system.

In addition to considering international relationships, another significant result of the project will be the gain to our understanding of the WTO. For a related benefit of this effort, one that usually flows from such comparative examinations, is the identification of new insights into all the legal systems and cultures involved in the exercise, including the "control" legal system and culture. That "control" is typically

[67] Potter, *supra* note 2 at 12-13.

the scholar's home legal system and culture. Indeed, it may even be the case that the scholar learns more about her own legal system and culture, especially if she is engaged in an examination of a hitherto unknown system to that scholar. In this case, the WTO may be considered the "control" or home legal system and culture in this paper. By considering Chinese legal culture and the WTO in the same breath, one is then confronted with issues never or rarely before considered in the WTO context. Thus, for example, when considering the role that historical incidents have had on shaping Chinese legal culture, the same consideration for the WTO is naturally raised. In other words, whether there may have been similar impacts on the WTO and its legal culture as a result of specific WTO historical incidents. For example, might the debacle that was the Seattle ministerial, within the meeting and on the streets, have had long term legal cultural consequences for the WTO? While that issue is not treated in this first part of the project, it certainly provides useful avenues for further research. Similarly, the examination of Chinese legal culture, both ancient and modern, raise many other potential avenues of research within the WTO, including, as briefly attempted here, the role of instrumentalism; the balance between regulations and morality; divergent treatment of groups—even to the extent of applying opposite legal regimes (Confucianism versus Legalism in the Chinese context) to the different groups; chilling of panellists and scholars; and so on. In conclusion, this initial examination raises many questions, even as it answers few, but it does leave the promise of greater understandings, both of the relationship between China and the WTO, but also of the WTO itself.

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6
WTO Governance: A Legal Cultural Critique

Colin B. Picker*

I. Introduction

As comparatists the world over understand, it is often through consideration of other legal systems that we can grow to understand our own better. In a symposium largely devoted to issues of governance in Japan, a consideration of governance within the World Trade Organization (the "WTO"), the world's premier international institution, may provide comparative insights that may be applicable to governance issues within Japan. Thus, readers of these Proceedings will hopefully have ideas about their own systems and governance issues sparked by this paper and its methodology.

The comparative analysis in this paper will employ a legal cultural methodology and will this focus on the *role of legal culture* in WTO governance. That methodology may be applicable when considering Japanese governance issues as well, for there is no question that legal culture is also an important component in any understanding of governance in Japan.

As I have recently defined legal culture in an earlier volume of proceedings from the Institute for Social Science:

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to

* Associate Professor, University of New South Wales, Sydney, Australia. A.B. (Bowdoin College), J.D. (Yale Law School). The research here is part of two larger studies by the author: one on China and Global Governance; and the other on legal culture and the WTO, that will be part of the author's PhD.

> be found within international organizations and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions.[1] It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.[2]

In addition, in a work such as this, it is worth noting the differences between legal cultures, legal systems and legal traditions:

> Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations."[3] Legal traditions, in contrast, are:
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> > families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development

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[1] *See* Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (Harvard 1987) at 8.

[2] *See* Colin B. Picker, *China, Global Governance & Legal Culture*, in CHINA AND GLOBAL ECONOMIC GOVERNANCE: IDEAS AND CONCEPTS (ISS Research Series No.45, Tokyo: Institute of Social Science, University of Tokyo.) (Junji Nakagaw, ed.) (2011) at 69-88.

[3] Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093, 1094 (2008).

> of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[4]

> Thus, one can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. In contrast legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally typically describe broad groupings and more typically reflect formal sources of law. Consequently, a comparative legal systems analysis of [international organization ("IOs") would focus on the formal rules within and across the organizations. Whereas a comparative analysis of the legal traditions of IOs, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an IO would usually analyse just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, overlap.[5]

Identification of legal cultural issues allows us to properly evaluate governance issues in comparative terms. Such an evaluation allows us to place the characteristic into a legal cultural framework. Identification is the first step in being able to employ comparative law tools. That identification also allows the issue to be noted, as opposed to the characteristic being subsumed within other governance issues. Once identified and noted specifically in its own right, one can then figure out if comparable characteristics exist in other systems and whether those other systems experience the same governance consequences. If so, one can then look to see if they employ mechanisms to counteract any negative consequences for the system, and to then consider whether those same "safeguards" can then be borrowed,[6] though it should be noted that successful transplantation is a complex and difficult undertaking. Identification of legal cultural governance characteristics in a legal system can also

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[4] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053 (2001) (text at fn 68) (citations omitted).

[5] *See* Colin B. Picker, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW AND INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS (Publ. of Swiss Instit. Comp. L) (2011) (Lukas Heckendorn & Colin Picker eds.) (some citations omited).

[6] In comparative law we call them "safeguards"- but that term has a different meaning in the WTO context.

allows us to understand the system's interaction with other legal cultures, domestic and international, helping explain points of conflict between the systems. While legal culture may only sometimes be a cause for governance failings in corporations, states and in international organizations, understanding the role of legal culture permits one new understandings and insights into those governance problems

The comparative analysis here will not focus on the technicalities of governance within the WTO, such as the qualified majority voting rules.[7] It will instead consider those aspects of the WTO's legal culture that are relevant to the overall effectiveness or success of the WTO's governance. This non-technical approach is supported by the fact that discussion of WTO governance does not typically centre on the technical aspects of governance. Of course, those issues are important and worthy of research, but at the legal culture level, they are, for the most part, unnecessary for this initial consideration of the WTO's governance.

Indeed, the dictionary definition[8] of governance is similarly non-technical, and provides, in relevant part, that

> Governance is "the action or manner of governing; the fact that (a person, etc.) governs [or] [c]ontrolling, directing, or regulating influence; control, sway, mastery".[9]

This definition may include the technical details of governance, but it also suggests that there is a broader meaning to "governance"—especially the idea of "control" and "mastery". Indeed, when governance is mentioned in other settings, it usually does not mean the technical details of the management operation. The failure or failing control or management is more likely the intended issue. Thus, for example, in the corporate context it means the creation of mechanisms to stop abuse and ensure transparency and good results.[10] Indeed, following the corporate scandals of Enron and WorldCom, "governance" was pointed to as one of the critical factors in the cause of those scandals (where bad governance prevailed) and in the safeguards that would

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[7] AGREEMENT ESTABLISHING THE WTO, Article IX.

[8] The WTO DSB often employs dictionaries to help determine the meanings of words and phrases in the WTO texts. "Thanks to the wisdom of the Appellate Body of the [WTO] the Oxford English Dictionary has been cited in almost every appellate report since 1995 and is emerging as one of the leading sources for the interpretation of WTO law," Ernst-Ulrich Petersmann, *Tribute: On the Constitution of John H. Jackson*, 20 MICH. J. INT'L L. 149, 149 (1999).

[9] From the OED online, see http://www.oed.com/view/Entry/80307?redirectedFrom=governance#.

[10] *See generally* Claire Moore Dickerson, *Ozymandias As Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003).

be set up to reduce the likelihood of further such scandals.[11] The governance issues of the WTO is, however, less like that of the corporations, in substance and spirit, than like that associated with states when their governmental systems are seen to be incapable of carrying out the necessary governmental task. In the government context, discussions of governance are usually part of a conversation on failure of government. Failure of the government to do what it needs to do. In other words, talking about governance presupposes that something is broken!

One of the best examples of broken state governance may be taken from that of governance within the United States—specifically, the failure of the U.S. government to stop using the lowly one cent penny. That coin actually costs close to two cents to manufacture, while it has been estimated that the time wasted in handling pennies in the United States is over a billion dollars a year.[12] Despite wide knowledge of this inefficiency, the American government seems unable to eliminate the penny. Of course, the case of the American penny is just an example of America's governance issues—of its "gridlock".

But, while numerous, the technical causes of America's "gridlock", such as overly short terms for the House of Representative, campaign finance rules, and so on, are really just reflections of aspects of the foundational legal and political culture of the United States.[13] It may be that the American governance system is working exactly as it was intended! Consequently, the current concerns within the United States about its governance may just reflect an alternative legal and political culture battling with the foundational culture. Thus, it is possible to see American governance differently even after a very brief examination of it within its legal cultural context. This paper's examination of the WTO's governance in a legal cultural context will also provide different perspectives and insights into that governance.

II. WTO Governance

Today's expectations for good governance by a government or organization can be said to include the expectation that it:

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[11] *Id.*

[12] See http://en.wikipedia.org/wiki/Penny_debate_in_the_United_States . Perhaps, the elimination of inefficient coins should be included as one of the measurements of good state governance in the next section!

[13] One can see this reflected in in Federalist Paper No. 51's description of the interaction of the different parts of the proposed United States federal governance scheme. Available at http://avalon.law.yale.edu/18th_century/fed51.asp.

1. Be an efficient controller, director or regulator.

2. Be rational, predictable and consistent

3. Balance the short and long term needs of its constituencies

4. Operate according to design

5. Where appropriate, act as a true representative body[14]

In every system, there will be a legal cultural components associated with the above criteria that may be helpful in understanding the presence and quality of each of these expectations in any particular governance context—including that of the WTO. But, before delving into the legal cultural components, one must first assess the WTO's governance against these criteria, albeit with a focus on those issues relevant to legal culture.

1. Be an efficient controller, director or regulator.

Few would ever describe the WTO as efficient, despite the WTO's focus on market principles and economic theory, with their corresponding concern with economic "efficiency". Indeed, the foundation of modern trade, comparative advantage, is premised on the benefit of utilizing differing levels of efficiencies among trade partners. While there has been some concern with efficiency, for example in the timeframes for disputes to be resolved at the WTO's Dispute Settlement Body (the "DSB"), overall efficiency is not one of the qualities which comes to mind when thinking about the WTO. Of course, efficiency, especially organizational governance efficiency, is relative and it may be that in fact the WTO is relatively more efficient than many other international organizations. Nonetheless, there are some specific governance efficiency, or inefficiency, issues within the WTO.

A major example of governance inefficiency within the WTO can be seen by consideration of the governance role played by the WTO's Dispute Settlement Body (the 'DSB") and the cases brought before it. That situation has arisen as a result of the

[14] These five are a distilation from Daniel Esty's comprehensive consideration of "good governance" in Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 J. INT'L ECON. L. 509 (2007). "Good governance thus depends on an appropriate blending and balancing of these elements in practice . . . 1. representativeness; 2. accountability; . . . 3. Rationality; 4. Efficacy; 5. Efficiency; 6. Neutrality; . . . 7. clarity; 8. stability; . . . 9. power sharing; 10. legality; 11. fairness; . . . 12. deliberation; 13. transparency; 14. participation and due process" *Id.* at 512-13.

confluence of two related governance issues—the WTO's "voting" system and the corresponding role that has then been assumed by the DSB. The members of the WTO rarely vote, instead there is an extreme reliance on consensus, while an admirable democratic and harmonious principle has proven itself to be an ineffective mechanism for decision making.[15] There has been virtually no decisions made at the member level since the WTO was created in 1995.[16] That inability to agree on necessary interpretations and amendments to the WTO rules and practices has left that critical governance role to the DSB. This means that policy is only made or explained in the context of those cases brought before the DSB, a role which it has vigorously adopted. So, even though there may be need for change throughout the WTO Agreements, that change appears to only be able to take place within the narrow context of such disputes as are brought before the DSB. Furthermore, the decision about which cases should be brought to the DSB is one left to the members themselves, usually operating along or in loose coalitions of similarly situated states. The decision to bring an action, of course, will depend on numerous WTO-independent factors unique to the states at issue.[17] Such a system, in which enforcement of WTO obligations takes place only as a result of other members' actions at the DSB is not an efficient method for the development of WTO law or the enforcement of WTO obligations. That method will likely lead to over and under enforcement with respect to specific issues or states. Clearly, this is a very inefficient governance mechanism and is hardly a model for efficient regulation or control of the world's international trade institution.

Compounding the above inefficiencies is the fact the actual implementation of the WTO's policies is carried out within the member states, through their domestic law, against a backdrop of enduring notions of state sovereignty. Furthermore, the WTO institutionally has rather weak powers and cannot efficiently direct or regulate its members. Its most effective method is through the trade policy review mechanisms,[18] which have the effect of shaming non-compliant members and alerting other members

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[15] *See generally* Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?* 8 J. INT'L ECON. L. 51 (2005).

[16] The one noteable exception relates to compulsory licensing of pharmaceutical products under the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement of the WTO. See World Trade Organization, Decision of the General Council, Amendment of the TRIPS Agreement, WTO Doc No WT/L/641 (Dec 6, 2005).

[17] *See, e.g.*, Gregory C. Shaffer, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) at 33-36.

[18] *See* WTO website Trade Policy Review Gateway at http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

to potential issues that may be brought before the DSB.[19] Compounding these weak powers is the fact in the face of member violations, the WTO cannot itself bring a dispute against a recalcitrant country to the DSB. Instead it must rely upon the state members to bring enforcement actions, complete with the inefficiencies that go with that discussed earlier.

The above, and other issues not discussed due to the length limitation of this paper, suggest that WTO governance suffers from some structural inefficiencies that likely undermine the WTO's development and effectiveness.

2. Be rational, predictable and consistent

As an initial matter, and like most organizations, levels of rationality, predictability and consistency within the WTO will be strongly impacted by the political atmosphere present within and surrounding the organization. This is especially the case when it comes to policy negotiations and implementation or enforcement of obligations. At those times one would expect political concerns to be especially influential. The rationality at those times will often reflect WTO members' perception that they are involved in a zero-sum game.[20] Those perceptions are not such a problem so long as the system is set up to manage such perceptions. But, it is not clear that is the case in the WTO, though it may be more so than for perhaps any other international organization.[21] Without the safeguard mechanisms to ensure that overall the different self-interest rationalities work to the common interest, one is left with a somewhat anarchic version of rationality, one not so suited to what is normally considered to be supportive of good governance.

Given the slow pace of change at the WTO there may be less concern about lack of predictability than would have been the case were the WTO to be a dynamically developing organization. As noted before, there has been almost no formal changes to the substantive WTO agreements since the end of the GATT's Uruguay Round negotiations in 1994.[22] To the extent there has been any development of the

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[19] *See generally* Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007).

[20] Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1, 125 (2009).

[21] *See, e.g.*, WTO News: Speeches — DG Pascal Lamy: *Comparative advantage is dead? Not at all, Lamy tells Paris economists* (12 April 2010), available at http://www.wto.org/english/news_e/sppl_e/sppl152_e.htm.

[22] *See also* Matthew Kennedy, *When Will the Protocol Amending the Trips Agreement Enter into Force?* 13 J. INT'L ECON. L. 459, 459 (2010).

organization and law, it has been developed by the DSB. Admittedly, the DSB does provide a level of predictability and consistency across its decision, reinforced by the DSB's inclusion of an appeals system – the Appellate Body of the DSB. But, while the specific disputes may be resolved somewhat predictably, the overall development of the WTO will be remain unpredictable as the cases on which it scan develop the law will be brought to the DSB without any coherent or predictable pattern. Instead, as noted earlier, they are submitted to the DSB based solely on the self-interest of the members, which is itself based on their own internal politics and pressures. Clearly, such a mechanism for selection of disputes will lead to gross inconsistencies, for some violations will lead to dispute settlement and some will not. Thus, some states more than others will be party to disputes, and some substantive fields more than others will be subject to DSB development. Paradoxically, that inconsistency sits on top and despite the very consistency provided by a dispute settlement system representing the new law bound trade system.

Another potential source of inconsistency is the disparate implementation of WTO agreements within member states. Of course, it is often difficult to know whether states have appropriately implemented WTO obligations. Fortunately, the WTO's trade policy review mechanism provides information on implementation, and many of the WTO members conduct their own broad reviews as well, such as that provided in the US National Trade Estimates Report.[23] A brief examination of the reports generated in those mechanisms, shows a broad range of inconsistent implementation across the WTO membership. The failures in implementation can be blamed on many factors, including ineffective governance structure, such as the failure within the Dispute Settlement Understanding to provide for the payment of compensation or for retroactive application of any findings of violations by the DSB.[24]

A significant new and major source of inconsistency is the growth of "WTO-plus" for new members.[25] Since China's WTO accession process, there is now a move to have new members join the WTO with greater levels of commitments (the so-called "WTO-plus") than was the case with the original or early members. Indeed, these new members often have to join with liberalization commitments greater than those

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[23] *See, e.g.*, Office of the U.S. Trade Representative National Trade Estimates Report 2010 at http://www.ustr.gov/about-us/press-office/reports-and-publications/2010.

[24] *See* Simon Lester, Bryan Mercurio, Arwel Davies & Kara Leitner, WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY (Oxford: Hart Publ.) (2008) at 165.

[25] *See generally* Julia Ya Qin, *The Challenge of Interpreting "WTO-Plus" Provisions*, 44 J. WORLD TRADE 127 (2010).

applicable to many of the original WTO members.[26] For example, the newer members often are pressured into committing to additional liberalizations beyond the mandatory WTO commitments, such as agreeing to sign onto the WTO's plurilateral Government Procurement Agreement.[27]

The failure to reign in the recent proliferation of regional trade agreements ("RTAs") has permitted the formation of hundreds of different RTAs, with little predictability or consistency among them or with the WTO.[28] Each of the RTAs is unique, covering different sectors and disciplines in diverse way and at different levels of liberalization. Furthermore, it is far from clear that these RTAs comport with the strict requirements of the WTO's rules that permit states to enter into RTAs, found in such provisions as the GATT's Article XXIV.[29] The failure of the WTO to enforce the rules concerning RTAs has lead to a trading regime that is, as is frequently noted, a "spaghetti" or "noodle" bowl of differing rules and demands.[30]

Finally, Rules of Origin can serve as a pernicious barrier to trade and yet each country and each RTA is essentially free to adopt its own rules for determining the origin of an imported product, and hence whether it is subject to specific rules applicable to the originating country and that product.[31] The WTO in 1995 began the process of harmonizing the many different rules of origin, but to date has yet to complete that task.[32] The failure to bring Rules of Origin under control, both for WTO members generally and within the RTA environment, has accentuated the inconsistency and lack of predictability caused by the 150-plus members and the ever increasing hundreds of RTAs. That failure has permitted the creation and maintenance of a veritable pasta bar of inconsistency throughout the world trade environment.

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[26] *See generally* Steve Charnotvotz, *MAPPING THE LAW OF WTO ACCESSION* in THE WTO: GOVERNANCE, DISPUTE STETTLEMENT AND DEVELOPING COUNTRIES (Jannow, Donaldson & Yanovitch, eds) ch 46 (2008) available at http://ssrn.com/abstract=957651.

[27] *Id.* at 22.

[28] *See generally* Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INTL ECON. L. 267 (2005) (hereinafter "Picker (RTA)"). "The surge in RTAs has continued unabated since the early 1990s. As of 31 July 2010, some 474 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO." WTO Website: RTA Gateway, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm.

[29] *Id.*

[30] Jagdish Bhagwati, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY 290-91 (1998).

[31] *See generally* Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111, 114-24 (2010).

[32] *See, e.g. Rules of Origin: Outgoing chair says 55% of rules of origin agreed*, WTO: 2010 NEWS ITEMS (25 March 2010), available at http://www.wto.org/english/news_e/news10_e/roi_25mar10_e.htm.

Accordingly, while a sophisticated and relatively successful institution, the WTO's governance failings have led to an institution riddled with inconsistencies, irrationalities and a lack of predictability.

3. Balance the short and long term needs of its constituencies

The art of governance can be a balancing act. Among the many different things that must be balanced are the short and long term needs of the different and numerous constituencies. The primary constituents of the WTO may be thought to be the State members, but more concretely those domestic participants within the state responsible for the state's interaction with the WTO—politicians and civil servants. The WTO must then balance the short and long term demands of those often competing groups. Needless to say, that balancing act is difficult, made all the more so by the difficulty of identifying the many different constituents' goals—be they short or long term goals.

At a general level, considering the long term, those civil servants and politicians involved in international trade governance will typically be committed to the idea of the multilateral regulation of international economic interactions and to an associated and eventual economic development and progress in their own and in other states. But, those goals are only slowly achieved. Nonetheless, a slow but consistent progress at the WTO would satisfy that long term goal. But, the present lack of progress in the on-going and interminable post-Uruguay Round negotiations, including the interminable Doha Round, risks satisfying their long term goal.[33] Indeed, the slow abandonment of that long term goal can be seen in the increasingly common abandonment of the multilateral trade system in favour of the development of bilateral and regional trade relationships.[34]

Those same civil servants and politicians also have short term goals. Their short term goals can be classified into market or industry protective or enhancement goals. Perhaps the most critical being the protective goals. This goal involves the management of the short term dislocations for markets and industries caused by new international economic relations. Those are the sort of new relations that constantly arise when a state is involved in the international trade system. There are many such dislocations, but this paper will merely discuss a few examples including, among so many others, the dislocations caused by: new members joining the WTO; the ever lower tariff and non-tariff barriers that come into effect when phase-ins expire; the

[33] See Doha Development Round gateway at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[34] *See* Picker (RTA), *supra* note 28.

new and imaginative protections enacted by different states under guise of WTO exceptions; the trade diversions of new RTAs; the rulings of the DSB; and so on. They must be managed in the short term for the civil servants and politicians to continue to work successfully with and in the WTO. The question is then whether the WTO balances and meets these short term goals. The WTO does appear to provide governance mechanisms that allow these short term demands to be managed. One of the primary mechanisms is the provision for unilateral imposition of safeguards, which allow politicians and civil servants to temporarily enact protections to off set dislocating events.[35] The potential to employ safeguards when needed also permits politicians and civil servants to make the initial deals necessary for the long term relationship of their state with the international trading system.[36] But, what if the international political fall-out from the use of safeguards undermines their employment by civil servants and politicians that have to balance domestic and international politics? Perhaps a noticeable decline in the use of safeguards may reflect such a balancing, but in favour of international harmony.[37] But, overall, these defensive short term needs may be met in the WTO's governance system.

It is a different story, however, for the short term enhancement goals of politician and civil servants. The goal in this case is to help the international economic condition of their domestic industries or markets, through the reduction in foreign barriers to their trade. These enhancements, as proof to voters of the benefits of the multilateral trade system, can also help secure the long term goals of the civil servant or politician by providing them with the ability to engage in negotiations for long term development of the trading system. The question is then whether the WTO has met these short term enhancement goals. Given the lack of substantial progress in adding to the benefits of the system that were established in 1995, it may be that the WTO is generally failing to satisfy this short term goal. While there may be some gains from victories at the DSB, for the most part the WTO has not provided new benefits to industry and markets beyond that of the Uruguay Agreements. Proof may be found in the desire by industry and politicians and civil servants to seek international economic enhancements in the bilateral and regional trade environment.

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[35] *See generally* the WTO Safeguards Agreement.

[36] *See* Lester, *supra* note 24 at 522.

[37] *See* WTO: 2010 News Items,*Committee on Safeguards: Safeguard actions reported to WTO show significant decline*, 25 October 2010 avaliable at http://www.wto.org/english/news_e/news10_e/safe_25oct10_e.htm.

To the extent the management of the short and long term expectations and needs of the WTO's constituents are not been fully met by and within the WTO, this may reflect a serious governance issue that will have its own short and long term governance consequences.

4. Operate according to design

While governance can exist without a design, it is likely that such a form of governance would not comport with modern notions of good governance. Even dictatorships will have a design or a modus operandi that is understood by all within the system within which they operate. Without a design there would be anarchic government, with the "failure" of that state or system not far behind. In some sense then, the existence of a design is the hallmark of governance, but that same governance can be measured against its practice of operating within and according to its accepted design.

Today the design of a government is typically, although not always, found in the constitution or founding documents—be they of a state or international institution, or even a corporation.[38] Of course, the original design will change over time, be a "living constitution" subject to later understandings or interpretations, though it must continue to follow the spirit of the underlying and original design or else it will be considered to be a new design or constitution. The WTO has an original "constitution"—its founding agreements. The question, however, is whether the WTO has in its short fifteen years already departed substantially from that design – formally or in spirit.

Of course, in some respects it is entirely too soon to make any determination whether the WTO has significantly departed from its original design. For design is something hard to see from within, it must be viewed from above and over time.[39] Furthermore, before assessing whether a design has been implemented and followed, one must first identify the design. With respect to the WTO, while the WTO Agreements are quite

[38] There are a few notable exception where that design is not considered to exist within some few specific identified documents, normally called constitions. The main example is that of the United Kingdom which does not have a constitution located in one or two documents identified as such, instead its constitution is spread across multiple documents spanning hundreds of years, from the Magna Carta to the Human Rights Act of 1998. See Colin B. Picker, *"A Light Unto the Nations" —The New British Federalism, the Scottish Parliament, & Constitutional Lessons for Multi-Ethnic States*, 77 TUL. L. REV. 1, 7 (2002).

[39] Supposedly, after being asked his opinion of the impact of the French Revolution two centuries earlier, Zhou Enlai noted that it "is too early to say". See BBC News website at

http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/zhou_enlai.stm

clearly the WTO's constitutional documents, the WTO nonetheless exists within a larger framework that casts a significant gloss over the institution. That framework includes the international legal order and the post-war Bretton Woods international economic architecture, including the GATT. The WTO is thus informed by those earlier frameworks, just as the U.S. Constitution is informed by the British Bill of Rights of 1689.[40] This background is especially important for it has the benefit of time, in contrast to the mere decade and a half of the WTO. Indeed, given the fact that as a technical matter the design of the WTO has not been breached in any significant manner, we must rely more on whether the design reflected in the spirit (or the "vibe" [41]) of the WTO and its historical constitutional context has been breached.

There are a number of issues that quickly come to mind when considering whether the soul or spirit of the design has been breached, though due to space limitations only a few will be discussed briefly here. Despite the purposeful move away from the diplomatic method of resolution of disputes and towards a more institutional mechanism, it can hardly have been intended that the sole vehicle for WTO substantive development would be through the DSB. If so, we can imagine numerous safeguards that would have been provided to control such an all-powerful DSB. Another departure from design would be the failure of the WTO negotiating rounds, from the Seattle Ministerial onwards. Few politicians or civil servants present at the end of the Uruguay Round would have imagined that the unresolved issues during that negotiating round would remain unresolved almost two decades later. For example, the failure to move the Agreement on Agriculture forward is a significant violation of the spirit of the foundation of the WTO, and a perceived betrayal by the developed world of the understandings made to the developing world at that time.[42] Finally, and perhaps the most egregious design failure is the inability of the WTO to reign in the incredible growth of RTAs. The massive move away from multilateral trade policy development by almost every member of the WTO is perhaps the most significant departure form the spirit of the multilateral WTO.

Thus, in less than twenty years the WTO appears to have departed in some significant respects from its original design. Of course, with all "living" designs, one can expect new directions and innovations. Deviations from design, however, can be critical, as they may be here, when they threaten the very life of the institution itself. As a

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[40] *See, e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 663 (1996).

[41] The "spirit and the feel" of a constitution may be akin to its "vibe", *see* The Castle (Miramax Home Entm't 1997), scene available at http://www.youtube.com/watch?v=ITUSZ6LRHrk (concerning a property takings alledgedly made in violation of the Australian Constitution).

[42] *See* WTO Agreement on Agriculture, Art. 20.

governance issue, these alterations to the WTO's plan may be its most significant governance problem.

5. Act as a true representative body

In most modern governmental systems there is an element of representativeness. Sometimes it is a major component of governance, sometimes it is less present (such as in monarchical or despotic systems, especially ones where inheritance is the de jure or de facto mechanism for leadership succession). In some respects, representativeness reflects the demand for a legitimacy that is necessary for effective governance.

Within the WTO, there are strong elements of representative governance. As a formal matter every state member of the WTO is considered equal and has the ability to vote and take part in all areas of governance, with almost all matters being decided by consensus.[43] But, the formal structure masks some fundamental failures in representation—inequities that reflect economic and political power disparities among the members.[44] Some failure of representativeness is to be expected, and exists within all systems. After all, the inability of politically and financially weaker parties to take part in governance to the same extent as more powerful members of a system is found in most, if not all, systems. To the extent the WTO's representativeness mirrors these typical failings then WTO's governance should receive no greater approbation or demand for change than would be the case for other systems.

If that failure, however, is self-perpetuating and inflexible then it may reflect a long term and serious governance problem. Governance may endure inequities in the short term. Even as short term inequities are problematic, we nonetheless expect such inequities to arise in the short term. But inequities that endure suggest the system is no longer representative in a long term sense, and will, among other things, lack legitimacy. Insufficient mobility, both in the increase and in the diminishment of power within the governance structure, suggests a long term failure in representation. While the WTO is only fifteen years old, many observers believe that it has inherited the political power legacy of the GATT—with its so-called "Green Room" system that reflected the traditional global power structures.[45] It should be noted, however, that there has been some mobility among those states that historically did not have

[43] *See* Lester, *supra* note 24 at 86.

[44] Ehlermann & Ehring, *supra* note 15 at 67.

[45] *See* Lester, *supra* note 24 at 90.

power in the WTO, especially when they have banded together to operate as a block. So, the issue is far from negative. Indeed, since 1995, we now have new participants playing significant roles at the WTO, such as Brazil.[46]

At a more technical level, there may be a failure of representation and hence legitimacy as a result of the very policy of equal treatment for all members. One-member-one-vote may itself undermine its true representativeness, for per capita representation is then skewed. Consider for example the relative power of one person in China versus one person in New Zealand. Furthermore, that governance failure is accentuated by the fact that the only effective part of the WTO, and the only part developing the Agreements is the DSB—a body largely independent of the WTO members, even as its agenda is driven by those relatively large number of disputes brought by or against the traditional state powers.

The WTO as a formal matter has good representativeness, though there remain some enduring issues related to the continuing power of the traditional economic global powers and to the counter-majoritarian power of the DSB. As a governance issue, there are clearly some problems, though overall this concern is a relatively less critical governance issue.

III. Legal Culture & WTO Governance

The question then is how the WTO's governance issues may be viewed through a legal cultural prism. In other words, whether one can discern legal cultural attributes that may then enhance our understanding of the WTO's governance. A few examples can highlight the method's utility.

1. The DSB and Legal Culture

The DSB is a goldmine of legal cultural characteristics. In the discussion of WTO governance above, the role of the DSB looms large as a result of the fact that the DSB has taken on the primary role in developing the rights and obligations of the WTO members—as a de facto, if not a de jure matter. In so doing, it is supplanting those very same members' role in WTO governance and the original design of the WTO. Furthermore, the development of that new "law" is controlled by whichever disputes

[46] *See, e.g.*, Gregory Shaffer & Michelle Ratton Sanchez, *The Trials Of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008).

happen to be pursued by members before the DSB, which is neither systematic, efficient nor predictable.

As a legal cultural matter, the role of a dispute settlement body in making law is traditionally found in the common law systems, though increasingly we see the same in many civil law systems though not usually at this high level of participation.[47] Similarly, the lack of systematic approach towards the development of the law is also a hallmark of the common law systems.[48] The question is then whether the DSB's role is a reflection of an emerging common law legal cultural approach.[49] If so, then instead of viewing it negatively, it may then appear to be a part, perhaps even a successful part, of the WTO's emerging governance system. After all, common law systems very often have good governance—despite the powerful role of their judiciaries in the governance architecture.

Similarly, the idea that the law is made in what appears to be an anarchic, chaotic, and ad hoc fashion should also not be viewed as necessarily alien or negative, but merely a similar reflection of an emerging legal culture—whatever that may end up being.[50] It may even have some positive attributes, such as increased flexibility and the ability to respond quickly and providing new law as the need arises. In other words, the governance may not be failing, though may not be perfect. Rather, is just different than what had perhaps been expected of this international institution and its associated field.

The consideration of governance above, with an eye towards a legal cultural and comparative analysis allowed us to see some unusual characteristics. For example, the fact that the WTO governance structure is driven by its members' cases at the DSB, where they enforce WTO obligations like "private attorneys general" in the United States. Such a mechanism is not one commonly found in legal systems, where public law is normally enforced by the government.[51] Public law suits brought by ordinary individuals is a particularly American invention, reflecting the American legal culture of small government and empowerment of the people through their lawyers and the

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[47] Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine , Seán Patrick Donlan & Martin Sychold , eds.)) (PUBL. OF SWISS INSTIT. COMP. L) (2010) at 123.

[48] *Id.* at 121.

[49] *Id.* at 135.

[50] *Id.* at 122.

[51] Gregory F. Hauser, *Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients From Civil Law Nations View Civil Litigation and Helping them Understand U.S. Lawsuits*, 17-AUT INT'L L. PRACTICUM 129, 131 (2004).

courts.[52] But, this method as applied in the WTO differs in some fundamental respects from that found in domestic systems, even that of the United States. Significantly, the WTO itself cannot bring a violating state to the DSB. It must rely upon states to bring enforcement actions. Even in the United States there are usually mechanisms for the State to sue or intervene in such cases.[53] But there is not such a mechanism within the WTO. Nor is the WTO's approach the norm for international organizations that provide dispute settlement for their members. For example, at the United Nations, the General Assembly and other specific parts of the UN system can bring a case against a UN state member to the International Court of Justice, albeit via the Advisory Opinion process.[54] The second difference is that in all common law systems, the common law making process is not the sole law making process. There is always an executive, and usually a legislature, that is able to provide any governance not provided by the common law courts through their law creating in their settlement of disputes. That is not the case with the WTO, where there is no comparable executive, and the members serve as the "legislature", albeit a non or dysfunctional legislature. These two differences suggest that the WTO governance architecture may have a significant flaw in its failure to either have a functioning legislature/executive or to permit the WTO itself to bring cases against recalcitrant members as a counterweight or safeguard against the DSB's law making.

2. The Weak Power of the WTO as an Institution

Another major governance characteristic that lends itself to a legal cultural analysis is the fact that the WTO is a relatively weak institution vis a vis its members.[55] The WTO is merely an institution, one that serves its members and which has little to no control over them. It is a member-run organization of sovereign states. Indeed, governance in the WTO may be hard to identify given the decentralized and disparate implementation of the WTO Agreements by the 150-plus members. Additionally, the growth of the RTAs has come at a significant cost to the multilateral WTO, weakening it yet further. This weak structure suggests that the WTO's governance is one of "limited powers". For those legal systems with strong governance systems this may present a legal cultural disconnect. Similarly, the issues raised when considering

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[52] Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1073-76 (1997).

[53] *See generally* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853 (1989).

[54] *See* Statute of the I.C.J., art. 65 (stating that ICJ may issue advisory opinion on any legal question asked of it by authorized body of United Nations).

[55] Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 501 (2000).

implementation of the agreements by the WTO members suggests federalism or subsidiarity may be relevant issues to consider.

For those countries that are unitary and not federal or that do not belong to unions or confederations with similar issues, or for those states with strong centralized powers, this may be another governance issue where there may be a cultural disconnect between those members and the WTO. But, identification of the issue as one related to subsidiarity or federalism and of limited government, should make the issue less alien. It may even allow a better understanding of what is going on in the WTO, and permit the WTO to address those issues better, perhaps even by borrowing from legal systems that face similar issues. For example, as noted before, the WTO cannot even bring suits to the DSB—in contrast to the European Union and the European Court of Justice.[56] Another example that may be examined anew under this perspective is the proliferation of RTAs. Perhaps consideration of how other legal systems with weak central governments have countered a centrifugal pull from their constituent parts could be relevant to the WTO handling the increasing use of RTAs by WTO members.

3. The Lack of Change to the WTO Agreements

The failure of the WTO to amend its agreements is also amenable to a legal cultural analysis. Since it was established in 1995 the WTO has had essentially little development that was not related to the DSB's decisions. That development by the DSB, however, has and will necessarily fall short of what a rational and orderly system requires. By failing to develop, both the short and long term expectations of the members are frustrated. There is little question that the WTO members are growing increasingly impatient with the lack of development. The fact that they are turning ever more often to regional arrangements and abandoning the multilateral WTO is proof of that impatience. As a matter of legal culture this presents a disconnect with the progress that will have been experienced in the legal systems of most of the members of the WTO during that same period. During those fifteen-plus years, new domestic statutes, codes, regulations and other forms of positive law will have been created and implemented by those states' legislatures and executives. Such development is not only normal, it is expected in those legal cultures. While some legal cultures do not expect development, particularly in some non-Western or

[56] Treaty on the Functioning of the European Union Articles 258 and 260 (old arts. 226 and 228 of the EC Treaty).

religious legal cultures, for the most part, the legal cultures that belong to the western legal tradition expect development and change.[57]

Of course, international law in general is also slow to change, but that slow pace is not typically considered problematic. Indeed, we do not talk about international law being like a bicycle, as we do with international trade law—that it has to keep moving or it will fall over.[58] Perhaps the difference is due to the impression that the WTO is more of a "real" system, tied to the internal activities and needs of its members in a way that is less obvious with the vast bulk of international law. Furthermore, the normal acceptance of the slow pace of change in international law is undermined in the WTO context by the speed with which commerce, the heart of the WTO's mission, wishes to respond to new issues. Yet, the WTO is a part of international law, and subject to the same forces that slow down the development of international law—primarily that sovereign states simply cannot act as quickly as can domestic legislators. The WTO is thus caught in a tug of war between the demand for and the impediments to change that apply to all international institutions and fields. While examining the issue through legal culture may not provide any quick fixes to this issue, it can lead to greater understandings of the impatience of the state members and perhaps lead them to understand the different reality present in the WTO.

The above few insights that were gleaned from just a brief legal cultural consideration of the WTO's governance issues show the strength of the methodology, both for an international institution such as the WTO, but also for a complex modern state and its diverse domestic institutions, public and private.

IV. Conclusion

Comparative analyses cast light on the system and field under examination, but are perhaps most helpful in serving as a mirror in which to observe and consider our own systems. In this case, the discussion of the WTO's governance issues and the related legal cultural considerations may permit us to consider the governance issues within our own legal systems. The ISS conference brought people together under the issue of governance in Japan. The question is then whether the issues noted above may in any way be helpful when considering Japan's governance issues. Just by raising the

[57] Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 7-10 (1983).

[58] *See, e.g.*, Robert B. Zoellick, *The WTO and New Global Trade Negotiations. What's at Stake* (October 30, 2001), COUNCIL ON FOREIGN RELATIONS, available at http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149.

questions and issues discussed here, there may be benefits for those considering Japan's governance concerns. For example, the issue of the WTO departing from its original governance design may be relevant when thinking of the current state of governance in Japan. It does this by forcing one to think back to original goals and principles and then to identify the factors that may have led to a departure from the original governance conceptions. Another insight that may prove helpful is to consider what appear to be new developments under a comparative lens. For example, when we consider the new and powerful role of the DSB within the WTO's governance under a comparative lens we discern common law characteristics. If we keep them in mind when examining the DSB it may then permit us to better understand the DSB and its roles and behaviours. A similar approach to novel, and perhaps disquieting and troubling domestic governance characteristics may also permit better understandings and insights.

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International Investment Law: Some Legal Cultural Insights

Colin B. Picker*

I. Introduction

A legal cultural analysis can be a very useful device when considering legal systems and traditions. Previous such analyses by the author have provided interesting insights into the legal culture of international fields and organizations.[1] Each of those examinations presented new challenges for the methodology as well as new opportunities for the methodology to be tested and expanded. This chapter will apply that methodological approach to international investment law. In the process of that examination this chapter will confront fresh obstacles and issues and consequently will further develop the methodology. It should not be surprising that international

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* Associate Professor (equivalent to non-chaired full professor in Law Schools in the United States), University of New South Wales, Sydney, Australia. A.B. (Bowdoin College), J.D. (Yale Law School). The research here is part of a larger study by the author on legal culture and international economic law that will be part of the author"s dissertation.

[1] *See*, *e.g.*,Colin B. Picker, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW AND INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS) (PUBL. OF SWISS INSTIT. COMP. L) (2011) (Lukas Heckendorn & Colin Picker eds.) (forthcoming 2013) (hereinafter "Picker (IOs)"); Colin B. Picker, *WTO Governance: A Legal Cultural Critique* in GOVERNANCE IN CONTEMPORARY JAPAN (PUBL. OF UNIV. TOKYO INSTIT. SOC. SCI.) (Kenji Hirashima, ed.) (2011) (hereinafter "Picker (Governance)"); Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold, eds.)) (Publ. of Swiss Instit. Comp. L) (2010) (hereinafter "Picker (WTO)"); Colin B. Picker, *China, Global Governance & Legal Culture: The Example of China & the WTO* (PUBL. UNIV. TOKYO INSTIT. SOC. SCI 2011) (J. Nakagawa, ed.) (hereinafter "Picker (China)"); Colin B. Picker, *International Trade & Development Law: A Legal Cultural Critique*, LAW & DEVEL. REVIEW NO 2:4 (2011) (hereinafter "Picker (Development)"); Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles And Opportunities*, 16 ROGER WILLIAMS UNIV. L. REV.86-99 (2011).

investment law presents its own challenges and requires its own individual approach, for it is a dynamic and expansive field in its own right. Nonetheless, as will be shown below, the methodology once again proves its worth by providing insights for those involved in international investment law—from scholars to practitioners to arbitrators and regulators. Any insights that can help develop our understanding of the field should be welcomed, for international investment law, despite the many controversies surrounding it, is a field that has tremendous ability to enhance the lives of people around the world by providing employment, infrastructure, and better living conditions and generally contributing to the improvement of people‟s lives.[2]

Typically legal discussions of investment focus on the technical substantive landscape—from the restrictions and incentives that may be present at the start of an investment transaction to the resolution of disputes when investments go awry. Yet, there is also a human angle that is relevant to any examination of the legal aspects of investments. The legal analysis of that human angle is represented by the legal culture of the participants. Those legal cultures will be reflected in the law-related behaviors of the individual investors, the investments recipients, the lawyers for both parties, the different governments‟ regulators and institutions, and the international civil servants and international institutions relevant to the investments. Additionally, the role of legal culture will be relevant at all stages of an investment from initiation of the investment to the operation of the investment, and to any investment disputes and their resolutions. Furthermore, those legal cultures will themselves impact the interpretation, application, and development of international investment law and will as a whole contribute to the creation of a legal culture for international investment law itself. Any insights ensuing from analyses of those legal cultural issues should prove beneficial to all the participants in international investments.

The most straightforward consideration of legal culture and international investment law would be simply to describe some common legal cultural characteristics for each aspect of international investment law. Those characteristics might include such features as the fact that Scandinavian investment contract negotiations may result in shorter or "less formal" agreements than is typically the case in the United States or Britain,[3] or that "saving face" is critical during investment negotiations in China.[4] These and the many other valuable discussions of specific legal cultural characteristics relevant to international investment law may be described as a "how-to" or guidebook legal cultural method. As the many citations in this chapter attest, there is no shortage of international investment law publications that have taken that approach. This chapter‟s legal cultural analysis of international investment law, however, will not take that approach. Indeed, such an approach is clearly not possible within one chapter. After all, each region, state, and municipality will have its own discrete legal cultural issues that must be identified and understood for each interaction of every part of international investment law. Similarly, each of the many

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[2] *See, e.g.*, Efi Chalamash, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?* 34 BROOK. J. INT'L L. 303, 308 (2009) (". . . during the 1990s [] when foreign investment became a central aspect of the global economy and effectively the principal engine of sustainable growth and development.").

[3] Sanna Suvanto, *Negotiating International Business Transactions—A Scandanavian Approach* (available at http://www.dundee.ac.uk/cepmlp/car/html/car7_article19.pdf last checked April 16, 2011) at 5.

[4] George O. White III, *Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China*, 5 TRANSACTIONS: TENN. J. BUS. L. 55, 58 (2003).

international institutions and organizations involved with the field will have its own legal cultures that will also vary with their interaction with international investment law.

Rather, and despite the value of such "guidebooks", this chapter will consider deeper conceptual and systemic legal cultural issues that should be considered when working within the field—either as a scholar or as a practitioner "on-the-ground". Of course, the broader issues that will be discussed will be illustrated with specific legal cultural characteristic examples that may be associated with that aspect of international investment law under examination. But, at its heart, this chapter is concerned with presenting the broader more systemic legal cultural issues facing the field of international investment law. This chapter will consider international investment law as a whole, and will leave the detailed legal cultural analysis of the many specific issues within domestic international investment regulation for other and later examinations.[5]

Nor will this chapter suggest which legal cultural characteristics may be better or worse for international investment law. Such a normative approach is rife with difficulties and entirely too contentious for a work that merely seeks to provide insights to what is presently going on within the international investment law field. Accordingly, this chapter will not enter the debate of which legal culture, systems, or traditions are more suited to an international investment climate or for specific aspects of international investment law.[6] That being said, it is likely that some of the insights provided in this chapter may be invoked in those debates. To the extent this chapter enters the fray at all it will merely be to suggest legal cultural characteristics within the field that may exist or be emerging and which may be relevant to those discussions about the direction of development of international investment law.

In order to provide the necessary background and context, this chapter will first explain the methodology and then discuss the unique obstacles international economic law presents for an application of the methodology. The chapter will then examine the field, with those difficulties in mind, and will identify systemic or macro-legal cultural issues within the field of international investment law that are presently or will in the future be significant influences on the development of international investment law.

II. Legal Culture

[5] Many such works already exist. *See*, *e.g.*, Talal A. Al-Emadi & Maryam A. Al-Asmakh, *Cultural Differences and Their Impact: Some Brief Comments*, 5 CHINESE J. INT'L L. 807, 807 n.1 (2005) (providing a detailed list of many such "how-to" works for negotiations and culture); Leon E. Trackman, "*Legal Traditions" and International Commercial Arbitration*, 17 AM. REV. INT'L ARB.1 (2006) (discussing legal traditions and cultures in the context of the main international fora for international investment dispute resolution); Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251 (2008); and so on.

[6] *See*, *e.g.*, Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 29-37 (2005) (discussing the many claims that the French and civil law systems are less conducive to economic development).

Comparative analyses can take many forms and include many methodologies.[7] Comparative analyses often examine quite specific issues—including individual laws, procedures, or institutions. Comparative analyses may also examine whole legal systems, legal traditions, or legal cultures, though in error these three are often used interchangeably. Therefore, as an initial matter, the term "legal culture" must be defined, and distinguished from legal system and legal tradition.

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those [cultural] characteristics present in [and tied to] a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. [Crucially, legal] culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are [vital] for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions. It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behavior/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behavior); the role/behavior/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.
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> Typically, however, comparative law focuses on legal systems and legal traditions, and not on legal cultures. Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the

[7] *See generally Methodological Approaches to Comparative Law Symposium Issue*, 16 ROGER WILLIAMS UNIV. L. REV. 1 *et seq* (2011) (comprising the papers from the 2009 Annual Meeting of the American Society of Comparative Law).

same characteristics[,] the same rules and organizations." Legal traditions, in contrast, are:

> families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[8]

One can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system"s legal actors. In contrast, legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally describe broad groupings and more typically reflect formal sources of law. Consequently, [and using examination of international organizations to prove the point,] a comparative legal systems analysis of international organizations would focus on the formal rules within and across the organizations. Whereas a comparative analysis of the legal traditions of international organizations, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an international organization would usually analyze just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, overlap, [but differ in sufficiently critical ways as to justify the more narrow application in different analyses of one over the other two methods].[9]

As noted above, a legal cultural analysis can be employed to identify specific legal cultural characteristics. For example, in the investment context that might be a consideration of the legal cultural issues present in international arbitrations.[10] As an example within the arbitration context, which also highlights the difference between legal culture and tradition, the following observation is best described as an observation of legal culture:

> [A] common law attorney representing a party in drafting an arbitration agreement would likely prefer substantial pre-hearing discovery, where each side provides considerable amounts of documents and depositions of key players are taken. On the other hand, a civil law attorney would likely prefer, or at least be more comfortable with, minimal or no discovery, such as a

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[8] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TULANE LAW REVIEW. 1053 (2001) (text at fn 68) (citations omitted).

[9] Picker (IOs), *supra* note 1, at 3-4 (most citations omitted).

[10] *See generally* Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67 (2010); White, *supra* note 4.

> procedure disallowing depositions and permitting only a limited exchange of documents.[11]

Although the author attributes the difference to legal tradition,[12] in fact the legal traditions do not have a monolithic view on pretrial discovery. Each of the traditions include legal systems that approach pretrial discovery differently. For example, within the common law legal tradition, the English and the Americans take very different approaches to pretrial discovery—the Americans tending to favor expansive discovery, while the English oppose such "fishing expeditions."[13] Nor will it be the legal system"s rules that determine lawyer"s views on evidence production, for arbitration of itself is neutral on the issue, leaving the decision to the parties. Rather, it will be the legal culture of the attorneys that is at issue in determining their views about extensive evidence production.

The above example also points to the fact that a great deal of legal culture is closely connected to the major legal traditions of the world—even as those systems are in the process of some level of convergence.[14] Thus, as a system becomes more common law, we might expect to see more of a pragmatic and ad hoc approach to the law.[15] Similarly, as a system becomes more civilian, we may expect to see more passive attorneys in dispute settlement contexts, such as in court or arbitration hearings.[16] Of course, legal culture is derived from more than the larger legal traditions, for as the example above shows, the specific legal cultural attitude towards discovery is independent of the legal traditions. Nonetheless, noting a tendency toward a legal tradition"s approach within a legal system will necessarily and strongly suggest the existence or emergence of associated legal cultural characteristics typically associated with that tradition.

The analysis of the example above, concerning discovery or pretrial evidence production, highlights the employment of a micro or specific legal cultural analysis—the sort that typically finds itself in those valuable "how to" or "guide book" considerations of the legal culture of international investment law. Another example of such a specific legal cultural analysis may help to show the detailed level that can be considered. For example, the late and distinguished Thomas Waelde noted that at the contract formation stage of an investment:

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[11] David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 U. PA. J. INT'L L. 1087, 1094 (2009). As the author notes, there has been a compromise between the two with a middle ground-style of evidence production now in standard use. *Id*.

[12] *Id*.

[13] *See* Steven Loble, *Jurisdiction and Evidence - An English Perspective*, 4 ILSA J. INT'L & COMP. L. 489, 503-504 (1998), *see also* Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1 (2006).

[14] *See* Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW, 3rd Edition (Thomson West Publishing 2007) at 799. *But see* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 71-72 (2001) (noting the enduring fundamental differences between the common and civil law systems).

[15] J. Bédard, *Transsystemic Teaching of Law at McGill: "Radical Changes, Old and New Hats"*, 27 QUEEN'S L.J. 237, 288 (2001).

[16] Picker (WTO), *supra* note 1, at 129.

> [T]here is a cultural element involved; common law practitioners have always preferred to regulate in utmost detail, depth, and scope the salient behavior of, preferably, the other party to an agreement, either because of the absence of relatively specific, comprehensive, and credible law, because of a tradition of narrow and literal interpretation, or simply for reasons of habit and precedent. Conversely, in societies such as Asia, where law is not such an important regulator of commercial relationships and the contract is rather a statement of good will and the start-up of a relationship . . .[17]

Identification of specific legal cultural characteristics is especially useful for those fields where culture has been ignored or simply not considered. This was the case with earlier legal cultural analysis for such fields as international trade law and its governing institution, the World Trade Organization.[18] But, identification of specific or micro-legal cultural issues is insufficient on its own for it is those legal cultural issues that span the field, at the macro, systemic, or holistic level, that drive the development of a field in particular and identifiable directions. Indeed, that form of macro-legal cultural analysis has also been undertaken and has successfully provided insights into the development of examined fields.[19] Of course, sometimes it can be difficult to separate the micro- and macro-legal cultural analyses because the identification of the specific legal cultural issues at the specific or micro-level will clearly suggest larger trends and issues within the field. Similarly, the identification of the macro or systemic legal cultural issues may have implications at the micro or specific level, and may itself rely on data generated by micro-legal analyses. As discussed further below, the analysis here will focus more on the macro or systemic legal cultural issues present within international investment law.

Regardless of whether the legal cultural issue would be considered to be specific or general, international investment law is a field particularly suited to a legal cultural analysis at both specific and systemic levels. The human element, and hence the legal cultural element, are present to such a significant level in international investments that it impacts the detailed and the overarching regulation of international investments. That human involvement is present as a result of the very many human interactions necessary to make such a difficult business opportunity work. Foreign investments, as is the case with all human activities that take place far from home, necessarily require trust and good communications to make them work. As a result, understanding the different cultures, including the legal cultures involved, will be critical to an investment‟s success.

The human element is also there because foreign investments may stir passions within the host state, as they concern issues of sovereignty, foreign culture, competition, national security, economic policies, the environment, local community, and so on. Indeed, it has been said that "[f]ew areas of international law excite as much

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[17] Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 220-21 (1996).

[18] *See* Picker (WTO), *supra* note 1.

[19] *See* Picker (Governance), *supra* note 1.

controversy as the law relating to foreign investment".[20] The controversy is said to be a result of the competition between different political and economic ideologies and between groups at different levels of development and power.[21] But, whether at the treaty formation, the investment agreement, or the dispute resolution stage, the conflict may also be a result of differences in legal cultures that have resulted in miscommunication and misunderstanding. Such missteps could be ameliorated by consideration of legal cultural issues at the different stages of the investment relationship. Of course, it may be that the difference in legal culture may itself lead to a conflict, but knowing that possibility in advance might save a great deal of trouble, and perhaps permit proactive attempts to get around the legal cultural obstacles and conflicts.

This chapter is not intended to suggest that considerations of legal culture alone are sufficient when trying to identify the disconnects between the very many participants in an international investment. There are, of course, often true substantive law, political, sociological, socio-political,[22] historical,[23] anthropological, and economic issues that need to be understood and taken into account. Furthermore, each of those approaches and concerns, along with legal cultural approaches and concerns, are related to and overlap with each other. In an ideal world, each would need to be mastered for the investment to be successful, however one measures such success. But, an understanding of the legal cultural issues in international investment law could go a long way to reducing typically difficult transactions and relationships by providing helpful insights that may lead to improvements in the field"s development and operation.

III. Obstacles to a Legal Cultural Analysis of International Investment Law

International law comprises many fields, including the subject of the present legal cultural analysis. But, some fields more than others are more amenable to that analysis. The difference may relate to the fact that some fields include parent institutions and broad-based treaties that help to centre the field for the analysis.[24] Some fields even include a long history of customary international law from which long-term legal cultural insights can be gleamed.[25] Indeed, at a basic level, some of those fields are easier to define than others. Those fields of international law that are controversial or relatively new tend to be less well defined—in substance and scope. Those diffuse fields may not have broad-based treaties or global institutions, and in

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[20] M. Sornaraja, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 2nd edition (Cambridge Univ. Press 2004), at 1.

[21] *Id*.

[22] Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1 (2010).

[23] *Id*. at 1.

[24] E.g.international trade law with its World Trade Organization, or international criminal law with the International Criminal Court.

[25] The Law of the Sea has a long history that includes significant customary international law, much of which has now been reduced to treaty form. *See*, e.g., Marko Pavliha & Norman A. Martinez Gutierrez, *Marine Scientific Research and the 1982 United Nations Convention on the Law of The Sea*, 16 OCEAN & COASTAL L.J. 115, 131 (2010).

some cases may have little hard international law, but will instead include mostly "soft law".[26] Nonetheless, those fields will also have a legal culture associated with them, for they will still involve humans interacting and responding to legal issues in conscious and subconscious ways.

Yet, despite being a subject peculiarly amenable to a legal cultural analysis, and despite the fact that it, perhaps more than other international economic law fields, has been the subject of specific legal cultural examinations (those "how to" or "guide book" works), it is a field that presents numerous obstacles to a systemic legal cultural analysis. As an initial matter, notwithstanding the fact that international investment law has existed for hundreds if not thousands, of years,[27] it is without a global institution; includes many issues that are controversial; and is responding in novel ways to many new issues that have arisen in the post-Second World War period as the impacts of globalization have become ever more ubiquitous. International investment law can thus be said in many ways to be new, controversial and without a parent.

Being new and without an overarching treaty or institution, it may even be unclear what is meant by "international investment law". Clearly, it is a field that is difficult to define, as opposed to such fields as international trade law with its WTO.[28] Nonetheless, we can at least broadly describe the contours of international investment law. It includes:

> "a patchwork of [BITs], regional provisions . . . and multilateral instruments (signed in the framework of the WTO, OECD, World Bank, or the [UNCTAD]). One should add to this list the unilateral liberalization measures taken by both developed and developing countries during the 1980s and 1990s . . . [and] the coexistence of voluntary, non-binding and binding rules that impose on the State an obligation and the responsibility to implement."[29]

As this "definition" shows,[30] even calling this collection of regulations a field is a challenge—for it is diffuse, fragmented, and uncoordinated. It has even been claimed that it is in "disarray".[31] Indeed, an estimate of the field suggested that there are "2,700 BITs, 200 regional cooperation arrangements, and 500 multilateral conventions governing cross border investment flows".[32] All this makes comparative legal cultural analysis difficult, though not impossible.[33]

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[26] *See generally* Gregroy C. Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).

[27] Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. Int'l L. & Com. Reg. 33, 36 (2009).

[28] With significant global membership, the WTO regulates almost all of the world"s trade, with even the many regional and other trade agreements, as a de jure matter, subservient to to the WTO.

[29] Leal-Arcas, *supra* note 27 at 51-52 (2009).

[30] *See Id*. at 38-41 (providing some definiations of foreign direct investors and examples of the types of different investments).

[31] Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 347 (2004).

[32] *See* Leal-Arcas, *supra* note 27, at 124.

[33] *See* generally Picker (Development), *supra* note __, (providing a legal cultural analysis of the diffuse field of international development law).

But, even as the field is incredibly diffuse and fragmented, so too it is highly focused. Investments are by their nature the product of detailed contracts and agreements and as such they will be governed by highly specific and often individual and bespoke legal regimes. For example, the primary modern investment regulatory regime is the Bilateral Investment Treaties, the "BITS". Those treaties although often appearing to come from a "cookie cutter" due to their frequent use of common provisions in so many of the different BITs,[34] are in fact designed to deal just with the specific investment relations between two states, and to be implemented between just those two states. Even more specifically, many times there will be investment agreements created ad hoc, involving the host state, the investor, the investor"s home state, and perhaps an international institution or two, such as a regional development bank. A field made up of such particular and often highly detailed regimes may prove especially difficult for a systemic analysis of a field such as is attempted in this chapter.

As noted above, the field is also in many ways new, and dynamic—both of which are a problem for a legal cultural analysis. Since the first modern international agreement concerning investment in 1907, the Drago-Porter Convention[35], the field has come a long way. However, it is for the most part relatively new. Although international investment law was discussed in the Havana Charter negotiations,[36] it was not until the 1960s, under the auspices of the OECD[37] and then through the UN in the 1970s that we began to see the beginning of what is today an incredibly broad field. The impressive and massive expansion of the BITs started in the 1980s and does not appear to be abating.[38] The field"s dynamism is apparent in the fact that in those last fifty years the field has undergone some substantial transformations—both qualitatively and quantitatively. Those developments span the thousands of BITs to the substantively binding and enforceable investor-state arbitrations, with their deep and sophisticated "jurisprudence constant".[39] This relatively young and correspondingly immature field is therefore harder to consider from a legal cultural perspective than is the case with a more mature field.

Even as the field"s relative youth presents difficulties for a legal cultural analysis, surprisingly, so too does its sophistication. Unlike some fields that are now well regulated, such as those of trade in services and international intellectual property,[40] investment law is already relatively complex. In contrast, the international fields regulating trade in services and intellectual property were essentially created anew—

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[34] Americo Beviglia Zampetti & Pierre Sauvé, *International Investment* in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW (Andrew T. Guzman & Alan O. Sykes, eds) (Edward Elgar 2007) at 215.

[35] *See* Hague Convention II on the Limitations of the Employment of the Use of Force for the Recovery of Contract Debts, signed on 18 Oct. 1907, 36 Stat. 2241; Treaty Series 537.

[36] *See* Leal-Arcas, *supra* note 27, at 55.

[37] *Id.* at 57-58.

[38] *Id.* at 59 (noting 1986 is considered to be the start of the expansion).

[39] *See* Andrew Newcombe & Lluis Paradell, LAW & PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009) at 47-49; s*ee also generally* Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker, Isabella D. Bunn, & Douglas W. Arner eds., 2008).

[40] *See* Leal-Arcas, *supra* note 27, at 125.

"from scratch". Those other fields were more easily brought into the international legal order, as they had no confusing and contradictory history to confuse the development of a cohesive legal culture. Yet, at the same time, international investment law is relatively undeveloped in comparison to those fields that had a long history of international regulation and institutions, such as trade in goods. International investment consequently faces the difficult situation of being both too developed and insufficiently developed.

Finally, another obstacle to a legal cultural analysis is that much international investment law is found within domestic legal systems, and hence varies tremendously across the globe. That diverse local investment law will itself be solidly anchored in the domestic legal culture and hence does not easily contribute to a systemic legal cultural examination of the field as a whole. Nonetheless, this issue too, like the other obstacles, can be overcome with sufficient imagination and flexibility. Of course, there is a risk that the conclusions will be too general, insufficiently "scientific," and somewhat conclusory. That concern, however, is one that will typically arise in all comparative analyses that go beyond micro examinations, and sometimes even in those ones. Generalizations and approximations are simply the cost of doing macro examinations. So long as they are noted and always kept in mind, they should not serve as obstacles to the underlying goal—the identification of insights and issues for the legal system under what is, in any event, a holistic examination.[41]

If the field is to move forward it must find some coherence across the new and the old, and it must address the incredible fragmentation of the field, described above. Understanding the legal cultural issues within and facing the field is one critical piece in the eventual puzzle.

IV. The Legal Cultural Analysis

Despite the obstacles noted above, there are some common legal cultural characteristics and questions that are amenable to consideration and examination and that play a large role in shaping and influencing major parts of the field. These few issues should be sufficient to show the utility of examining international investment law under a legal cultural analysis. Of course, considerably more issues would need to be considered in order to obtain a complete understanding of the role of legal culture for the whole field.

A. The Legal Cultural Impact of Public International Law

The legal culture of international law has been explored before, and some general legal cultural insights have been generated from those examinations.[42] If international investment law can be legitimately placed within international law, then it can be expected that the legal culture of international law will be present to some degree in

[41] *See* Picker (IOs), *supra* note 1, at 12.

[42] *See*, *e.g.*, Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093, 1094 (2008) (hereinafter "Picker (International)").

international investment law. The question is then raised as to whether international investment law is truly a field within public international law. To the extent that it is regulated by public international law devices, such as treaties and customary international law, then it is clearly within the scope of public international law. BITs, which are the primary form of international investment law, are treaties and have the full force provided by international treaty law and are therefore clearly a part of international law.[43] In addition, the provisions found within the typical BIT are themselves often part of the substance of international law, with other parts serving as a model for the development of new international law.[44] For example, BITs typically provide that:

> The contracting state parties agree to grant foreign investors the following: 1) admission into the host country; 2) *national treatment* vis-a-vis their own investors; 3) *most-favored nation* treatment vis-a-vis investors of other nations not party to the treaty; 4) "fair and equitable treatment" under *international law*; 5) "full protection and security" under *international law*; and 6) compensation in the event of an *expropriation*.[45]

Expropriation compensation,[46] national treatment, and most-favored-nation provisions are also parts of international law.[47] It is safe to say that international investment law is thoroughly immersed in international law and particularly includes substantial "hard" international law—law with real application and enforcement. Indeed, one scholar noted that "even if there is no complete uniformity yet, there is enough convergence to be able to speak of international investment law as an existing international law discipline made up of uniform investment law principles."[48]

Although BITS and international investment law institutions such as the ICSID are quite clearly a part of international law, international investment law also includes within it law that would seem to have a less immediate connection to public international law, such as that part of international investment law that would be found within domestic regulations or within private international law. But, if the underlying investment transactions and the resultant legal issues that follow from it are the sort of legal issues with which international law would normally be involved, then we can assume that they will also be influenced by international law and its legal culture, although not to quite the same degree as those parts of international investment law that are more clearly part of public international law. For those situations where a state is a party and nationals of another state are the other party, then we would expect international law to be relevant. Although purely private international investments would appear not to have an international law nexus, they are nonetheless transnational, and hence borders are crossed and the means of international commerce are utilized. The presence of international law exists in the

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[43] *See generally* José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17 (2009).

[44] *See generally*, Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

[45] Garcia, *supra* note 31, at 311-312 (citations omited, emphasis added).

[46] *See*, *e.g.*, Zampetti & Sauvé, *supra* note 34, at 225.

[47] *See generally* Newcombe & Paradell, *supra* note 39, at 147, 193, and 321.

[48] Leal-Arcas, *supra* note 27, at 67.

interstices of those transactions. International law is further relevant to these transactions when problems start to appear between the foreign parties. At that time, the foreign investor may seek assistance from its own state, and international law is relevant as the extraterritorial actions of a state are regulated by international law, in one form or another.[49] If eventually there is litigation, through domestic courts, arbitration, or otherwise, there may be issues involving enforcement of foreign judgments, service of process, foreign evidence gathering, and so on—all regulated by international law. So, even the domestic and private components of international investment law appear to have a serious relationship with public international law and hence to its associated legal culture.

The concordance between international investment law and international law suggests that international investment law will be impacted to some degree by the overarching legal culture of international law. Although the legal culture of international law is difficult to identify, previous considerations of the issue have managed to discern its general contours and to identify some legal cultural themes that pervade it as a whole.[50] Without going into too much detail, the legal culture of international law is predominantly Western.[51] Furthermore, international law:

> comprises some unique legal cultural elements, after all, the subjects of international law are sovereign states, but that it also draws heavily from both the civil law and common law traditions—but in a specific style and composition . . . they resemble the classical mixed jurisdiction systems of the world (such as Quebec, Scotland, etc).[52]

To the extent international investment law reflects international law‟s legal culture, then one would expect international investment law‟s legal culture to reflect strong civil and common law legal cultures, but with each present to a greater or lesser degree in the different parts of the law. For example, with respect to procedure and dispute settlement, the mixed jurisdictions[53] and international law tend to be more common law-like, while the private law, to the extent one can analogize to it within public international law, will tend to be more civilian.[54] A detailed consideration of

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[49] *See* Miles, *supra* note 22, at 15; Newcombe & Paradell, *supra* note 39, at 5-7.

[50] *See, e.g.,* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093 (2008) (hereinafter "Picker (International)"); Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond*, 3 J. of COMP. L. 160 (2008); Colin B. Picker, *Beyond the Usual Suspects: Applications of the Mixed Jurisdiction Methodology to Public International and International Economic Law*, appearing in MIXED LEGAL SYSTEMS AT NEW FRONTIERS, (Esin Örücü, ed.) (2010).

[51] *See* Picker (International), *supra* note 50, at 1095-1100.

[52] Picker (Development), *supra* note 1, at 50, citing Picker (International Law), *supra* note 50 at 1102.

[53] The mixed jurisdictions "were first defined more than one hundred years ago as „legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law.‟ The origin of mixed jurisdictions typically lies in the many transfers of colonial power, usually from French or Dutch to British control and from Spanish to American control." Picker (International), *supra* note _, at 1102 (quoting and citing William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000) (quoting Maurice Tancelin, *Introduction* to F.P. Walton, THE SCOPE AND INTERPRETATION OF THE CIVIL CODE 1 (Butterworths 1980) (1907)); *see also* Kenneth G. C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 7 (2003).

[54] *See* Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 4-5, 63 (Vernon Valentine Palmer ed., 2001); Picker (International), *supra* note 50 at

international investment law under the rubric developed to consider international law as a mixed jurisdiction would be detailed work that would likely provide some interesting and useful insights. Such an examination is not, however, provided here for it tends to quickly become very specific and detailed, and the goal in this chapter is to consider international investment law from a systemic legal cultural perspective. But, the more relevant of those commonalities and insights will be considered in greater detail below.

Of course, there is an open question as to whether it is the connection to international law that would result in similar legal cultural issues being present within international investment law or whether international investment law would of its own accord have independently developed similar legal cultural characteristics. Although an interesting question, and with some limited relevance, regardless of the causality it is through comparison with and reflection on international law's legal cultural characteristics that it is possible to explore whether similar characteristics exist within international investment law. Indeed, frequently a legal cultural characteristic will exist, but until it is explicitly noted, it will often go unnoticed. For example, the fact that common law procedure and dispute settlement styles exist within both the legal culture of international investment law, as discussed below, and within international law could mean that those two similar characteristics were arrived at independently or that international law led the way for international investment law to follow. Yet, without the issue having being considered as part of international law or within the mixed jurisdictions, it likely would not have been explored in the same way in the international investment context—which is the more critical issue.

Although not considered in depth here, a few examples will show the value of considering a shared international law and international investment law legal culture. The Western legal cultural tradition of international law suggest that international investment law would also be largely Western. Although being „Western" implies the presence of many different legal cultural characteristics, one in particular is troubling for international law, and perhaps then equally troubling for international investment law—the requirement that Western legal systems embrace "legal pluralism, accepting the existence of competing legal systems and jurisdictions."[55] Specifically, and despite international law being solidly within the Western legal tradition, it has problems reflecting the legal pluralism considered to be one of the defining characteristics of the Western legal system.[56] Of course, within it, international law welcomes many different sources of international law and accepts different regimes covering different fields. The pluralism issue, however, arises because international law believes itself, almost by definition, to be hierarchically superior to all other laws and legal systems.[57] To the extent there is a conflict, international law will find its

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1117, 1127; Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 292 (2003).

[55] Picker (International), *supra* note 50, at 1082 (citing Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983).

[56] *See*, Berman, *supra* note 55, at 7-10; *see also* Glendon, supra note 14 at 46.

[57] Nor is this issue saved by the fact that international law is mainly a positivist system. The very strong positivism present within international law is itself a form of legal pluralism, for the respect given to each state by only holding the state to that international law to which it has consented suggests a respect for the individual states' legal systems regardless of what sort of legal system the state employs. But, international law is not entirely positivist, for there also exists peremptory norms, jus cogen. *See*, *e.g.*, Alfred von Verdross, *Forbidden Treaties in*

own laws to be supreme, and the question as to the existence of a conflict will be determined under international law. Although such a position is necessary for the existence of international law, it creates a legal cultural sheen to international law that will tend to denigrate legal systems alien to international law. Although this may not be a problem for Western legal systems, it may undermine international law‟s acceptance of the legitimacy of non-Western legal systems. The consequence for international investment law, which often regulates investments in non-Western legal systems, is particularly troubling, for it may then take on that legal chauvinism within its legal culture despite the very real need to take into account the different legal systems in which it operates. This problem is reinforced, as discussed later in this chapter, as a result of the power asymmetries that are pervasive throughout the field.

In sum, international investment law‟s connection to international law will likely serve as a major factor in the development of the legal culture of international investment law. At a minimum, consideration of the congruence will permit examination of some specific legal cultural trends and factors that will influence the practice and development of international investment law.

B. The Role of Language

The role of languages is increasingly understood to be a critical and determinative factor in the development of a legal culture.[58] This is especially true for relatively undeveloped legal cultures, the sort one tends to find among the many new fields and institutions of international law, such as international investment law.

The role of language as a determinative factor in the development of a legal culture has been best explored in the context of those legal systems that serve as comparative law laboratories—the mixed jurisdictions.[59] The impact in those systems is more easily observed due to the very constant and easily visible clash between the legal cultures within those mixed systems. For example, where the civil law language was healthy, as in Quebec, the civil law has remained strong. Where the civil law language was weak, as in Louisiana and will be in South Africa now that Afrikaans is but one of many official languages, so to the civil law will wither and the common law legal culture will slowly dominate and replace the civil law legal culture.[60] Yet, the same pressures are present, albeit less visibly, in all other systems including those within the international legal order.[61]

With respect to international investment law, language is visible as an issue in international investment law in numerous ways, from the negotiations of the contract

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International Law, 31 AM. J. INT'L L. 571 (1937). The existence of jus cogens, and the fact that it is up to international law to determine its existence, undermines the ultimate respect international law might have for domestic legal systems.

[58] *See* Glendon, *supra* note 14, at 972-982.

[59] Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 TUL. L. REV. 151 (2003); Max Loubser, *Linguistic Factors into the Mix: The South African Experience of Language and the Law*, 78 TUL. L. REV. 105, 144-47 (2003).

[60] Loubser, *supra* note 59, at 121.

[61] Picker (International), *supra* note 50, at 1123-24.

to any resultant disputes. As such, it has the ability to influence the legal cultural character of the field as a whole, and of the specific transactions at issue. To the extent one language becomes dominant in the negotiations, contract, treaty, or dispute resolutions, then the legal systems associated with that specific language will inexorably exert their legal cultural influence. Of course, and without question, the language at issue in influencing the legal culture of international investment law is English.[62] Indeed, all aspects of the world of international investment law are finding English to be increasingly the dominant language.

> Where only one or even neither of disputing parties, for example, has English as their native tongue, the parties will nevertheless default to English (and arbitrators who speak or at least understand English) as the most practical language in which to conduct proceedings. [63] This predilection spreads even to the interpretation of the language of the BITs themselves as in some instances of treaties between Latin American and non-English speaking countries, English is added as a third official text and deemed to prevail in the event of a difference in interpretation between the versions of the languages of the contracting parties.[64]

The role of language, and in particular the English language, was discussed by the author in a recent work concerning legal cultures and international organizations, but is equally applicable in the present context of international investment law:

> Language and legal tradition are closely tied together, with, for example, English associated with the common law and French, German, Spanish and Italian tied to the civil law tradition.[65] Furthermore, Chinese and Arabic are also typically associated with non-common law legal systems—be they civilian, socialist, or Islamic legal systems. After all, any major western language employed other than English will tend to end up reflecting more civilian, or rather, less Anglo-American and hence common law legal culture within the institution.[66] Whereas the use of English will tend to strengthen the emergence and perhaps dominance of a common law legal culture.[67] Of course, the ever increasing role of English, as the common second language of

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[62] McLean, *supra* note 11, at 1095; Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 355 (2001). One scholar-practitioner noted that "you take account of the peculiarities of national law, but the agreements look the same and they will almost always be in the English language [while even] in France where it's technically illegal, . . . [people will] pay their €300 fine for having their agreement in English." Flood, *supra* note 74, at 64. (internal quotation marks omited). *See also* Suvanto, *supra* note 3, at 5-7 (noting an increasing use of use of English within Scandinavian companies and in inter-Scandinavian deals).

[63] Driven in not insignificant respect by the fact that few native English speakers will have non-English language fluency. *See* Clark, *supra* note 83, at 1076-77

[64] Garcia, *supra* note 31, at 362 (footnote added).

[65] *See* Picker (International), *supra* note 50 at 1124.

[66] *Id*. at 1123-25; *see also* Loubser, *supra* note, 59 at 144-47.

[67] *Id*. at 107-08; *see also* Esin Örücü, *The Judge and Jurist in Scotland: On the Verge of a Second Renaissance*, 78 TUL. L. REV 89, 102 (2003).

> the world, suggests a continuing and potentially expanding influence of common law legal cultural characteristics.[68]

In some cases even domestic statutes are written in English so as to properly capture an intended common law approach—for the purpose of facilitating investment.[69]

Of course, the move towards the English language will not necessarily lead to employment of a common law legal culture.[70] As an initial matter, there may be a counterweight as more civil law scholars and practitioners write in English and introduce non-common law ideas into English language sources. But, language can be very closely tied to culture, including legal culture, and the strict meanings of words can curtail the use of foreign concepts in another language. Another potential counter to the common law invasion through English is some investment related efforts that have not followed the common law or relied upon the use of English. For example, the Organization for Harmonization in Africa of Business Laws ("OHADA") have implemented a French civil law approach to its shared pro-investment legal regime, with French remaining the primary language. It should be noted, however, that even this endeavor has made overtures toward non-French legal devices and toward the common law and Anglo-phone neighbors of the members of the OHADA.[71]

For international investment law, the dominance of English should be viewed as a warning and sign that the common law and its associated legal cultural characteristics may be entering the field in greater force and vigor than otherwise expected. Furthermore, given the foreseeable continued dominance of English, this process shows no signs of abating. The legal culture of the field may therefore continue to feel a pressure to develop along common law lines, with its associated legal culture.

C. Participant-Driven Legal Culture in International Investment

One of the main areas of consideration in a legal cultural analysis will be the participants and actors within the legal system under analysis. Those participants include lawyers, individuals, and corporations with a legal relationship to the issue;[72] judges; jurors; legislators; regulators; civil servants; international officials; NGO and

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[68] Picker (IOs), *supra* note 1, at 17-18.

[69] *E.g*. Dubai‟s International Financial Centre. *See* Damien P. Horigan, *The New Adventures of the Common Law*, 1 NO. 5 PACE INT'L L. REV. ONLINE COMPANION 1, 10, 22 (2009)

[70] Laura J. Macgregor, *The Effect of Unexpected Circumstances on Contracts in Scots and Louisiana Law* in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND (Vernon Palmer & Elspeth Reid, eds) (2009) at 272 & 279 (using the mixed jurisdictions as the laboratory, and pointing out that language will not always be the determinative factor, noting that despite employment of different language, Scottish and French contract law can be remarkably similar and also that the lack of French in Louisiana did not stop the Civilian notion of "cause from thriving in Louisiana").

[71] Dickerson, *supra* note 6, at 21 (2005). The OHADA is the Traité Relatif à l'Harmonisation en Afrique du Droit des Affaires (the Organization for Harmonization in Africa of Business Laws), which includes Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comores, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal, and Togo as well as Guinea and Guinea-Bissau. *Id*. at fn 2.

[72] In a legal cultural setting individuals are very relevant—but only to the extent they have a direct connection with the law, through their roles as voters, clients, litigants, victims (broadly construed), witnesses and so on.

MNC officers and directors; and even the general public. Any humans actively involved in the legal system can have a role in the creation and development of the legal culture, just as they will also reflect the legal culture in their conscious and subconscious interactions with the legal system. In this section just a few of the more central participants will be considered, chosen for their legal cultural influence across the international investment field as a whole, as opposed to their legal cultural impact at a more specific level within an investment. As an initial matter lawyers, law schools and artificial persons will be considered. Specifically, this means consideration of the dominant Anglo-American law firms and legal education of non-common law lawyers in Anglo-American law schools; finally, there will be a brief consideration of the role of multinational corporations ("MNCs").

The large Anglo-American law firms are perhaps one of the most influential groups of participants within international economic law in general.[73] Their significant place in the international investment law can be attributed to a number of causes including historic, economic and regulatory factors, and even as a result of some legal cultural factors. Historically, the fact that America first developed the large law firms is important to their later joint dominance.[74] Additionally, the dominance of the Anglo-American firms is also a result of the fact that there are really only two jurisdiction of great importance to finance—London and New York, with the result that their law firms will have the edge over the law firms of other jurisdictions, especially over those from very different legal traditions and cultures.[75] In addition, the comparatively deregulated legal market in England and America has allowed their law firms to expand to positions that then enabled them to dominate the field.[76] In contrast, in much of the rest of the developed world, law firms are heavily regulated, with some jurisdictions even prohibiting partnerships.[77] The view of "free competition" is different in different countries, with the United States on one extreme, going even so far as to free its lawyers to advertise and set their own fees and style of compensation in comparison to such jurisdictions as Italy where fees are fixed and there is much less competition.[78] One consequence of the regulations is that for many countries solo practice or small firms is the norm.[79] In addition, those jurisdictions' smaller markets then further hinder the development of very large firms that could compete with the Anglo-American ones. Sometimes the legal culture in those jurisdictions itself inhibits their law firms' growth. For example, in some legal cultures lawyers are primarily hired remedially, not proactively, as businesses have the attitude that they can get along just fine without legal assistance, leading to significantly lower demand for lawyers and making larger firms less feasible.[80]

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[73] *See* Junji Nakagawa, *A Comment on Professor Colin Picker's paper on "WTO Governance: A Legal Cultural Critique"* in GOVERNANCE IN CONTEMPORARY JAPAN (PUBL. OF UNIV. TOKYO INSTIT. SOC. SCI.) (Kenji Hirashima, ed.) (2011); *see also* Picker (WTO) at 130.

[74] John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35, 42 (2007).

[75] *Id*. at 48-49.

[76] McLean, *supra* note 11, at 1095.

[77] Stefano Agostino, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 335 (1996).

[78] *Id*. at 354.

[79] *Id*. at 335. For example, in Italy a forty-lawyer law firm would be considered huge. *Id*.

[80] *Id*. at 353.

Reflecting these and other factors, a recent survey of the top hundred law firms of the world identified only two that were not from a common law country and only seven that were not from the United States or Britain.[81] This dominance by Anglo-American law firms has and will continue to have a long term impact on the development of the legal culture of international investment law. Indeed, it has been argued that at this point "globalization cannot succeed without the large law firm".[82] Certainly, the large law firms are having a very large impact on the legal culture of international investment law.

> The term imperialism, implied to the spread of United States law and United States lawyering abroad, may be a shade too strong. In part, what we have is a matter of taste, like the spread of Coca-Cola. It is perhaps also sheer convenience and the fact that Americans were in the field . . . fairly early, and because their style of lawyering suits the needs of the international order.[83]

However, this same author quickly notes that his comments are not just confined to the role of US law firms, but to law firms from throughout the common law world.[84] It also casts a common law sheen or gloss, and associated legal culture, over the field that in turn makes it even more difficult for non common law lawyers to enter the field.[85]

This legal cultural impact is in all areas of international investment law. For example, the Anglo-American law firms and their legal cultures are having an impact in negotiations and in the resultant legal instruments. For example, Scandinavian contracts have been influenced by American lawyers in a very physical manner—their contracts are getting longer.[86] Another area where there has been a legal cultural impact from the Anglo-American law firms is in the issue of mediation versus litigation for international investment dispute resolution. There is reportedly a bias within the American law firms away from mediation and toward litigation. As a matter of legal culture, this will likely contribute to a more litigious, combative, and adversarial approach to dispute resolution in the field than would otherwise have been the case.[87] However, it should be noted that it is not just the law firms, but their clients as well (though perhaps more accurately, the in-house counsel) at those

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[81] See http://www.thelawyer.com/global100/2006/index.html (last checked April 23, 2010) (of the seven, one is French, one Dutch, one Canadian and four Australian; those seven are all listed in the seventy-five to one hundred tranche).

[82] Flood, *supra* note74, at 41.

[83] Garcia, *supra* note 31, at 362.

[84] *Id*.

[85] *Id*. at 362.

[86] *See* Suvanto, *supra* note 3, at 5-7.

[87] *See* Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251, 1276-77 (2008) ("The professional culture of U.S. lawyers also erects barriers to recommending and using mediation to resolve trans-border disputes . . .", with the article then describing the reasons for this phenomenon).

businesses that are pushing for U.S. or Anglo-American styles in those international arbitrations.[88]

The large Anglo-American law firms are clearly having and going to continue to have an influence on the development of the legal culture of the field. But, those law firms are international and employ many non common law attorneys, and so one might have expected them to counterbalance the impact of the common law attorneys in those firms. But, those large firms will have an internal culture, reflecting their common law parentage that will acculturate non common law lawyers into the Anglo-American way of doing things. Consequently, even the large number of non-common law lawyers within the large Anglo-American law firms will likely cast a common law sheen over the field.

The common law acculturation of the non common law lawyers in the big firms will have started even before the non common law lawyers were hired as a significant number of them will already have studied at law schools in the common law world. But, it is not just the Anglo-American law firms that place a premium on such training. Lawyers, scholars, government, and international organization officials throughout the non common law world increasingly seek and feel they require such an experience.[89] Indeed, the increasing number of legal practitioners, officials and scholars from non-Anglo-American backgrounds who have spent time in Anglo-American legal education establishments cannot be ignored—both for what they become and what they bring back with them to their home legal systems.[90]

> Young lawyers from jurisdictions outside the Anglo-American nexus now find it essential to obtain an LL.M. degree at a major U.S. or U.K. law school, otherwise they will not be conversant with global legal techniques.[91]

Perhaps of greatest and ever increasing impact is that there will be some common law acculturation even for those who did not receive such education in the common law world. This issue, and some potential responses to it, were previously considered in the context of the legal culture of international organizations, though it is directly on point with respect to the legal culture of international investment law.

> [E]ven when law students do not attend common law system law schools, it will often be the case that their lecturers and advisors studied or have spent considerable time at universities in common law countries.[92] But, education institutions outside the common law world have now entered into competition with the common law universities for the valuable foreign student market—

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[88] McLean, *supra* note 11, at 1094-95. The in-house counsel are themselves likely to have had their training in those large law firms.

[89]David S. Clark, *American Law Schools in the Age of Globalization: A Comparative Perspective*, 61 RUTGERS L. REV. 1037, 1061 (2009). *See generally* Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006); Picker (WTO), *supra* note 1, at 133.

[90] McLean, *supra* note 11, at 1095.

[91] Flood, *supra* note 74, at 54.

[92] Many will also submit articles to the numerous and less demanding student run law reviews in the United States and thus will, to some extent, be forced to adopt to American legal culture in order to have their scholarship accepted.

> even going so far as to teach in English.[93] . . .[But], it is debatable just how much those civil law institutions can influence the common law scholars, practitioners, officials and students that attend those organizations. It is likely that there will not be the same large influence, due as much to the issue of language as anything else . . .Consequently the common law countries‟ education institutions‟ current domination may not be so easily displaced.[94]

Anglo-American legal education‟s impact is thus far-reaching, though not unprecedented—the role of late Middle-Ages‟ Northern Italian legal education was even more significant in spreading the ius commune and the Corpus Juris Civilis to almost all of Europe;[95] however, this time the spread of Anglo-American legal culture is global.

Another global character in international law in general is the major presence and employment of artificial persons. This is especially the case in international economic law, and in international investment law in particular. The question is then raised as to whether those artificial persons, typically multinational corporations and almost always set up as limited liability entities, impact the legal culture of international investment law. It has been suggested that their presence provides a sense of immunity and lack of connection between the people who actually make the decisions and any consequences for those decisions.

> It would seem that the use of international comity, forum non conveniens, and the doctrine of separate corporate legal personality to preclude foreign investor liability for environmental damage in host states also replicates this pattern. Rogge describes the character of the current legal framework as constituting the "best of both worlds" for multinational corporations--they are permitted to operate in other states and to profit from politically oppressive regimes or environmentally lax regulation, but are shielded from liability for damage resulting from those activities. The same system that enables foreign investors to engage in transnational operations withholds protection from those they damage.[96]

Even as corporations benefit from limited liability on a personal level, the wider investment regime also permits them to benefit from investments without having to concern themselves with many of the so-called non economic externalities of their investments: "The law of capital-exporting states enables their multinational corporations to pursue economic activities globally, but disengages when called upon to protect the local communities and environments within which those companies operate."[97] Indeed, their immunity may, as a de facto matter, be even greater due to the fact that their multinational character may also be a way to escape the effective jurisdiction and control by any one government—either official control or moral

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[93] *See* Clark, *supra* note 83, at 1075.

[94] *See* Picker (IOs), *supra* note 1, at 17.

[95] *See* Glendon, *supra* note 14 at 56-57; *see also* Clark, *supra* note 89 at 1075 n. 165 (noting the dominance of German legal education as recently as the nineteenth century).

[96] Miles, *supra* note 22, at 34 *et seq.* (citations ommited).

[97] *Id*. at 37

control. Furthermore, to the extent they may fall within the control of a state, they may always resort to lobbying to have the regulations or laws changed.[98]

The role and protections offered to those MNCs will likely have an impact on the legal culture of the field. One should expect a larger focus on legal and technical compliance as opposed to compliance with larger social justice obligations as MNCs operate behind their limited liability and other shields. The legal culture may also tend to be more myopic, viewing externalities and other issues as outside the scope of the field. Like the issues raised in the discussion of asymmetries within the field, one consequence of those types of MNC behaviors, and of a corresponding legal culture for the field, is that the MNCs may end up being considered less legitimate, along with the field itself.[99] Few of these legal cultural attributes would be considered positive by most observers. This is so even though there are good reasons to permit the use of limited liability: not all the negative consequences of investment can be solved by corporations, and MNCs have shareholders monitoring the corporate profitability and share price.

The consideration of the legal cultural impact of the actors, the participants, within the field is helpful in providing insights into the development and operation of the field. Clearly, consideration of all the other participants would be useful for the field, though in a short chapter such as this one, that is not possible.

D. The Diversity of the Field

International investment law is a very diverse field—at the substantive and participant levels. Those diversities will clearly have an impact on the legal culture of the field.

1. Ideological Diversity

One of the more important diversities within the field relates to how the field is viewed with a strong division between a positive view and a negative view of international investment law. Of course, there will be very few opinions about the field that are wholly positive or wholly negative. As a sophisticated body of law, reflecting many different demands and needs, it is simply not possible that the field could serve all goals and all constituencies equally well or equally badly. Nonetheless, there are deep divisions within the field, and it is the existence of those deep divisions and their impact on the legal culture of the field that is considered.

Some fields are more controversial than others, though all fields will include within them some parts that are hotly disputed. The deep seabed provisions of the Law of the Sea are an excellent example of a highly contentious area within a generally

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[98] *See* Sornoraja, *supra* note 20, at 2, 183.

[99] Another impact of the large role of MNCs in the field is the consequent separation of the human actors from the legal entities involved, a result of the demise of the "company man". This in turn may also lead to a "short termism" within the legal culture, as corporate officers understand their likely short tenure. That short termism fits well with and mutally enforces the other MNC legal cultural issues discussed above.

uncontroversial field.[100] International investment, however, is one of the more controversial fields within international law. The failure of the Multilateral Agreement on Investment ("MAI")[101] was perhaps the most visible expression of such intense feelings about international investment law.[102] The divisive disagreements within and about international investment law span the entire field, including, among other issues, its BITs, investment provisions in RTAs, international institutions, and impact on the target economies.[103] The rancor is not just confined to investments in specific levels of economic development, for the controversy can be found to concern investments in both the developing and in the developed world. For example, the regional investment law in North America, pursuant to NAFTA's Chapter 11 investor protection provisions, has also had a tumultuous time since its inception in 1994.[104]

Part of the divisiveness is a legacy of the colonial and imperial expansionism of the West.[105] Part of the divisiveness is also due to there being little agreement in the field about the macroeconomics and "what constitutes investment stability".[106] The divisiveness is further accentuated when investments become pawns in the relations between states. For example, during times of crisis when foreign nationals' investments are expropriated, sometimes just property of nationals of specific states are targeted, or where the foreign state imposes investment restrictions as a foreign policy tool.[107]

The divisiveness is made worse by the fact that many other issues get pulled into the international investment law debate—issues that are of close personal concern to states. Those sensitive subjects include matters of governance, corruption, discrimination, labor and human rights, environmental protections, high-profile investor misconduct, and so on. All of those issues are controversial, from the content of their principles to their application. Yet, investments touch on all them and very often require that a position be taken on them by the foreign investor and the host state—even if that position is to ignore the issue. For example, when investing in a new power plant, the environmental issues must be resolved. When investing in a country known for corruption, the foreign investor must navigate those demands—one way or another. When investing in a manufacturing or service industry in a country not known for implementation of health and safety laws, the investor must

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[100] John Charles Kunich, *Losing Nemo: The Mass Extinction Now Threatening the World's Ocean Hotspots*, 30 COLUM. J. ENVTL. L. 1, 44 (2005).

[101] *See* Leal Arcas, *supra* note 27, at 67-68 ("the MAI sought to set strict global rules limiting governments' rights and abilities to regulate currency speculation and set public interest policies regarding investment in land, factories, service sectors and stocks [and . . .] would have expanded worldwide key NAFTA investment provisions, including . . . the right to establish an investment in another country, the ability for corporations to sue governments for cash damages over any regulatory action affecting profits, and an expansive definition of investment . . .").

[102] *See* Leal-Arcas, *supra* note 27, at 67-70, 110 (discussing the MAI and its failure, and showing the long lasting impact of the failure for the field).

[103] *See generally*, Peter Muchlinski, *Policy Issues* in the OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT (Peter Muchlinski, Federico Ortino & Christph Shreuer, eds) (2008) at 3 *et seq*.

[104] *See generally* Catherine M. Amirfar & Elyse M. Dreyer, *Thirteen Years of NAFTA's Chapter 11: The Criticisms, the United States's Responses, and Lessons Learned*, 20 N.Y. INT'L L. REV. 39 (2007).

[105] *See generally* Miles, *supra* note, 22.

[106] Leal Arcas, *supra* note 27, at 125.

[107] Garcia, *supra* note 31, at 316-317.

decide how to cope with those issues. Furthermore, the foreign investor‟s own state, through its ability to regulate its own nationals in their extraterritorial behavior, will also be deemed to be taking a position on all these issues.[108] Similarly, the international institutions involved, from those insuring or directly funding the investment to those responsible for the regulation of the substantive law, must also be deemed to have taken a side on the issue. Silence or a lack of decisions on the issue is itself a position in the debate. In some ways, international investments are one of the primary flash points of the many contentious issues arising from globalization. These controversies are further inflamed by the general failure of investor arbitration to take into account these many issues.[109] Being largely driven by investors, with no room for third parties (such as NGOs) representing these other views, it is no wonder that the law, itself driven mostly by disputes, will then fail to adequately deal with these issues. This will in turn further stir up the debate and potentially undermine the legitimacy of the law itself.

The consequences as a legal cultural matter for the field are a constant defensive posture, and an inability for the field to mature. The development of fundamental principles and long-term strategy are stymied by a need to constantly defend the basics as well as to handle issues outside the usual competences of investment experts. Furthermore, there is no normative consensus, leaving the discipline resting on few common principles, in a time when international law, and the law in general, has taken on a greater acceptance of the important role of context and an understanding that commonly accepted principles are necessary to secure legitimacy in a world with incredible diversity. Although individual transactions may be free of the different perspectives, due to the unsettled and divided nature of the field, the long-term viability of the transaction and investment may itself be unsettled. Also, no international organization can be created, nor can there be better harmonization with the other fields and international organizations within the international legal order so long as the field is itself divided.

In a field that is so fragmented and unable to mature, one can expect the legal culture to be replete with the legal cultural equivalent of an identity crisis, a lack of legitimacy, and insecurity, anger, and confusion. These legal cultural "characteristics" will be reflected in the role played by national politicians and international organization leaders in the development of the field as those "leaders" will likely be reluctant to assert leadership and provide direction. A "hunker down" or bunker approach may be evident. One may expect a lack of transparency, for transparency will just expose activities to censure. In such an atmosphere the field will be hard pressed to secure rational development.

2. Power Diversity

Another aspect of the diversity of the field is the significant difference in economic and other power measurements between the many different participants in the field.

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[108] A good example is the recent developments of anti-corruption rules for overseas business activities in most developed countries, initially via the OECD‟s Anti-bribery Convention. Organization for Economic Cooperation and Development(OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997 available at http:// www.oecd.org/dataoecd/4/18/38028044.pdf (last visited October 4, 2012).

[109] Miles, *supra* note 22, at 19.

Although international investments are very often between similarly developed economies, there are also many investments from more developed states into less developed states. Historically, although the early international investment law was created as a result of investment between largely equal states, in the modern period it has been developed largely in the context of investments from more powerful into weaker states, often reflecting post-colonial relationships and dependencies.[110] Indeed, the main international investment law development in the modern period has been the tremendous growth of the BITs that are typically avenues for investment from the developed to the less-developed world. It has been noted that outside the NAFTA Chapter 11 context, "BITs amongst developed countries inter se are virtually unheard of."[111] After all, the great gains from investment are often from investments in untapped or emerging economies.[112] The ubiquity of these asymmetric investments suggests many legal cultural issues for the field.

One aspect of these asymmetric investments is that they and their associated BITs are very often offered from the more-powerful to less-powerful parties on a "take-it-or-leave-it" basis.[113] As a legal cultural matter, such asymmetries are chauvinist and contrary to the legal pluralism culture that should be a part of the Western legal tradition. As noted above when discussing the legal culture of international law, this "anti-pluralism" or "legal cultural myopia" may have an enduring and pernicious impact in the very substantive concerns of the field. That history and continuing legacy of power asymmetry has been credited by some scholars with creating some specific legal cultural characteristics:

> [An] inherent investor bias of international investment law in the twentieth and twenty-first centuries [which finds] a modern manifestation in its excessive focus on the rights of the investor, its obsessive promotion of foreign investment to the exclusion of the interests of the host state and of other stakeholders, the manner in which it is used by foreign investors and their states to secure commercial interests, and the investor-state arbitral system of dispute resolution.[114]

In addition to representing specific substantive issues, these qualities are also manifestations of the legal culture within the field. Indeed, these are as much legal culture as might be an anti-defendant bias among middle-class jurors in a domestic legal system. These are attitudes with legal significance that drive the substantive body of the law as well as other aspects of the development of the field. These legal cultural conditions are likely present throughout the legal culture of international investment law at this stage. This may be the rare case of legal cultural attributes that are applicable across the whole field. The acceptance of this situation has not gone

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[110] *Id*. at 3-4.

[111] Garcia, supra note 31, at 315; Leal-Arcas, *supra* note, 27 at 60 (noting that BITS are between developed and developing countries); *but see* Newcombe & Paradell, *supra* note 39 at 43 (noting some exceptions to the usual asymmetry between the parties, even as noting those asymetries were the usual case).

[112] *See* Garcia, *supra* note 31 at 320.

[113] *Id*. at 316 (quoting Jose Alvarez discussing his experience as a US BIT negotiator who noted among other things that "the United States call[ed] the shots and the BIT partner [was like a] supplicant").

[114] Miles, *supra* note 22, at 11.

unchallenged,[115] but has rather contributed to the divisiveness within the field, helping to generate those legal cultural characteristics that are related to such divisiveness.

Another legal cultural consequence of the asymmetric condition of the field is that the historic European conception of international law and of those parts of the law relevant to investment have apparently triumphed over non-Western approaches.[116] This has important legal cultural consequences when so much of the investments are into non-Western states. The legal cultural imperialism is not diminished by the fact that most states, even in the non-Western world, have an overlay, often superficial, of a Western legal system—be it civil or common law in origin, itself often a colonial legacy.[117] The legal cultural issues that arise from this situation have been previously discussed in the other recent legal cultural analyses, for it is a common situation among the many parts of international law.[118] In those earlier examinations, many points of legal cultural conflict between the local and Western international field were noted, such as: the very large informal legal systems operating in many non-Western states,[119] the tenuous hold of positivism in many non-Western systems,[120] and the transparency difficulties in indigenous oral legal traditions.[121] Clearly there is a need for non-Western legal cultural issues to be taken into account at the specific legal cultural analysis level. But, at the systemic level, the failure of the field to adequately take into account those issues is further evidence of the Western legal cultural character of the field—a character that is likely to raise legitimacy concerns given the very large non-Western legal culture present throughout the world.

Another legal cultural issue related to the power asymmetries within the field is the issue of legal cultural transplantation that may be taking place through the conduit of international investment law. For example, it has been claimed that through its BITs the United States has been exporting aspects of its legal system, and associated legal culture, around the world.[122] Given the United States is one of the few common law systems in the world, it is quite likely that it is exporting a common law legal culture to non-common law systems. Although it may be said that the EU and other economic powers are also exporting their own legal cultures, they and most investment target states will more likely share the same legal tradition and hence many of the same legal cultural characteristics. Of course, there may be instances where there are investment relations between an economically powerful civil law country and a developing country from the common law world, in which case there may be a corresponding spread of civilian notions into those common law countries.

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[115] *See*, *e.g.*, Zampetti & Sauvé, *supra* note 34.

[116] Miles, *supra* note 22, at 4.

[117] *Id*.

[118] *See generally* Picker (IOs), *supra* note 1, at 14; Picker (Development), *supra* note 1, at 65-68).

[119] *See*, *e.g.*, Pitman B. Potter, THE CHINESE LEGAL SYSTEM: GLOABALIZATION AND LOCAL LEGAL CULTURE (ROUTLEDGE 2001) at 12-13.

[120] *See*, *e.g.*, Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program*, in CULTURE MATTERS HOW VALUES SHAPE HUMAN PROGRESS (Basic Books, 2000) Lawrence E. Harrison & Samuel P. Huntington (eds.) at 67.

[121] *See* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD (4th ed., Oxford, 2010) at 64.

[122] *See*, *e.g.*, Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT'L L. 263, 265 (2009).

But, that potential transplantation is likely to have been offset by the powerful economic relations those common law systems would have with the United States or the UK or the other common law economic powers (Australia and Canada to name just two). This is especially likely as those common law developing countries would probably have been former colonies or have been in other similar relationships for the common law to have been originally transplanted into their system.[123] Furthermore, with the general trend of international investment and commercial law toward a more common law feel, it is likely that the trend would also counter the influence of the civil law system on the developing common law system. Indeed, if the mixed jurisdictions are predictive, the almost invariable trend of legal cultural drift is from civil to common law and almost never in the opposite direction.[124]

3. International-Domestic Diversity

Another source of diversity is that international investment law, like most international law fields, takes place on two planes—both international and domestic. One might then expect that the legal culture of the field will reflect these two planes. Indeed, the legal culture present in an international investment law context will in broad terms reflect the legal culture of the domestic legal systems involved, typically civilian or common law systems. But, the field would also reflect the legal culture of international law and any relevant international institutions.[125]

This diversity or duality will impact the legal culture of international investment law in a number of ways. For example, the domestic legal culture may prove more powerful than the international legal culture, for despite the existence of an international legal culture, that legal culture will simply be less entrenched and robust than a domestic legal culture. As such the domestic legal culture may inhibit the role of the legal culture of international law on the legal culture of international investment law. This may be more of an issue for international investment law perhaps than many other international law fields for it is one of the fields of international law that has exceptionally close connection to states‟ domestic laws. Once again, this is an issue that will empower those states and the attorneys who are frequent participants in international investments, for their legal cultures will be more strongly reflected in international transactions. Most likely, those states will disproportionately tend to be United States and Britain, due to the dominance of their law firms as well as the fact that London and New York are the financial capitals of the world.

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[123] *See* Glendon, *supra* note 14, at 320-24 (discussing the common law‟s "distribution" methods).

[124] Glendon, *supra* note 14, at 968. But note Israel as an exception in its early years when the influx of civil law trained lawyers after the Second World War shifted the system toward the civil law. Palmer, *supra* note 54, at 6.

[125] If at the formation stage of the investment those institutions might include, among others, one of the regional development banks, or if at the dispute stage, the arbitration facilities of the International Chamber of Commerce in Paris. Legal cultural analyses of these institutions would be helpful, but at the moment the author is not aware of any such works. However, a recent symposium of the Swiss Institute of Comparative Law invited representatives of many international institutions to discuss the role of legal traditions and cultures within their institutions. For a volume including some of those reports, see COMPARATIVE LAW & INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS (PUBL. OF SWISS INSTIT. COMP. L) (forthcoming 2013) (Lukas Heckendorn & Colin Picker eds.) (forthcoming 2013).

In conclusion, a field‟s broad diversity does not mean a legal cultural analysis is inapplicable. Although the existence of strong diversity within a legal field may provide obstacles for a legal cultural analysis, the above discussion shows that the nature or character of the diversity may itself contribute to the legal culture of the field and its analysis may then lead to broadly applicable insights for the whole field.

E. The Dispute-Centered Development of the Field

Investment disputes are a major focus of those studying and working in international investment law. The resolutions of those disputes with their published decisions are significant sources of international investment law. The fact that the field is being developed by disputes is a significant factor in the ongoing development and maturation of the legal culture of international investment law.

Although it is true that a major part of the law in any field and system involves resolution of disputes, it is not the case that all systems, or even a majority, are significantly developed as a result of dispute resolutions. Dispute driven law formation, although it exists in all systems either as a de jure or de facto matter, is a primary feature of the common law or Anglo-American legal systems[126]—with its associated common law legal cultural characteristics. Civil law or the "continental" legal systems have elements of dispute driven law creation, but are, as a conceptual matter if not as a practical one, developed through scholarship and legislation.[127] In contrast, in the common law world, and to a significant extent in the international investment law world, the law is developed as a result of judicial opinions and the employment of precedent. Even when it is not the judiciary that is the driving force of the law but rather the regulators and legislators, in the common law world such legislation and regulation is often today created in response to disputes, and is very quickly subject to judicial interpretation that is then the main source of the law.

Dispute-centered law creation in the common law world is a reflection of the common law‟s pragmatism, in contrast to the civil law‟s traditional proactive approach of creating law from principles, in advance of disputes.[128] The legal culture associated with dispute settlement-driven systems is accordingly more pragmatic and less focused on principles. It also supports a larger role for judges and arbitrators, and a correspondingly smaller role for academics and legislators. However, those academics that are important in the development of international investment law may themselves contribute to the common-law gloss by their focus on disputes and the law created from those disputes. Even when some of those scholars argue that there is no precedent in international investment law, eventually they will have to admit that there is "de facto" precedent.[129] This is not to suggest that scholars and legislators are irrelevant. It may be the case that scholars in particular, more so than the legislators, play an ongoing and important role in the development of this diffuse body of law.

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[126] *See*, *e.g.*, Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240 (1999).

[127] *See*, *e.g.*, Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 731 (2005). Legislation can be broadly defined here to include codes, regulations, executive legislation, treaties and so on.

[128] Picker (WTO), *supra* note 1, at 121-22.

[129] Christoph Shreuer & Matthew Weiniger, *A Doctrine of Precedent* in the OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT (Peter Muchlinski, Federico Ortino & Christph Shreuer, eds) (OUP) (2008) at 1197.

Indeed, they are likely more relevant than is typically the case in the Anglo-American legal culture.[130] That may be a reflection of the fact that international investment law, like international law in general, is a mixed system, with some civilian characteristics still strongly present, even as the common law looms at the gate, voracious to devour everything. "Legislators" too, domestic or international (in the sense of state officials or diplomats negotiating treaties) are a part of the international investment order. The many efforts to create investment law proactively, either in the context of the BITs or other multilateral disputes, are proof of their existence. But, the resultant "legislation", in the form of BITS and other treaties and agreements, are too often written in vague generalities, allowing the jurisprudence to both inform the meaning and to develop the future path of the BIT or other treaty.[131]

The fact that international investment law is being developed increasingly by dispute resolutions suggest a greater role for the common law than might otherwise have been the case. The consequences for the legal culture of the field, at the macro- and micro-levels could be significant, as common law methods and approaches are increasingly employed, slowly shaping the legal culture, which then feeds back into the selection of common law devices to match that legal culture. Given how few legal systems in the world are in fact common law,[132] this suggests an advantage to those that hail from common law jurisdictions, or for those able to assimilate common law legal cultural characteristics into their own legal systems.

V. Conclusion

The mechanics and specifics of international investments have been subject to numerous valuable legal cultural analyses. Many papers have been written on the legal cultural issues that arise in investment arbitration and investment negotiation, and in the operations of investments in different legal systems. But, the field has not really been subject to a legal cultural examination at the system level. Although difficult and rife with obstacles, doing so can be a rewarding experience.

As this short attempt shows, despite necessary generalizations and simplifications, some critical legal cultural issues have been identified. Those issues include consideration of some of the legal cultural factors that may be driving the development of the field to some specific legal cultural characteristics that may be

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[130] Glendon, *supra* note 14, at 179.

[131] Olivia Chung, *The Lopsided International Investment Law Regime and its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 959 (2007).

[132] *See* Barnes, *supra* note 127, at 684 (showing that fifty-one nations utilize common law systems, whereas 115 nations have civil law systems). Civil law systems include most of Europe, save Ireland and England, and also include Russia, China, Mexico, South and Central America, and significant parts of Africa. In contrast, the common law systems include the United States, Anglo-Canada,England, Ireland, Australia, some African countries, most of south Asia (although family law tends to be based on religious law), and a few other countries around the world. *See id*. at 685.

> Common law (exclusive of any civil law), whether in "pure" or "mixed" form, is utilized by some fifty-one nations, or 26.7% of all nations of the world. These nations account for 34.81% of the world's population. . . . Civil law (exclusive of any common law), whether in "pure" or "mixed" form, is utilized by some 115 nations, or 60.21% of all nations of the world. These nations account for 59.01% of the world's population.

Id.

applicable across the field, with wide-ranging implications for its operation and growth. Those factors extend from the use of English to the limited liability of the MNCs involved in international investment. The legal cultural characteristics that may span the field range from such different attributes as a defensiveness associated with the divisiveness of the field to a common law pragmatism created by the significant role of dispute resolution on the development of the field.

Finally, if there is ever to be an international agreement on investment, and perhaps even a global institution, it would be helpful to understand the field from all perspectives. Legal culture is one of the perspectives that should be understood for it too often operates at a subconscious level, but has the ability to affect all aspects of the operation of the field. Furthermore, because the field, including any overarching treaty or institution, must interact with other fields and systems, each with its own legal cultures, it would be very helpful to know if there are likely to be any legal cultural disconnects in those interactions. Certainly, these and other legal cultural issues must be taken into account, for failure to do so could undermine the success of any future multilateral agreement or institution for the field.

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Dishing Up the Pie: Bringing the Poor to the Table of International Economic Law

Part 1: Poverty and International Law: Setting out the Framework

Title: Anti-Poverty v. The International Economic Legal Order?
A Legal Cultural Critique

Author: *Colin B. Picker*[*]

I. Introduction

International economic law ("IEL") poverty reduction policies have at times been successful, yet there is no question that poverty persists throughout the world despite significant global economic growth in the last half century. In many respects, poverty appears to be resistant to the poverty reduction policies of what is now a very sophisticated and comprehensive international economic legal order. This paper will consider one of the possible sources of that failure—the many different legal cultural disconnects or discontinuities that arise between the international economic legal order, its anti-poverty policies and the legal arenas within which poverty exists.

This chapter will consider those disconnects from a systemic perspective, though there will necessarily be reference to specific examples of IEL anti-poverty reduction efforts to provide examples of those troublesome legal cultural disconnects. This chapter will not, however, assess or dissect the failures of specific IEL anti-poverty reduction policies.[1] Rather, this paper will assume that all IEL anti-poverty policies, successful or not, face

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[*] Associate Professor, University of New South Wales, Sydney, Australia. A.B. (Bowdoin College), J.D. (Yale Law School). The research here is part of a larger study by the author on legal culture and IEL that will be part of the author's PhD.

[1] *See*, *e.g.*, the chapter in this edited work by Ross P. Buckley, *The Contribution of the International Financial System to Global Poverty*.

legal cultural issues that may undermine those efforts. Those issues would then be better handled for being identified and understood, allowing IEL poverty reduction policies a better chance for success, while at the same time minimizing any potential harms to the different legal and other cultures involved.

II. Legal Culture

Before embarking on a legal cultural analysis of IEL's poverty reduction policies, the term "legal culture" and its associated methodology, "legal cultural analyses", must first be explained.

To the extent legal culture and legal cultural analyses are associated with any one field, that field would be comparative law. But there are many different methods within the broader methodology or field that is Comparative Law—the scope of those comparative analyses range from the examinations of regulations, cases, process, governance, and institutions both in domestic and international legal systems.[2] Comparative analyses may also take a macro-perspective, by considering the legal system of a state or the legal tradition across many different states. Comparative law may thus consider the legal culture of communities, states, systems or traditions. But the terms "legal system", "legal tradition" and "legal culture" are often confused.

> I define legal culture to consist of those [cultural] characteristics present in [and tied to] a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the [legally related] actions or behaviours of the actors, organizations, and even of the substance of the system. [Crucially, legal] culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition.

[2] *See generally Methodological Approaches to Comparative Law Symposium Issue*, 16 ROGER WILLIAMS UNIV. L. REV. 1 *et seq* (2011).

Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are [vital] for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions. … By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.

Typically, however, comparative law focuses on legal systems and legal traditions, and not on legal cultures. Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations." Legal traditions, in contrast, are:

> families of legal systems, sometimes . . . legal models or patterns . … [I]t is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[3]

[3] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TULANE LAW REVIEW. 1053 (2001) (text at fn 68) (citations omitted).

> One can see that while similar, … the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. … [A] legal cultural analysis of an international organization would usually analyse just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization.[4]

Legal cultural analyses can be helpful in identifying legal cultural characteristics that are relevant to the operation of IEL's poverty reduction policies. But, despite the clear relevance of legal culture in this and other parts of the international legal order, it has been largely absent from examinations of international fields and institutions.[5] But, even an initial legal cultural analyses will very quickly disclose legal cultural characteristics previously not considered or revealed in earlier more traditional examinations of international fields or institutions. Indeed, preliminary legal cultural analysis of different parts of IEL, focusing heavily on the WTO in particular, have uncovered a series of legal cultural characteristics that should be considered when working within the IEL legal order.[6] Even more so than the WTO, IEL's poverty reduction policies are particularly suited to a legal cultural analysis as the human element, and hence the legal cultural elements, are present to such a greater degree.

As was the case in previous legal cultural analyses, the analysis here cannot stand alone, for the political, sociological, socio-political, historical, anthropological, and economic

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[4] Colin B. Picker, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW & INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS) (PUBL. OF SWISS INSTIT. COMP. L) (forthcoming 2012) (Lukas Heckendorn & Colin Picker, eds.) (hereinafter "Picker (IOs)") (most citations omitted).

[5] The exceptions are noteable, *see*, *e.g.*, Pablo Zapatero, *Modern International Law and the Advent of Special Legal Systems*, 23 ARIZ. J. INT'L & COMP. L. 55, 67 (2005) (focus on dispute settlement, and while excellent, too sparse on the issue of legal culture and traditions); *See* Picker (IO), *supra* note 4 for discussion of the reasons for the dearth of comparative analyses.

[6] In addition to works already cited in earlier footnotes, s*ee*, *e.g.*, Colin B. Picker, *WTO Governance: A Legal Cultural Critique* in GOVERNANCE IN CONTEMPORARY JAPAN (PUBL. OF UNIV. TOKYO INSTIT. SOC. SCI.) (Kenji Hirashima, ed.) (2011); Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold, eds.)) (Publ. of Swiss Instit. Comp. L) (2010); Colin B. Picker, *China, Global Governance & Legal Culture: The Example of China & the WTO*, in CHINA AND GLOBAL ECONOMIC GOVERNANCE: IDEAS AND CONCEPTS (Publ. Of Univ. Tokyo Instit. Soc. Sci.) (Junji Nakagaw, ed.) (2011),; Colin B. Picker, *International Trade & Development Law: A Legal Cultural Critique*, 4 LAW & DEVEL. REVIEW NO 2:4 (2011) (hereinafter "Picker (Development)").

contexts also need to be considered in order to fully understand the conflicts and disconnects between the participants involved in creating and implementing IEL anti-poverty policies.[7] For example, there are success stories associated with particular IEL policies that were unsuccessful when applied in other regions that had different contexts. One comparison of Sub-Saharan Africa and East-Asian development resulting from equivalent export led trade policies showed vastly different results for the poor of those regions—highlighting the importance of other non-IEL issues such as:

> "very stable political regimes[;] . . . relatively egalitarian income distributions predating the export orientation strategies[;] significant level of infrastructural development as well as capital infusions on relatively generous terms[;] a high degree of regional integration[; and export of] manufactured goods as opposed to agriculture." [8]

Those elements were present in East Asia and essentially absent in the sub-Saharan region, helping to explain the very different poverty levels, despite comparable levels of exports within the economies.[9]

Notably, however, legal culture is absent from the above otherwise excellent discussion of the different contexts, and yet there is no question that the two regions have vastly different legal cultures that should also be taken into account in order to ensure IEL anti-poverty policies are successful. Furthermore, each of those approaches and concerns, along with legal cultural approaches and concerns, are related to and overlap with each other. In an ideal world, each would need to be mastered; but the perfect should not be the enemy of the possible, and an initial, yet basic, understanding of the legal cultural issues involved would be very helpful in reducing the disconnects that may arise from the different and competing legal cultural issues at play when IEL policies seek to reduce or eliminate poverty.

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[7] Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1 (2010).

[8] Chantal Thomas, *Poverty Reduction, Trade, And Rights*, 18 AM. U. INT'L L. REV. 1399, 1407 (2003)

[9] *Id*.

III. Anti-Poverty Policies are not the same as Development Policies

Before engaging in a legal cultural analysis of the anti-poverty policies of IEL this chapter must identify relevant differences between poverty and development, for much of what passes as anti-poverty policy is more accurately characterized as development policy. There are significant differences between them that are relevant for a legal cultural analysis, and not surprisingly, identifying the relevant legal cultural differences will itself reveal insights into the legal cultural characteristics relevant to anti-poverty policies within IEL, and may also be helpful in legal cultural analyses of IEL's development policies.

There is no doubt that much of the international economic legal order is concerned with the amelioration of poverty. For example, "raising standards of living" and concern for the least developed states is front and centre in the Preamble to the Agreement Establishing the WTO.[10] The World Bank also notes that its "mission is to fight poverty".[11] Typically, however, the conversation is framed in terms of development, as indeed it is even in the WTO's preamble, while the World Bank describes its constituent parts as development institutions.[12] Indeed, that concern with development has been captured in both hard and soft IEL law, and in principles and doctrines within IEL. A hard law example is the "special and differential" treatment provisions within the WTO[13] and the IMF's Poverty Reduction and Growth Facility.[14] A soft law example may be the Millennium Development Goals[15] or the attempts to guide multinational enterprises when

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[10] *See* Marrakesh Agreement Establishing the WTO, preamble.

[11] See World Bank "About" webpage, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html .

[12] *Id*.

[13] *See*, *e.g.*, Andrew D. Mitchell, *A Legal Principle of Special and Differential Treatment for WTO disputes*, 5 WORLD TRADE REV. 445-469 (2006).

[14] *See IMF Website Factsheet on the Poverty Reduction and Growth Facility (*this program has now been replaced with the Extended Credit Facility) available at: http://www.imf.org/external/np/exr/facts/prgf.htm.

[15] *See* United Nations homepage for the Millennium Development Goals at http://www.un.org/millenniumgoals/

they invest in developing countries.[16] Those and other policies may be characterized as the field of international development law— an ever increasingly sophisticated body of law.[17] But it is not "international poverty law".[18] Not surprisingly, development law is considerably easier to find and hence to examine than is the case for anti-poverty laws, hard or soft, within IEL. While there is no question that development is rightfully a concern of IEL institutions' attention, so too are anti-poverty policies.

The following distinctions between poverty and development are relevant for a legal cultural analysis of IEL's anti-poverty policies. It should be noted that these distinctions are generally accurate, though, as with all generalizations and for all fields that are forced to employ generalizations and work in the aggregate, there will be instances, sometimes many instances, where the distinction does not hold true. For purposes of this chapter and its analysis, it may be said that:

> IEL development policies are more often concerned with the state and its overall economic development while poverty, in contrast, due to its focus on the individual, poverty may be more focused on the economic improvement of those sub-parts of the state that are impoverished.
>
> Development's usual subjects are developing states and their rights and opportunities within the international economic order.[19] In contrast, poverty is more often focused on the individual and the individual's rights and opportunities within society.[20]

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[16] *See*, *e.g.*, Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. Int'l L.J. 309 (2004); Auroa Voiculescu, *Privatising human rights? The role of corporate codes of conduct* in INTERNATIONAL POVERTY LAW: AN EMERGING DISCOURSE (Lucy Williams, ed.) (2006).

[17] *See* Tomer Broude, *Development Disputes in International Trade*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW (Yong-Shik Lee, Won-Mog Choi, Tomer Broude & Gary Horlick, eds.) (Cambridge Univ. Press) (2011) at 32.

[18] *See, e.g.*, Eugenia McGill, *Poverty And Social Analysis Of Trade Agreements: A More Coherent Approach?* 27 B.C. INT'L & COMP. L. REV. 371, 392 (2004) ("Recent World Bank publications and other documents suggest that there is a framework in place to link trade policy to poverty reduction. In general, however, trade liberalization is still seen as a development goal that is parallel rather than subordinate to poverty reduction.").

[19] See Part IV A below.

[20] *Id*.

Development, as befits a state-centred approach, aggregates the many state or region-wide issues that help to define a state as developing.[21] Indeed, elimination of poverty may be but one of the criteria by which development is measured.[22] In contrast, poverty may, though not always, be a description that aggregates the sum total of the personal conditions that have led to or describe an individual's impoverishment.[23]

Development leads to the economic and other improvement of the state in the aggregate, but the benefits can easily be captured by elites, such as the owners of businesses. In contrast, by more often focusing specifically on impoverished individuals, poverty reduction should benefit those at the lower end of the economic ladder, such as workers and their families, with less direct capture by elites.

Development is a transnational or international comparison of the economic status of states.[24] In contrast, poverty, especially relative poverty, will tend to be considered in domestic and local terms more than in international or transnational terms.[25]

Development policies have been brought within the international legal order more so, qualitatively and quantitatively, than anti-poverty policies which are less

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[21] See, e.g., World Bank's Development Indicators available at http://data.worldbank.org/indicator

[22] *Id*. ("Poverty" is but one section, comprising 17 indicators out of the 331 employed by the World Bank in assessing development.).

[23] Amartya Sen, COMMODITIES & CAPABILITIES (1987); *See also* Jonathan Haughton & Shahidur R. Khandker, HANDBOOK ON POVERTY & INEQUALITY (World Bank 2009) at 3.

[24] *E.g.*, the World Bank and the WTO both typically speak in terms of developed, developing and lest developed "countries"—not usually developing regions (intra or inter-state) or peoples. *See* note 13 above ("The World Bank is a vital source of financial and technical assistance to developing countries around the world"); WTO Doha Round at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[25] *See* Part IV A below.

> present within the international legal order, and may not be so easily regulated and shaped by the law.[26]
>
> Development is typically aimed at those states which in the aggregate satisfy the criteria of being in the process of development—as developing or least developed States. IEL Poverty reduction policies may be more acceptable in all states of the world, for there are impoverished communities and individuals in all states.[27]

Of course, the two fields do impact each other across many issues. For example, economic development of the state in the aggregate should reduce poverty, while poverty reduction for individuals should contribute to the state's overall economic development. Accordingly, any legal cultural insights previously identified with respect to international development law[28] may have some relevance to a legal cultural analysis of IEL anti-poverty policies, just as new insights generated by the analysis in this chapter may have some applicability to aspects of international development policy.

IV. IEL Anti-Poverty Policy Legal Cultural Characteristics

This chapter will provide a few examples of legal cultural characteristics that could have an impact on IEL anti-poverty policies. The examples will be grouped into four broad legal cultural themes, and generalizations will be employed even though the reality is that legal culture, like culture in general, is almost infinitely varied, and in that variety can impact IEL's anti-poverty policies in ways too numerous to consider.[29] Generalization and broad themes permit, however, insights that are useful—though the limitations of analyses based on generalizations and aggregation must always be kept in mind.

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[26] *See* Part IV B below.

[27] *See See* Colin B. Picker, *Islands of Prosperity and Poverty: A Rational Trade Development Policy for Economically Heterogeneous States*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW (Yong-Shik Lee, Won-Mog Choi, Tomer Broude & Gary Horlick, eds.) (Cambridge Univ. Press) (2011) (hereinafter "Picker (Regionalism)").

[28] *See* Picker (Development), *supra* note 6.

[29] Amartya Sen, Culture and Development, World Bank Paper (December 13, 2000), available at: http://info.worldbank.org/etools/docs/voddocs/354/688/sen_tokyo.pdf at 3.

A. An Individual, Personal, Relative and Subjective Tone

As noted above, perhaps the single biggest difference between the elimination of poverty and the promotion of development is that poverty is more directly associated with or aimed at individuals. Development, in contrast, has a less direct connection to the condition of individuals. This because development is more often associated with the economic condition, often in the aggregate, of abstract entities such as artificial persons, corporations, and political entities. In contrast, poverty is a personal condition—indeed, a deeply personal condition. Human beings, not abstract entities, be they states or otherwise, are the actors to whom the term poverty applies. This individual and personal characteristic of anti-poverty policies must be reflected in the legal culture associated with those policies.

Modern definitions of poverty strongly show the direct connection with individuals. The World Bank states that poverty "is pronounced deprivation in well-being".[30] Well-being is then measured in terms of individuals' access to the resources they need for living as well as their basic life conditions, such as health and education.[31] Indeed, the most sophisticated approach to understanding well-being in the context of poverty also supports the individual and personal nature of poverty. That approach is one suggested by Nobel Prize winner Amartya Sen. He argues that well-being is related to "a capability to function in society" and that "poverty arises when people lack key capabilities, and so have inadequate income or education, or poor health, or insecurity, or low self-confidence, or a sense of powerlessness or the absence of rights such as freedom of speech."[32]

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[30] WorldBank Poverty & Inequality Analysis, available at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:22569747~pagePK:148956~piPK:216618~theSitePK:336992,00.html

[31] *Id.*

[32] *See* note 29 above.

The personal nature of poverty is also clear from efforts to "identify" within states which classes and types of people may be considered to be impoverished.[33] In addition, the connection to individuals is also apparent from the fact that poverty is most usefully a relative term,[34] as are all descriptions of individuals. Whether someone is funny or tall or intelligent are for the most part only useful measurements relative to other local people's possession of those qualities. Thus, a person's impoverishment is most usefully considered in comparison to someone within the local or state community that has less of the indicia of poverty. Accordingly, a person considered to be living in poverty in the United States will have radically different levels of material possessions and living conditions than someone considered to be living in poverty in India. But, unlike more objectively measured human attributes such as height, where we may simply employ one measurement (distance between feet and top of head), poverty employs so many measurements, often quite subjective, that two individuals living next to each other in the same community and in similar conditions may disagree with each other as to whether they are impoverished.[35] Identification of impoverishment can thus be doubly subjective—varying across communities and between individuals in the same community. There can be little doubt that responses to the legal cultures relevant to anti-poverty policies, within IEL or otherwise, will likely have to reflect these subjective characteristics if they are to be successful.

IEL, in contrast, is not typically concerned with individuals. It is, after all, part of public international law, a body of law which outside the human rights context is traditionally directly concerned with states and not individuals.[36] Indeed, IEL is certainly not used to dealing with individual's personal conditions, such as a sense of "powerlessness", nor is the internal psychological outlook of participants normally a part of IEL. While there are aspects of IEL that may become personal and individual, such as specific investor rights or individualized antidumping orders, in those cases the individual is likely to be an

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[33] *Id.* at 4.

[34] *Id.* at 43-45.

[35] Haughton, *supra* note 23 at 60-63.

[36] *See generally*, Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241 (2001).

artificial entity such as a company and hence it is less likely that there will be the direct emotional connection to any one person or groups of people. While IEL may be able to work with poverty reduction at the macro-level, usually within the context of development, it is not presently substantively or as a matter of its legal culture typically oriented to handle individuals' personal and emotional conditions.[37] But, if IEL anti-poverty policies are to be more successful, they must expect to operate within a legal cultural context that may often be very strongly individualized, emotional, subjective, relative and personal.

B. A "Marginalization of Law" Legal Cultural Characteristic

It has been said that there is no separate field of international development law and that to the extent it does exist, it mostly comprises soft law.[38] While it has been argued before that those characterizations of international development law are not true,[39] that view of international development law is likely generous and respectful in comparison to a field that could be considered "international anti-poverty law". This chapter is not going to debate the reality or not of such a field, though there is no denying that to the extent the field is real it is an emerging field. Rather, here there will be a focus on the legal cultural consequences of the amorphous nature of such a nascent field.

As an initial matter, the difficulties faced when constructing an international anti-poverty law field may be related to the fact that the complexities involved in attacking poverty go significantly beyond creating and enacting new regulations and laws. In other words, the perception is that poverty may be best handled through complex, related and multifaceted approaches, including through tangible actions such as the provision of education,

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[37] *See*, *e.g.*, McGill, *supra* note 18 at 389-90 ("Whereas trade liberalization is part of the neoliberal economic policy framework commonly referred to as the "Washington Consensus," which the IMF and MDBs have pursued since the 1980s, current approaches to poverty reduction--which emphasize its multidimensionality, including elements of vulnerability and disempowerment--have their roots in alternative development discourses, such as UNDP's "human development" framework").

[38] *See* Picker (Development), *supra* note 6 at 44; *see also* Broude, *supra* note 17.

[39] *See generally* Picker (Development), *supra* note 6.

resources, social work, and so on—activities that touch on all areas of human regulation and as such are not clearly containable within one discrete field. Of course, this may overplay the impotence of IEL policies, for there is no shortage of legal initiatives that can come into play in the elimination of poverty. But the fact that effective anti-poverty policies may require efforts significantly beyond the scope of law and regulation imprints a legal cultural characteristic in which law is itself marginalized. This is not quite an "anti-law" (more of a "legal agnosticism") legal cultural characteristic, but it is one that will permeate the environment in which IEL anti-poverty must operate.

Another contributing factor to the generation of this legal cultural characteristic is the fact that anti-poverty policies have been less an explicit focus of specific IEL policies than other IEL goals have been. For example, within the GATT the whole of Part IV is devoted to development, whereas one is hard pressed to identify any specific part of IEL that is as clearly and specifically focused on anti-poverty policies. In part that may be because of the previously noted perception that anti-poverty is handled across many fields, and indeed is specifically thought to be subsumed within development policies. Anti-poverty may have been less a focus of IEL for the many reasons noted in the other sections of this paper, from the fact that it deals with individuals who are not normally the subject of IEL (discussed above) to the fact that it may require difficult close interaction with non-western legal cultures and systems (discussed below). Regardless of the reason, the fact that anti-poverty policies are less present within IEL will also contribute to the marginalization of law within the relevant legal cultures.

Relatedly, because IEL's anti-poverty impact is frequently a side product of the implementation or enforcement of IEL policies that are aimed at other issues, those anti-poverty benefits are less clearly connected to the international economic legal order. For example, the successful elimination of WTO prohibited subsidies in developed countries, such as the cotton subsidies in the United States, will also result in reduction in poverty among those developing countries that had been hurt by the subsidies.[40] Thus, the anti-

[40] Appellate Body Report, *United States - Subsidies on Upland Cotton*, WT/DS267/AB/R, (adopted 21 March 2005); *see also*, Karen Halverson Cross, KING COTTON, DEVELOPING COUNTRIES AND THE "PEACE CLAUSE": THE WTO'S US COTTON SUBSIDIES DECISION, 9 J. INT'L. ECON. L. 149 (2006).

poverty benefit is a secondary benefit of the dispute, with the primary benefit being the elimination of prohibited subsidies. While there may be direct IEL policies aimed at the elimination of poverty, such as international financial law that supports and promotes microfinance,[41] there are considerably less of them and they are correspondingly less visible than those IEL policies which have a secondary positive impact on poverty. The legal cultural consequence is once again to marginalize and segregate the elimination of poverty within IEL.

That marginalization is accentuated by the fact that IEL regulations and policies of relevance to poverty reduction are often in the form of state permitted exceptions to IEL obligations.[42] One example is that the prohibition on government financial subsidies to specific industries may be waived for developing countries' efforts to promote new or infant industries.[43] Provision of exceptions may reflect the view that certain demands may not be ideal economic policies in the circumstances faced by countries with extensive poverty levels. They may also be politically conceded in order to secure sufficient support for the primary obligations in the face of opposition from countries with chronic poverty. As a matter of legal culture, the extensive use of exceptions to achieve poverty reduction policy goals suggests that poverty reduction policies are frequently a second best policy, and more relevantly can be viewed as often being "outside" the law in that they are exceptions to the "law"—further contributing to a legal-agnosticism or "marginalization of the law" legal cultural character.

Finally, IEL institutional issues may also contribute to this legal cultural characteristic. Essentially, the primary institutional problem is that anti-poverty policies are simultaneously an IEL institutional orphan and a child of many competing IEL institutional parents. In other words, IEL lacks institutional coherence with respect to anti-poverty policies. Despite commitments to "policy coherence",[44] the sheer number

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[41] *Microfinance: A View from the Fund* (IMF Monetary and Financial Systems Department) (2005), at 16-20, available at http://www.imf.org/external/np/pp/eng/2005/012505.pdf.

[42] *See* Picker (Development), *supra* note 6 at 59.

[43] GATT Article XVIII.

[44] *See* McGill, *supra* note 18, at 384.

and variety of fields and institutions within IEL that overlap and often offer conflicting policies on anti-poverty is quite breathtaking. No one institution is paramount for anti-poverty the way that trade law has the WTO,[45] nor are there even institutions that while not paramount are the heavy weight players for the field, in the way that ICSID is for investment, UNCTAD for development, IMF for finance and so on. In contrast, anti-poverty is handled by numerous international organizations, from the World Bank and the Regional Development Banks to various United Nations bodies, with concomitant "turf battles". Furthermore, anti-poverty is supposedly covered by the substantive provisions of numerous fields, from trade to investment to finance.[46] In addition to no or poor coordination,[47] each of these fields and institutions will have their own legal culture which may not interface well with the legal cultures of the other institutions or fields.[48] Given the need for interconnected and coordinated anti-poverty policies, the clash of those IEL legal cultures may undermine the effectiveness of their creation and implementation, reinforcing the perception that law is simply less relevant. While not a problem unique to IEL anti-poverty policies, these issues nonetheless need to be addressed. While elimination of such conflict is not really possible in the absence of an overarching IEL institution and consolidation of the substantive law, recognition of the existence of the legal cultures and their potential negative interactions will at least permit the conflicts to be anticipated and ameliorated, bolstering the role of law and policy in IEL efforts to tackle poverty.

C. The Presence of Non-Western Legal Cultural Characteristics

There is no escaping the fact that much of the legal culture that will be encountered in IEL, particularly at the transnational and institutional level is associated with the major western legal traditions of the world—even as those archetypes are in the process of some

[45] Even the RTAs must show their allegiance to the WTO, though adherence, formally at least, to the strictures of such provisions as GATT Article XXIV.

[46] *See*, *e.g.*, the other chapters in this book.

[47] *See* McGill, *supra* note 18.

[48] *See* Picker (IOs), *supra* note 4.

levels of convergence and change.[49] The fact that the legal culture of the international economic legal order is firmly a part of the western legal tradition and its associated legal culture has been examined in detail in previous legal cultural analyses of both public international law and IEL.[50] But it is sufficiently critical to the legal cultural analysis of IEL's anti-poverty policies that it is worth presenting again and then supplementing to take into account the different context of IEL's anti-poverty policies.

As an initial matter, IEL is inescapably western. As a result of the last few centuries' expansion and influence of the western world, the western model of international law is now the dominant approach.[51] Furthermore, that western model itself comprises very strong elements derived from the two main western legal traditions—the Continental/Civil and the Common Law Traditions.[52] That western influence, and associated western legal cultures, is visible in the institutions and fields within international law—despite the many parts of the world with strong non-western legal traditions, systems and cultures that might, and should, otherwise have had an influence in the development of the modern international legal order. In contrast to the western international legal order, many of the people living in poverty that are typically the focus of IEL anti-poverty efforts are located in regions in which there are vibrant non-western legal traditions, systems and legal cultures. Such a difference must inevitably lead to a legal cultural disconnect.

The issue of this clash of western and non-western legal culture has been extensively discussed in previous legal cultural analyses of different parts of the international legal

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[49] *See* Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW, 3rd Edition (Thomson West Publishing 2007) at 799. *But see* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 71-72 (2001) (noting the enduring fundamental differences between the common and civil law systems).

[50] *See* notes 4 and 6 above.

[51] *See also* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093, 1094-99 (2008) (hereinafter "Picker (International)"), but for discussion of the non-Western role in the creation of international law, *see* Christopher G. Weeramantry, *Keynote Address, International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J. 277, 280-81 (2000); Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT'L L. & PRAC. 151, 158 n.25 (1999) (collecting sources).

[52] *See* Picker (International), *supra* note 51 at 1099-1106.

order.[53] Perhaps most relevant was the discussion in a recent legal cultural critique of international development law.[54] While differences between development and elimination of poverty have been noted above, with respect to the impact of the western legal culture much of the analysis is, as an initial matter, transferable to the IEL anti-poverty context.

Numerous examples from non-western systems suggest many specific legal cultural insights relevant for international development law and to IEL's anti-poverty policies. Using Africa as an initial example,[55] it was noted that:

> the Western legal cultural characteristic of change and dynamism within the law may be culturally less present in Africa, in which the past may figure larger in minds. Given the dynamic nature of international development law this may present a significant legal cultural obstacle to its implementation. Similarly, the role of religion is a significant force throughout Africa, even going so far as to imbue secular law with "religious or transcendent" significance. That role of religion may likely impact the place of positivism within the legal culture. International development law, despite its heavy normative basis, must still rely on positive law to achieve its goals. Anything which undermines the role of positive law may necessarily undermine the implementation of international development law.[56]

As was noted in the development law context, indigenous or chthonic people's legal culture, [57] which is typically non-western, may also pose legal cultural challenges:

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[53] *See*, *e.g.*, notes 4 and 6 above.

[54] Picker (Development), *supra* note 6.

[55] As was noted in that earlier work, "any employment of the generalization of Africa as one unit, whether of legal culture or otherwise, is clearly problematic, for there are numerous legal cultures within that continent. But that generalization is one that has been used by others in the past, including experts on African cultures and on whose work [the analysis relied]. Also, rather than it being a generalization, the examples [employed] are merely ones that are not uncommon throughout much of African legal culture" *Id*. at 66 (internal citations omited).

[56] *Id*. (internal citations omitted)

[57] "There are over 370 million indigenous people in some 90 countries, living in all regions of the world." *State of the World's Indigenous Peoples*, UN Permanent Forum of Indigenous Peoples, available at http://www.un.org/esa/socdev/unpfii/en/sowip.html.

> [S]ome chthonic legal cultures, while open to trade, have some highly restrictive characteristics with respect to commercial activities, including some that might be thought to stand in the way of development, though it is more likely that they simply need to be managed differently. Finally, and perhaps quite crucially, the role of the state does not fit well with chthonic tradition. This is evident in the revival in Africa and central Asia of "community-clan institutions". Relatedly, there may be a cultural disconnect as a result of the domestic law top-down decision making which inevitably arises as a result of the fact that international law implementation is typically handled by national governments, and not sub-federal entities or regions, or even peoples. Finally, there may be conflicts with respect to individual property rights obligations and community or tribal notions of collective property within international development law implementation, specifically in the intellectual property and investment contexts.[58]

Of course, there may be many characteristics of non-western systems that support IEL anti-poverty policies. The greater communal approach to property rights, for example, is likely to be of assistance when IEL tackles poverty. [59] But to the extent the IEL system does not typically embrace a communal approach, then even supportive non-western legal cultural characteristics will be placed in opposition to IEL's anti-poverty policies, undermining their effectiveness.

Consideration of the consequences of this cultural divide between the western public international/IEL and the non-western aspects within much of the regions with endemic poverty is beyond the scope of chapter. But, the issue is clearly significant, and it must be considered and handled in order to ensure the success of any IEL anti-poverty policies and programs.

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[58] Picker (Development), *supra* note 6 at 67-68 (internal citations omitted).

[59] *See* Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program*, in CULTURE MATTERS HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington, (eds.)) (2000) at 71.

D. The Role of Agrarian and Rural Legal Cultural Characteristics

States rarely comprise one homogenous legal culture, for the people that live in a state tend to be divided into different groups that vary by ethnic, economic, socio-political, and other divides. Each of those groups may differ in its approach and relationship to the law, reflecting and creating different legal cultures. Among the many ways to divide the people within one state is whether they live in rural or urban areas and whether they work within the agricultural or industrial/services sectors. To the extent these divisions harbor differing legal cultures it can then be expected that the differences will be relevant for IEL's anti-poverty policies. This is especially critical because the majority of the world's deeply entrenched poverty is found in rural and agrarian communities.[60]

There are many reasons for the relative absence of agrarian and rural issues within IEL. The different positions of agriculture/rural communities and industrial/urban communities may include: the general lack of inclusion of agriculture within IEL, and especially within international trade; [61] the corresponding focus on international trade and investment in industrial manufacturing and services that are more typically found in urban than rural parts of states; the focus on new issues such as trade in services; urban communities in developed countries relative weakness in shielding themselves from the forces of globalization in comparison to the power of the agricultural and rural part of the country, leading to greater IEL penetration into urban and industrial sectors;[62] and IEL's policy of treating each state as one unit and not typically focusing on the different subparts within states, thereby accentuating the aforementioned reasons.[63] As a result, agrarian or rural legal cultures will then be significantly absent or marginalized within IEL, to the detriment of anti-poverty policies that must operate within that environment.

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[60] World Bank, Global Economic Prospects: Realizing The Development Promise of the Doha Agenda 105 (2003), available at http://www.worldbank.org/prospects/gep2004/full.pdf

[61] *Id*. at 103 *et seq*.

[62] *See*, *e.g.*, Geoffrey Rapp, *Advanced Economic Development,International Trade, and Farmers: Is the New Global Economy Bad News for Agricultural Workers?* 5 DRAKE J. AGRIC. L. 471 (2000).

[63] *See* Picker (Regionalism), *supra* note 27.

While agrarian/rural and urban/industrialized legal cultures are not precisely understood,[64] we can identify certain typical differences between the two. Those differences are not absoluteand there will be clear differences also between urban and industrial and service industry legal cultures, and between rural and agricultural legal cultures, but for purposes of this paper urban and industrial/services will be considered together, just as will be agricultural and rural.

Urban/industrial/service legal cultural characteristics may be said to include the following:

> Greater legal innovation;[65]
> More professional judiciaries;[66]
> May be more closely regulated, supervised and connected to the government;[67]
> Greater connection with foreign and international legal culture;[68] and
> Access to law is more evident and plays a greater role in daily lives.[69]

In contrast rural/agricultural legal culture may be said to include, among other things:

> Greater roles for traditional and indigenous legal traditions;[70]
> More reliance on mediation;[71]
> More use of informal "social control" mechanisms;[72]

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[64] *See*, *e.g.*, Frances Gibson and Francine Rochford, *Dispute resolution in rural and regional Victoria* 21 ALT. DIS. RES. J. 111, 115 (2010).

[65] *See* Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts*, 1870-1970, 19 LAW & SOC'Y REV. 449, 454-55, 470, 478 (1985).

[66] *Id*. at 477.

[67] *See* Alan Berman, *Future Kanak Independence in New Caledonia: Reality or Illusion?* 34 STAN. J. INT'L L. 287, 303 (1998); John Gillespie, *Land Law Subsystems? Urban Vietnam As A Case Study*, 7 PAC. RIM L. & POL'Y J. 555, 561, 604-05, (1998).

[68] *Id*. at 602. (first with Chinese, then French and then foreign Communist legal culture).

[69] Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1364 (2004).

[70] G. Sidney Sillimam, *A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice through Mediation*, 19 LAW & SOC'Y REV. 279, 291, 295-96 (1985).

[71] *Id*.

> A "shortage of [formal and official] non-adversarial services (counselling, mediation and contact services)" [73]
>
> "[E]motional and financial strain of having to travel long distances to access services".[74]
>
> Greater flexibility within the law, both as a matter of expectation and as a matter of operation,[75] though that flexibility may itself undermine certainty and predictability.

The characteristics above suggest quite strongly that urban/industrial legal cultural characteristics are more likely to fit with IEL, while those of the rural and agrarian are less likely to fit so well. Thus, a pertinent legal cultural conflict might arise between a rural community's usual reliance on informal dispute resolution mechanisms with the more formalized dispute resolution mechanisms that may be bundled in with micro-finance or microtrade opportunities encouraged under IEL antipoverty programs. Similarly, there may be additional legal cultural disconnects arising from the fact that commercial obligations are considered communal or familial and not individual in many rural or agricultural societies, as opposed to the usual individual liability that is associated with western finance.

These and other legal cultural disconnects that may be present are particularly relevant for IEL anti-poverty policies given that the target of those anti-poverty policies, endemic poverty, will often be present to a greater degree in the rural and agrarian sectors of society. This is not to say it is not present in urban areas, but that the indicia of poverty are very much more present in the rural areas.[76] As such, to the extent IEL policies reflect IEL's legal culture and are hence more attuned to industrial and urban legal cultures, they

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[72] Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 Yale L.J. 1689,1694 (1989).

[73] Gibson & Rochford, *supra* note 64 at 113.

[74] *Id*.

[75] *Id*. at 116.

[76] *See Global Economic Prospects*, note 66 above; *see also* Picker (Regionalism), *supra* note 27 at 320.

will necessarily not fit as well with some of the legal cultural characteristics present in rural or agricultural communities.

V. Conclusion

One of the problems with legal cultural analyses is that they very easily identify issues and insights into the fields and institutions under examination, but do not so easily provide answers as to how to handle the revealed legal cultural disconnects. While the limitations of a chapter in an edited volume precludes a lengthy attempt at identifying solutions to the identified legal cultural issues facing IEL anti-poverty policies, this conclusion section will nonetheless suggest a few brief examples of potential avenues that may be pursued.

As an initial matter, sometimes the identification of the disconnect will itself suggest the solution for ameliorating any potential issues associated with the legal cultural conflict. For example, identification of a "marginalization of law" legal cultural disconnect suggests that the employment or acceptance of informal law, as opposed to reliance just on formal law, should be considered. Second, sometimes, a broad approach could be used to tackle multiple legal disconnects. For example, IEL anti-poverty policies may be more successful if they would take communities' legal cultures into account from the start (as do the many micro-IEL policies presently in vogue).[77] Another approach may be a greater employment of the principle of subsidiarity, permitting implementation at the local or regional level, or perhaps even at the tribal or ethnic level.[78]

There is still room for optimism concerning an effective role for IEL policy in reducing poverty. As an initial matter, once these legal cultural disconnects have been identified then efforts can be made to ameliorate any conflicts and disconnects. Further, as noted

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[77] *See*, *e.g.*, Colin B. Picker, *A Legal Cultural Analysis of Microtrade* (presented at the Second Law & Development Conference (Seattle, Dec. 2012).

[78] *See* Picker (Regionalism), *supra* note 27; *see also* Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L. J. 263, 267 (2006).

above, there will be legal cultural issues that actually may support IEL's poverty reduction policies. But, perhaps most positively, so long as efforts are made within the IEL system to reduce or eliminate poverty, one can expect that obstacles such as those posed by legal culture will eventually be tackled and resolved in the general desire to do good.

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A Legal Cultural Analysis of Microtrade

Colin B. Picker, *University of New South Wales*

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A Legal Cultural Analysis of Microtrade

Colin B. Picker

Abstract

As a new international economic policy, microtrade will face a whole host of issues, including potential legal cultural obstacles. Those legal cultural issues will arise as a result of the different and sometimes conflicting legal cultures of the varied participants within the different fora and communities involved in microtrade from the LDCs to the NGOs to the artisans within the exporting entities. This paper identifies many of the legal cultural issues involved in microtrade, with such identification ideally then permitting the amelioration of the negative impact on microtrade of those legal cultural issues. Many legal cultural issues will be explored, including the legal cultures associated with rural communities, women, international trade law, the microtrade organization, and the legal culture associated with small entities.

KEYWORDS: trade law, comparative law, microtrade, international economic law, legal culture

I. INTRODUCTION

Microtrade is essentially a mechanism to support development in the least developed states ("LDCs") through the creation of a mechanism, structure, and organization that will facilitate small scale international trade from the LDCs into more developed markets.[1] Microtrade seeks to make this work through leveraging the lower labor costs in the LDCs, demand in more developed markets, and through collaborative and voluntary efforts to minimize the costs of shipping and other barriers to such small scale trading ventures.[2]

In so doing, there will be a whole host of legal cultural issues that may stand in the way of effective implementation of microtrade policies. Those legal cultural issues will arise as a result of the different legal cultures of the varied participants within the LDCs, within the international organizations and fields that would be involved, and even within the developed states that will be the ultimate destination for microtrade products. While those legal cultural issues will often serve as obstacles, in contrast, and as will be briefly discussed below, they may sometimes serve to enhance microtrade initiatives. This article will seek to identify many of the legal cultural issues throughout the different fora and communities involved in microtrade, with such identification ideally then permitting the amelioration of their negative impact, or their enhancement if they have a positive impact on microtrade. Though this article will not, for the most part, present mechanisms that could be employed to offset any negative consequences from the clash or disconnects between the different legal cultures. Rather, this article will merely identify some examples of the legal cultural issues that will be relevant to microtrade, with such identifications being the significant first steps in eventually resolving them so that microtrade may work to best effect.

It should be noted that this article is not an indictment or negative critique of the idea of microtrade. Rather, this article seeks to support the idea of microtrade by noting the potential legal cultural problems that could undermine microtrade and thus must be handled to ensure the success of this innovative idea. But before embarking on the legal cultural analysis of microtrade, the concept of legal culture and legal cultural analyses must first be explained.

[1] Yong Shik-Lee, *Theoretical Basis and Regulatory framework for Microtrade: Combining Volunteerism with International Trade Towards Volunteerism*, 2 Law and Development Review, no.1 (2009), 367-399, at 368.
[2] *Ibid.*.

II. LEGAL CULTURE

Legal Culture covers a broad range of issues, with many of those issues also considered within comparative, socio-legal or legal anthropology works.[3] The associated methodology, legal cultural analysis, is one not typically encountered within the world of international economic law. While one of many methodologies and approaches within comparative law,[4] ones that often consider specific substantive laws or institutions, within legal systems, it is not one that automatically comes to the fore, for it is often misunderstood or confused with other related parts of legal systems and methodologies, namely the analyses of legal systems and traditions. Thus, as an initial matter, those terms must first be fleshed out in comparison to each other. Previous legal cultural analyses have discussed this issue before and so rather than start afresh that explication is laid out below.

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those [cultural] characteristics present in [and tied to] a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the [legally related] actions or behaviors of the actors, organizations, and even of the substance of the system. [Crucially, legal] culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to be found within international organizations and fields—for they too are legal systems. Those different legal cultures are [vital] for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions. It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal

[3] *See, e.g.*, M. Hirsch, *The Sociology Of International Economic Law*, 19 The European Journal of International Law, no. 2 (2008), 277.

[4] *See generally*, *Methodological Approaches to Comparative Law Symposium Issue*, 16 Roger Williams University Law Review, no. 1 (2011) *et seq*, 86 (comprising the papers from the 2009 Annual Meeting of the American Society of Comparative Law).

culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behavior/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behavior); the role/behavior/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.

Typically, however, comparative law focuses on legal systems and legal traditions, and not on legal cultures. Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations." Legal traditions, in contrast, are:

> families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[5]

One can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. In contrast, legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally describe broad groupings and more typically reflect formal sources of law. Consequently, [and using examination of international organizations to prove the point,] a comparative legal systems analysis of international organizations would focus on the formal rules within and across the

[5] U. Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 Tulane Law Review, no. 3 (2001), 1071 (citations omitted).

> organizations. Whereas a comparative analysis of the legal traditions of international organizations, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an international organization would usually analyze just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, overlap, [but differ in sufficiently critical ways as to justify the more narrow application in different analyses of one over the other two methods].[6]

Institutions, legal fields, and policies that operate at the "micro" level are easily impacted by legal culture, for the role of individuals and their attitudes towards them will correspondingly be greater than it would be on those institutions, fields and policies that operate at the macro or state level and where legal culture is aggregated and more easily subsumed by those institutions, fields and policies. Thus, microtrade, indeed all international economic law ("IEL") that operates at the micro level, from microfinance to microinsurance, will be substantially impacted by the legal cultures of the communities and fields involved. Each of those micro-IEL policies are, after all, implemented at the individual level—with those individuals' legal behavior and attitudes directly relevant and not submerged under layers of institutional bureaucracy. Similarly, because individuals working within micro-IEL will be involved in matters of direct personal consequence to them, one can expect their passion and emotional attachment to be considerably higher than would be the case for participants involved in macro-IEL policies.[7] How that emotion and associated passion expressed will depend to a great extent on the culture and in particular on the legal culture of the communities within which the individuals reside and work.

The legal culture of relevance to microtrade will of course vary with the communities within which the participants are located or affiliated. Those communities will have a wide variety of legal cultures. One concern may be whether given such a large number of different communities that will be involved

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[6] C. B. Picker, "An Introduction to Comparative Analyses of International Organizations" in L. Heckendorn and C. B. Picker, (eds.), *Comparative Law & International Organizations* (Swiss Institute of Comparative Law, forthcoming 2012) (hereinafter "Picker (IOs)") (most citations omitted).

[7] *But see* C. B. Picker, "International Trade as a Tool for Peace: Empiricism, Change, Passion, and the Israeli-Palestinian Conflict, appearing" in Tomer Broude & Arie Kacowicz, (eds.) *Trade as a Promoter of Regional Peace* (Jerusalem, Davis Institute for International Relations, 2006); C. B. Picker, "Trade & Security: Empiricism, Change, Emotion & Relevancy," in P. Alai, T. Broude, and C. B. Picker, (eds.) *Trade as the Guarantor of Peace, Liberty, and Security? Critical, Historical, and Empirical Persepectives* (American Society of International Law Press, Studies in Transnational Legal Policy: A Series of Books, 2006).

with microtrade across the globe, and indeed even within one country, how anything useful can be discussed in relation to microtrade and legal culture. In fact, there are two immediate approaches of value. The first approach is to identify legal cultural characteristics that will generally be found throughout the more typical communities involved, so that problems that may arise from legal cultural disconnects with the microtrade policy can be anticipated and ameliorated. The other approach is to identify if there are any legal cultural issues that will be present within the microtrade or micro-IEL policies and institutions themselves, and hence should be identified to ensure they do not hinder the implementation of those policies among the many different legal cultures of the world. This article will consider both of these approaches. Though, confined to just those two approaches necessarily leaves out the detailed identification of legal cultural issues in specific microtrade initiatives, but those analyses should be part of the background work for those specific future projects—the legal cultural equivalent of environmental impact statements/assessments prior to construction projects.

It must be noted that many of the issues identified as being a part of legal culture also have substantive characteristics as well, be they found in formal legislation, treaties, regulations or even in the less formal customary law found both within international law and within domestic or even tribal legal systems. Of course, they too should be considered, though here the focus is more on the somewhat inchoate and intangible legal cultural of the different fora and communities. For example, this article will consider the way that the relevant legal cultures treat the role of women in legal transactions, though there will also be more formal and customary rules in many of those systems that specifically focus on those roles as well.[8] Similarly, this article will consider the legal cultural aspect of the way that developed countries treat former colonies, though clearly it is always worth considering any IEL substantive aspects of those enduring relationships.

Finally, it should be pointed out that this article does not suggest that legal cultural analyses are themselves sufficient to ensure an effective consideration of the context within which microtrade policies will operate. Indeed, other issues, some of which are related to legal culture, must also be considered, such as, the political, sociological, socio-political, historical, anthropological, and economic context. This article, however, will simply focus on legal cultural considerations, leaving those other contextual analyses for other examinations of microtrade.

[8] *See, e.g.*, S.Hofstetter, *The Interaction Of Customary Law and Microfinance: Women's Entry into the World Economy*, 14 William & Mary Journal of Women and the Law, no.2 (2008), 337.

III. LEGAL CULTURES OF RELEVANCE TO MICROTRADE

Even though microtrade is conceived as operating for the benefit of LDCs, it will nonetheless operate across many different fora: from the LDC states to the developed state markets for the products; from the centrally planned to laissez-faire states that exist across all levels of economic development; and from western to non-western states. Microtrade will furthermore apply to a wide range of communities and participants within these different states: from women in developing countries to small businesses in developed countries; from rural indigenous communities to impoverished urban communities; and from artisans in developing countries to NGOs in developed countries. In each of these and other groups there will be specific legal cultural issues relevant to microtrade policies that should be considered and handled if microtrade is to have its best chance for success. The length of this article precludes an exhaustive consideration of all the communities and participants involved and all of the legal cultural issues that are relevant. Nonetheless, this article will provide a few examples to highlight the applicability of the methodology to microtrade.

A. Legal cultural issues related to LDCs

The idea of microtrade is that it seeks specifically to assist in the development of LDCs, though it should be briefly noted here that there is no conceptual reason why the model could not be applied in the non-LDC developing countries, or perhaps even in impoverished communities in developed countries.[9] Of course, there is no shortage of political and other reasons why the idea is not likely to be applied outside LDCs, but that is not an issue for this article.[10] Nonetheless, the concept may achieve its greatest impact in the LDCs, a group of states that have otherwise failed to reap much of the benefits of the development movement of the last half century.[11] Thus, to the extent there is limited resources or enthusiasm and

[9] Though the microtrade model proposed by Lee seems to rely upon the very low labor costs in the LDCs, *see* Lee, *supra* note 1, pp. 6-8, the fundamental idea being proposed should still be applicable outside the LDCs in the right circumstances.

[10] *See, e.g.*, C. B. Picker, *Neither Here Nor There—Countries that Fall Between the Developed and the Developing World in the WTO*, 36 George Washington International Law Review (2004), 147, 160-167. ; C. B. Picker, "Islands of Prosperity and Poverty: A Rational Trade Development Policy for Economically Heterogeneous States" in Yong-Shik Lee, Won-Mog Choi, T. Broude and G. Horlick, (eds.), *Law and Development Perspectives on International Trade Law* (Cambridge University Press, Cambridge, 2011),p. 327.

[11] Lee, *supra* note 1, pp. 3-4.

energy for creation of microtrade, it should then be focused on applying it within the LDCs.[12]

There are clearly a whole host of legal cultural issues that are likely to be present within LDCs that are relevant when creating or implementing microtrade. Of course, many of those legal cultural issues will be present in other developing or even in developed states, but the impact of these legal cultural characteristics is likely to be greater within the LDCs, where IEL policies may already be struggling to acquire traction. Nonetheless, the examples of the analysis provided here could also be applied within other developing and developed states.

1. The presence of non-western legal cultural characteristics

As has been previously shown in earlier legal cultural analyses, IEL, and hence microtrade which exists within IEL, is a legal system that substantially fits within the western legal tradition.[13] Furthermore, it is the case that the western legal systems have "colonized" most of the world, with most legal systems outside the "west" incorporating significant parts of one of the two major families of the western legal system, the common or civil law families. [14] Whether those systems have in place civil or common law systems is typically a product of the colonial or neo-colonial history of the system.[15] Thus, we can expect the LDCs to have substantial western aspects to their legal systems. Those western parts of LDCs' legal systems will not then typically be a source for any legal cultural disconnects with IEL and microtrade. Though it should be noted here that despite the western heritage, the significant degree of mixing with the original and later legal traditions, systems, and cultures that may have taken place could result in those original western elements no longer fitting so well with more classically western legal systems and cultures, such as is found within IEL and trade. Furthermore, if the system is heavily civil or heavily common law, then it may, as is also the case for many legal systems in the developed world, encounter disconnects with international law and IEL, which are themselves mixed systems, reflecting civil or

[12] Indeed, some of the developing and developed states already have in place schemes to assist small businesses. *See*, *e.g.*, the United States' Small Business Adminsitration, available at: <www.sba.gov>; South Africa's SEDA (small enterprise development agency), available at: <www.seda.org.za>.

[13] C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal Of Transnational Law, no. 4 (2008), 1093, 1094-1101 (hereinafter "Picker (International)").

[14] *See* M. Glendon, P. G. Carozza, G., & C. B. Picker, *Comparative Legal Traditions: Texts, Materials and Cases on Western Law*, (3rd ed., Thomson West Publishing, 2007), pp. 42, 68-72, 320-24. There are 51 common law system states and there are 115 civil law system states, which together cover 94% of the world's population. *See* W. R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 Louisiana Law Review, no. 2 (2005), 677, 685. Though it should be noted most systems are "mixed" to some extent, including with non-western systems. *See* E. Örücü, "General Introduction" in Esin Örücü (ed.), *Mixed Legal Systems at New Frontiers* (Wildy Simmonds and Hill, 2010), pp. 1-2.

[15] *See* Glendon, *supra* note 14, pp. 68-72, 320-24.

common law legal cultural characteristics at different points,[16] which may then clash with the opposite legal culture of the domestic system.

To the extent microtrade interacts with legal cultures that include within them non-western legal cultural characteristics, one may anticipate a legal cultural disconnect with western legal systems, including much of IEL and international trade. Of relevance here is that there will be sufficient non-western legal cultural characteristics within many of the LDCs. A significant number of LDCs have typically retained pre-colonial legal customs or traditions, often in the areas of family law or inheritance.[17] Furthermore, to the extent there are strong tribal or indigenous communities or cultures within the LDC, it is likely that their traditional legal culture has survived in one form or another, in one part of the legal system or another, or has influenced the incorporation of the western law. As such, there will be legal cultural disconnects that arise when the non-western domestic legal cultural characteristics interact with the western legal cultural characteristics of microtrade.

Because the interaction of non-western legal cultures and IEL has been discussed before in other recent legal cultural analyses,[18] this article will simply provide a few different but brief examples to highlight the issue. For example, among the suggestions to make microtrade work is employment of microfinance,[19] but the use of microfinance may raise concerns in some systems where non-western approaches to finance may be present, such as among communities where Islamic law permeates the legal culture and where there may be restrictions, formal or otherwise, on such typical economic transaction tools as interest charges.[20] Of course, there are mechanisms and approaches that have been employed to permit these sorts of projects in places or among communities where Islamic law has an influence.[21] But, critically, these and other such issues need to be identified so that they can then be managed in a way that does not lead to a direct conflict between the local communities and the other microtrade participants.

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[16] *See* Picker (IOs), *supra* note 6.
[17] *See* Glendon, *supra* note 14, pp. 968-70.
[18] C. B. Picker, *International Trade & Development Law: A Legal Cultural Critique*, 3 Law and Development Review, no. 2 (2011) ; C. B. Picker, "Anti-Poverty v. The International Economic Legal Order? A Legal Cultural Critique" in K. Shefer (ed.), *Poverty & the International Economic Law System* (forthcoming) (hereinafter "Picker (Poverty)").
[19] *See*, *e.g.*, Lee, *supra* note 1, p. 13.
[20] B. L. Seniawski, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 Columbia Journal of Transnational Law, no. 3 (2001), 701.
[21] Though note that Islamic finance has developed satisfactory mechanisms and approaches to finance that cover the roles played by interest charges. *See*, *e.g.*, N. Mersadi Tabari, *Islamic Finance and the Modern World: The Legal Principles Governing Islamic Finance in International Trade*, 31 The Company Lawyer, no. 8 (2011), 249.

There may also be legal cultural issues associated with the non-western lack of individual liability, and the employment of communal/family/tribal liabilities.[22] Another issue likely to be encountered is in group/communal property legal cultures.[23] Those different notions of land ownership can also lead to the inability to prove title under western models,[24] which can itself then undermine microtrade projects. For example Neef notes, in the context of fair trade transactions, the land ownership obstacles that Hmong farmers faced,

> Legal constraints have rendered it impossible for the litchi processing cooperative to apply for a Good Manufacturing Practice (GMP) certificate which is a prerequisite for marketing their products in local supermarkets. Being members of an ethnic minority group settling in a national park, they do not have officially documented land ownership rights. Hence, the processing facility could not be legally registered to date.[25]

The many and different legal cultural impediments arising out of the clash between western and non-western legal cultures is a subject that deserves a multi-volume study. But, it is sufficient here to note that those involved in microtrade need to be sensitive to the potential existence of such non-western approaches, and to try to identify them from the start so they can be handled at the inception of the microtrade transaction and not later when it will be much harder to resolve, potentially putting the entire microtrade transaction in jeopardy.

2. Rural/agricultural legal cultures

Much of the issues already identified above tend also to be associated with rural and agricultural societies. After all, non-western legal cultures are more likely to have survived outside urban or industrial environments which would more likely have been brought under the dominant western legal cultures. But, the legal cultural issues associated with rural and agricultural communities are much more than just a greater likelihood of encountering non-western legal cultural characteristics. Indeed, rural and agricultural societies will necessarily have a different approach to the law than will be found in urban and industrial societies.[26]

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[22] H. Patrick Glenn, *Legal Traditions of the World*, (4th ed., Oxford, 2010), p. 72.
[23] *Ibid*., p. 70.
[24] A. Erueti, *The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law*, 23 Arizona Journal of International and Comparative Law, no. 3 (2006), 543.
[25] A. Neef, K. Mizuno, I. Shad, P. M. Williams, and F. Rwezimula, *Community-Based Microtrade in Support of Small-Scale Farmers in Thailand and Tanzania*, 4 Law and Development Review, no. 1 (forthcoming 2012).
[26] In this work, rural and agricultural communities are conflated, though clearly they will differ on a great many issues with respect to legal culture and otherwise. Similarly, urban and industrial communities, and

Furthermore, urban and industrial regions will typically be in greater harmony with the IEL system and as such one should not expect the mere fact that microtrade is applied in an urban or industrial setting to lead to legal cultural disconnects with microtrade. Though, if the microtrade were located in severely depressed parts of an urban environment, such as the favelas in Brazilian cities, then we very well should expect there to be legal cultural issues that need to be taken into account.

As recently noted in a legal cultural analysis of poverty and IEL:

> Urban/industrial/service legal cultural characteristics may be said to include the following:
>
> > Greater legal innovation;
> > More professional judiciaries;
> > May be more closely regulated, supervised and connected to the government;
> > Greater connection with foreign and international legal culture; and
> > Access to law is more evident and plays a greater role in daily lives.
>
> In contrast rural/agricultural legal culture may be said to include, among other things:
>
> > Greater roles for traditional and indigenous legal traditions;
> > More reliance on mediation;
> > More use of informal "social control" mechanisms;
> > A "shortage of [formal and official] non-adversarial services (counseling, mediation and contact services)"
> > "[E]motional and financial strain of having to travel long distances to access services".
> > Greater flexibility within the law, both as a matter of expectation and as a matter of operation, though that flexibility may itself undermine certainty and predictability. [27]

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sometimes service and commercial communities, are conflated here, though without question they too would differ on a great deal, be it legal culture or otherwise. But, for purposes of this short work, use of the conflated pairs is defensible, for agriculture does tend to be in rural communities, and rural communities do tend to be significantly involved in agriculutre, while urban communities are more likely to have industrial than agricultural economies, and industrial entities are themselves more likely to be found in urban regions.

[27] Picker (Poverty), *supra* note 18, p. __ (quoting B. Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 Yale Law Journal, no. 8 (1989),1689, 1694; and F. Gibson and F. Rochford, *Dispute resolution in rural and regional Victoria*, 21 Alternative Dispute Resolution Journal, no.2 (2010), 111, 115., but other citations ommitted).

Just as those legal cultural issues were relevant to IEL anti-poverty policies, so too they are relevant when considering microtrade. The few differences noted above suggest that microtrade that is to be applied within the rural or agricultural sector may need to be adjusted in order to ensure that rural communities' more informal approach to the law is reflected, or else when there are disputes, as must inevitably be the case, microtrade participants from rural or agricultural communities may be more vulnerable in a system that may employ a more formal dispute resolution mechanism. But, the differences may also work to the benefit of microtrade's application within agricultural and rural communities. For microtrade, because of the small and personal nature of the transactions, may need to rely on the informal and personal more than is typical in long-distance transactions, reflecting a greater need for trust and understanding between the parties. In ordinary international commercial transactions, trust is also critical, but is often substituted by such sophisticated devices as documentary sale transactions involving letters of credit.[28] We should assume that given the small volumes, the low profit margins, and the support already being provided to the small entities involved in microfinance that there will be less employment of the traditional trust substitutes and greater reliance on old-fashioned personal trust. Thus, the greater reliance on personal relationships within rural and agricultural communities will actually support the application of microtrade. This is an example of a legal cultural characteristic that can, depending on the specific circumstances, play either a supportive or destructive role.

In any event, recognition of the potential for different legal cultural approaches between participants from rural/agricultural and urban/industrial communities may be important in ensuring microtrade is effective.

3. Other LDC factors

While not solely confined to LDCs, as Lee notes, within LDCs there is often:

> poor social and industrial infrastructure, insufficient capital and low levels of technology, low literacy rate and education level, lack of entrepreneurship and management expertise, insufficient political leadership for economic development coupled with political instability, corruption and weak government institutions with absence of effective administrative support, and even some cultural issues deterrent to economic development[29]

[28] *See* R. H. Folsom, M. W. Gordon, and J. A. Spanogle (eds.), *International Business Transaction Hornbook* (2nd ed., Westlaw, 2001) chapters 1-8.
[29] Lee, *supra* note 1, p. 4.

Each of these will necessarily have a legal cultural consequence or characteristic associated with it. Thus, it may be that "insufficient political leadership" and the presence of "political instability" can lead to a legal culture where the law is unable to develop, and may instead stagnate. Such a legal environment is not one conducive to the implementation of such novel devices as microtrade. Similarly, the "lack of entrepreneurship and management expertise" will mean that the legal culture of those involved in microtrade will likely be deficient in those parts relevant to commercial, labor and business law—critical fields for the success of microtrade. Instead, as has already been observed in the fair trade context, there will be a need for "learning by doing" with concomitant "trial and error".[30] In any event, below, for the purpose of highlighting potential avenues of examination, just two of the above criteria will be considered in greater legal cultural detail.

a. Endemic corruption

While corruption may not be legal in any society,[31] it is nonetheless a part of the general culture of many of the regions in which poverty is endemic, including among a significant number of LDCs.[32] Leaving aside the causal question of legal culture permitting or leading to endemic corruption,[33] there is no question that the presence of endemic corruption within the legal system has an impact on the legal culture, and hence on the legal culture's receptivity to microtrade.

Corruption's impact on legal culture can be considered at the specific or system level. At the systemic level, Patrick Glenn, in his excellent book on legal traditions, discusses the destructive impact corruption—pecuniary, institutional and intellectual—has on legal traditions.[34] He notes that corruption "may destroy larger traditions from within."[35] That observation will be equally the case for legal cultures, for the same forces that permit corruption to destroy a legal tradition will also have an impact on legal culture, perhaps even more forcefully for legal culture will have no institutional or substantive law to serve as a bulwark against the negative forces of corruption.

Furthermore, the negative role of corruption may be accentuated in LDCs by the all too common inadequate or faulty importation of western legal cultures and

[30] *See*, *e.g.*, at a more basic level in Neef, *supra* note 25.
[31] *See* Transparency International "*Frequently Asked Questions about Corrpuption*" No. 9, available at: <http://www.transparency.org/news_room/faq/corruption_faq#faqcorr9>.
[32] *See* Transparency International "*Corruption Perceptions Index*", available at: <http://www.transparency.org/policy_research/surveys_indices/cpi>.
[33] *See*, *e.g.*, M. Kurkchiyan, "Judicial Corruption in the Context of Legal Culture," in D. Rodriguez and L. Ehrichs (eds.), *Global Corruption Report, Transparency Int'l, Global Corruption Report 2007: Corruption in Judicial Systems*, p. 99, available at: <http://www.transparency.org/publications/gcr/gcr_2007>.
[34] Glenn, *supra* note 22, pp. 28-30.
[35] *Id*. p. 28.

traditions into the LDCs, where the protections against corruption failed to be imported or to take hold. As Glenn notes, specifically in the development law context:

> Western development work has thus far been unable to overcome the problem of widespread corruption of western institutions and western law when it has been transplanted abroad, since there is no immediate way of reconstructing western ethical and intellectual support for such type of law abroad. [36]

Thus, the legal traditions, and legal cultures within the LDCs are at even greater threat from corruption than is the case in the developed world. Despite the obstacles LDC legal cultures may lay in the path of microtrade, corruption's destruction of that every same LDC legal culture may be much more harmful for microtrade. After all, as an inherently legal organism, microtrade needs to be planted in a legal cultural environment for it to flourish.

In addition to its systemic negative effects, corruption may also impact legal culture at more specific and concrete levels. At the most basic level, the rule of law, itself a legal cultural characteristic,[37] as well as so much more, is eroded by endemic corruption. The attrition of the rule of law within a legal culture is clearly problematic for the success of a rules-based policy such as microtrade. More concretely, "in legal cultures exhibiting widespread corruption . . . levels of trust are low."[38] Clearly the loss of trust within the legal and general culture of a community will be a very serious concern for microtrade which, as noted earlier,[39] will necessarily require higher levels of trust than might otherwise be expected in the usual international transaction.

Corruption is a discrete issue, but one that has such significant impact on development policies, it should not be left out of any analysis, even of a legal cultural analysis. As Glenn has shown, corruption plays a role in the life of legal traditions, and as argued here—in legal cultures as well. Keeping corruption squarely in the sights of microtrade policy development, at all levels, including at the legal cultural level is critical to the success of any microtrade policies.

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[36] *Id*. p. 284.
[37] *See, e.g.*, R. Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 Michigan Law Review, no. 7 (2003), 2275, 2285.
[38] H. E. Chodosh, *The Eighteenth Camel: Mediating Mediation Reform in India*, 9 German Law Journal, no. 3 (2008), 251, 280.
[39] *See* infra Part III A 2.

b. Low literacy and education

Lee also identifies "low literacy rate and education levels" as one of the central factors undermining development in the LDCs.[40] Literacy is, of course, directly related to legal literacy, which in one sense can mean ability to interact in an increasingly legal world.[41] Literacy and associated legal literacy are considered by some to be integral to the existence of a legal culture,[42] and clearly have a large impact on the legal culture. A few examples are provided here to highlight some of the legal cultural consequences that may arise.

As an initial matter, lower literacy and education will invariably marginalize those without the tools to take an active or sophisticated part in the development of the legal system and its culture. Thus, even more so than is usually the case, this will lead to capture of the "official" or "formal" [43] legal culture by elites. One can then expect the legal culture to fail to reflect those lacking legal literacy. Indeed, lack of education and literacy may lead to a legal culture with insufficient transparency and rule of law, which will itself be an issue for the success of microtrade policies, and indeed successful IEL policies in general.[44]

A more prosaic effect may be a "dumbing down" of the legal culture. While some dumbing down is inevitable when complex legal concepts and procedures are employed by non-legally trained members of society, it is likely that the constitutional, political, sociological and historic background necessary to understand the legal system is even less present in an illiterate society that lacks formal education. In some case the vacuum of knowledge may even lead to a legal culture divorced in significant respects from the actual legal system—a "fallacious legal culture."[45] This may happen when popular culture is derived in part from foreign cultures with different legal systems and it replaces the image of the local legal system in the minds of the public with that of a foreign legal system. For example, American or British television programs with strong legal components may lead a foreign public to believe that all legal systems, including their own, operate in the same manner as that seen in those programs.[46] This may

[40] *See* Lee, *supra* note 1, p. 4.
[41] J. Boyd White, *The Invisible Discourse of The Law: Reflections on Legal Literacy and General Education*, 54 University of Colorado Law Review, no. 2 (1983), 143.
[42] C. Osakwe, *Anatomy of the 1994 Civil Codes of Russia And Kazakstan: A Biopsy of the Economic Constitutions of Two Post-Soviet Republics*, 73 Notre Dame Law Review (1998), 1413, at Part VII A.
[43] It could be said that the official or formal legal culture will be the legal culture in the aggregate, the "one" most likely to interact with and reflect the formal organs of government and of the judiciary. Whereas the unofficial or informal legal culture will then be that present within specific subsets of the state, such as individual communities or among the ordinary people, and that rarely interacts with the official or formal legal organs of the state or the formal or official participants of the legal order.
[44] *See, e.g.*, M. Beutz, *Functional Democracy: Responding To Failures Of Accountability*, 44 Harvard International Law Journal, no. 2 (2003), 387-432, 428.
[45] I hereby coin this phrase!
[46] *See* Picker (IOs), *supra* note 6, p. 91.

happen when an LDC participant misunderstands their own legal system and indeed even that of the developed country market for their goods—for most developed markets will not be Britain or America, and hence will themselves have different approaches to the law than that conveyed through American and British media and popular culture. Clearly, if such beliefs are a part of the legal culture of an LDC one can expect microtrade to encounter obstacles related to misunderstandings of their law

Needless to say there are many other legal cultural consequences of low literacy and education levels,[47] but the above are sufficient to show that where those conditions apply, thought needs to be given to associated legal cultural obstacles. Thus, at a practical level, those legal cultural consequences can interfere with successful microtrade through: participants' erroneous understandings of their own legal systems and lawyers; their inability to monitor their lawyers or to take part fully in legal issues; diminished ability to effectively participate in formal contract negotiations, contract enforcement and implementation' and eventually undermining their participation in dispute resolution. Microtrade will be sorely tested if it is to coexist with these negative conditions.

B. Other legal cultures and characteristics relevant to microtrade

In addition to consideration of those legal cultural characteristics that are directly associated with LDCs, there are legal cultures and legal characteristics that are associated with the mechanism or operation of microtrade itself that must also be examined. Those characteristics include, among others, that:

> The LDC entities be small, micro after all;
> There will be significant involvement of participants outside the LDC—from NGOs to the governments and purchasers in the developed state markets;
> Microtrade takes place within the international law and IEL framework;
> It is likely that microtrade will have a proportionately larger involvement of women; and
> Because the present proposal for microtrade includes the idea of an organization to facilitate microtrade, the legal cultural aspects of such an organization must also be considered.

[47] *See, e.g.,* P. Michell, *Illiteracy, Sophistication and Contract Law*, 31 Queen's Law Journal, no. 1 (2005), 311.

The legal cultural characteristics or consequences of each of these are briefly considered below.

1. Smallness

Microtrade is a devise to facilitate development through small trading entities. Lee defines it as "international trade on a small scale, based primarily on manually produced products using small amounts of capital and low levels of technology available at a local level in LDCs."[48] There are, of course, legal cultural consequences of "smallness." As an initial matter, small production facilities and businesses, especially if they are new or new to even this small scale of operation, will be less connected to the dominant commercial legal culture, as their typical and historic transactions will likely not have required the full services of that system. Indeed, a related issue to smallness that is accentuated in the LDCs is a general lack of interaction, at an organized level, between the private and public sector. As Lee notes: "[t]he working institutional arrangement between the private sector and the public sector . . . is not found in many LDCs, and it is not likely to be seen in the foreseeable future."[49] This relative legal cultural isolation from the larger legal culture is a less than ideal setting in which to set up microtrade, though once aware of these limitations, the microtrade policy put in place can make adjustments to ameliorate any potential problems, and perhaps even take advantage of the isolation to ensure negative traits within the dominant legal culture are kept at bay.

At a more concrete level, small entities will typically employ lawyers much less often[50] and one would therefore expect that they would more often resort to informal networks and relationships.[51] As a matter of efficiency it may not make sense to employ lawyers as frequently or deeply as it would in larger or more sophisticated entities.[52] The role of law is thus likely reduced when entities are small. This diminished role for law will clearly have an impact on the legal culture. Most notably, the legal culture will reflect less formal use of the law and

[48] Lee, *supra* note 1, p. 1.
[49] *Ibid*., p. 5 (note internal citation omitted).
[50] L. M. LeSage, *Sticky Thickets: Local Regulatory Challenges For Small And Emerging Sustainable Businesses*, 31 Western New England Law Review, no. 3 (2009), 673 ("small businesses cannot afford the luxury of in-house counsel or large-firm business lawyers specializing in regulatory compliance. Many cannot even afford dues for trade organizations that may be able to represent their interests in regulatory or legislative proceedings. Unlike large corporations, with in-house lawyers and regulatory compliance staffs, the owners of small businesses must either take their personal time to wade through the complex regulations or spend scarce resources on attorneys to help them do so" (internal citations omitted)).
[51] *See, e.g.*, J. Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 Law and Society Review, no. 2 (1994), 193.
[52] This may be so even if small firms may feel the impact of regulations more than bigger firms where economies of scale spread regulatory compliance costs out over a correspondingly larger business.

its actors and institutions. This is not to say this does not work effectively or most efficiently for these small entities – especially in the domestic and local setting. Rather, so long as it is understood that the legal culture operates this way, then it can be taken into account, either through explicitly making the microtrade legal relations more formal or by co-opting the informal mechanisms and approaches into the relationship.

Small entities may also adopt a different risk analysis than larger entities. This may be the case where the assets of the small entities constitute the total or majority of the assets of the participants/owners or where there is less limited liability or where management are also the owners and not employees of the entities. All those factors, ones much more likely in small entities and more likely in LDCs, suggests greater risk aversion which will influence their attitude to the law and disputes, in other words, will shape their legal culture.[53] These characteristics will be accentuated by interactions with the global market, where they may be especially susceptible, more so than larger and diversified entities, to global and domestic market fluctuations. Their legal cultural attitude towards international economic law regulation and hence microtrade may thus be less favorable than larger companies, as they may be more suspicious and less trusting of the formal IEL system.

Another issue associated with "smallness" is that small entities that manufacture goods in small quantities may often employ artisans and craftsmen, which then raises a whole series of related questions. For example, might artisans have their own legal culture? Are there legal cultural issues associated with the "low levels of technology" they will likely employ? Is the relationship to intellectual property stronger in an artisan community than would have been expected in a business community within an LDC? Would the risk analysis discussed above be accentuated within artisan legal culture? While not dealt with here, the issue of artisan legal culture should be explored further.

Finally, the legal cultural issues associated with "smallness" may also be relevant to the purchasers of microtrade transactions in the target markets in developed countries. This is because it is not unlikely that the bulk of those willing and able to support microtrade will be smaller purchasers, not the Walmarts of the world. Thus, the legal cultural consequences of smallness are visible even in developed countries and must be considered at all points of microtrade transactions.

[53] *See* Neef, *supra* note 25 (noting the risk aversion of the Hmong lichi growers).

2. Developed country participants

The target markets of microtrade are typically going to be developed countries, though there is nothing within the microtrade concept that would preclude any market, developing, LDC or otherwise serving as a market for microtrade products.[54] But, given the likely centrality of developed country markets for microtrade, it is probable that much of the support for setting up and maintaining microtrade initiatives will be driven by participants from developed countries, be they NGOs,[55] developed state governments, or even corporations.[56] Identifying the relevant legal cultural issues of those participants is important for mitigating any potential legal cultural clashes between their legal cultures and that of the LDC communities and even with that of microtrade or any microtrade organization itself (see below). For example, to the extent a developed state government is required to be involved in facilitating microtrade, for example by reducing the barriers to microtrade goods, such as through amendments or extensions of GSP[57] or through more relaxed application of rules of origin,[58] then the legal culture of the country and, for example, its views on exceptions or on discretion granted to officials may be important. Similarly, to the extent historic post-colonial relationships and their role within the legal culture are relevant and hence support LDCs that are former colonies or undermine those that were not former colonies,[59] then that too it is relevant.

The legal culture of the target states with respect to private and commercial law may also be relevant. For example, when it comes to contract creation, interpretation and enforcement, does the legal culture of the target developed state market support the more relaxed attitude that may be necessary for microtrade transactions – particularly in the early stages of the microtrade relationship? Those target corporations, as well as the NGOs that are likely to be involved, have in the fair trade context tended to increase bureaucratization and apply increasingly hard standards, ones that have been increasingly unattainable to the developing country beneficiaries.[60] In addition, there is a question whether the

[54] Indeed, Lee refers to "participating developing countries" as being potential target markets for microtrade. *See* Lee, *supra* note 1, p. 16.
[55] It is likely that the NGOs involved will be located in developed countries, if the Fair Trade Movement is any indication. *See* P. Khumon, *Microtrade and the Fair Trade Movement*, 5 Law and Development Review, no. 1 (forthcoming 2012), (noting that all the fair trade certifucation agencies are in developed countries).
[56] *See* Lee, *supra* note 1, p. 16.
[57] *Ibid*.. pp. 18-20.
[58] *Ibid*. p. 23.
[59] *See*, *e.g.*, Partnership Agreement between Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (Cotonou Agreement) OJ 2000 L 317/3; *but see*, L. Bartels, *The Trade And Development Policy Of The European Union*, 18 European Journal of International Law, no. 4 (2007), 715 (discussing the gradual shift of the EE away from colonial preference).
[60] *See*, *e.g.*, Khumon, *supra* note 55.

fundamental legal culture of the supportive corporations will fit over the long term with microtrade, especially when their legal culture may be driven by their too-often short term duty to shareholders.

Perhaps the biggest issue will be the direct cultural clash or disconnect between the legal cultures of the LDC participants and those of the target markets. For example, it has been noted that the developed country participants may have a greater interest in the human rights and protection of the environment aspects of microtrade policies than on its development aspects – in contrast to the LDC participants who will more likely be concerned with the development aspects of microtrade.[61] While that in and of itself is not a legal cultural clash, for the different objectives can coexist, it is that the legal cultural attitudes towards many of the human rights and environment concerns could be different—from different views of gender and children's roles, to different attitudes to the uses and managements of the environment. For example, in the context of fair trade, Neef noted that the "German-based fair-trade organization expects to work with farmer groups that adhere to certain social standards rather than with individual producers."[62] Also, "additional benefit for the community has to be clearly evident to the fair-trader."[63] The ultimate purchaser may thus impose their own determination as to what constitutes "community benefits", perhaps even under a western viewpoint that is not in sync with local legal and general culture. Finally, there might also be an urban-rural legal cultural conflict, given the LDC suppliers may likely be rural and the developed country purchasers urban.

It is hoped that the disconnect likely to arise between the legal cultures of the LDC suppliers and the developed country purchasers/end users will generally be anticipated at the microtrade project formation. Though it may be that the specifics will not be subject of the level of analysis which is necessary if the disconnects are to be handled. While this article has briefly engaged in such a specific analysis, the few examples clearly show the applicability of the methodology and the need for such detailed analyses.

3. The legal culture of international law and international trade law

Two other related legal cultures that are also worth considering are the legal cultures of international law and that of international trade law. Those legal have been explored in detail before,[64] or mentioned above[65] and thus do not need to be

[61] One such clash may concern the use of child labor. *See ibid*., pp. 17-18.
[62] Neef, *supra* note 25.
[63] *Ibid.*
[64] *See* Picker (International), *supra* note 13; C. B. Picker, "A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization" in E. Cashin Ritaine, S. Patrick Donlan, and M. Sychold (eds.), *Comparative Law and Hybrid Legal Systems* (Swiss Institute of Comparative Law, 2010) (hereinafter "Picker (WTO)").

reproduced in detail here. But, two specific legal cultural issues associated with international law and international trade that will likely play a specific role in the effective implementation of microtrade policies will be noted here.

As an initial matter, the legal culture of international law is heavily based on states as the legal actors as opposed to private parties.[66] Given the role that individuals and private parties will have in microtrade, this may be an issue. While international trade and other parts of IEL are increasingly accepting of the role of individuals and private parties,[67] the fields are still structured within the state-centered world of international law. Thus, even when individuals and private parties are explicitly covered by IEL policies, including future microtrade policies, there will be an undercurrent opposed to their involvement that must be handled to ensure that microtrade will operate as intended with respect to individuals and private parties.

Another major concern is that the legal culture of international trade law is typically focused on hard law.[68] If the fair trade movement is an indication,[69] then it is likely that much of microtrade will operate as soft law. Soft law, however, is not viewed so favorably in the hard-law dominated world of international trade where hard law, in the form of treaties in particular, is

> "viewed as especially well positioned to address what can be considered the distributive challenges inherent to international trade . . Trade liberalization is, as a result, an inherently fragile activity, and is difficult to achieve on a sustained level . . . Treaties help respond to these domestic pressures both by making commitments to liberalization more credible and by developing institutions that make defections from commitments more costly. . . Because of the costs involved in establishing hard legal orders, participants want to make sure signatories live up to their commitments."[70]

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[65] Part III A 1 infra.
[66] *See* Picker (IOs), *supra* note 6, p. __.
[67] Two clear examples are the role of individuals in investor-state dispute settlement and in unfair trade remedies.
[68] C. Brummer, *Why Soft Law Dominates International Finance - and Not Trade*, 13 Journal of International Economic Law, no. 3 (2010), 623, 624-27. Those parts of international trade law that are soft, such as most of Part IV of the GATT concerning developing countries, have largely proven to be ineffective. *See, e.g.*, Yong-Shik Lee, "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade & Development in the WTO" in Yong-shik Lee (ed.), *Economic Development Through World Trade: A Developing World Perspective* (Kluwer Law International, 2008), p. 9.
[69] Khumon, *supra* note 55.
[70] Brummer, *supra* note 68, pp. 624-25.

While soft law has a venerable heritage within international law,[71] in particular playing a vital role in the slow acceptance of invasive international obligations, such as in human rights,[72] within the dollars and cents world of international trade law it tends to get short shrift.[73] As such, to the extent microtrade is soft law, the legal culture of the international trade law field will tend to view it quite negatively.

Overall, the legal culture of international law and international trade in particular cannot be ignored when constructing microtrade, especially as so much of microtrade will need to be implemented by individuals and within domestic legal systems, both of which are not normally the direct subjects of international law or international trade law.

4. Legal cultural issues associated with gender

The role of women in microfinance has been well established.[74] It may very well be the case that we will see a similar gender impact when microtrade policies are implemented. If so, there seems to be little question that such a large role for women in microtrade will raise challenges for many of the legal cultures at issue in microtrade. Indeed, as has been found in many of the regions where microfinance has been launched,[75] there is some concern that some of those legal cultures will stand in the way of women's effective participation in microtrade, thereby undermining the implementation of microtrade in those instances.

Specifically, given the patriarchal and gendered nature of a great many of the legal cultures within the LDCs, it is likely that their legal culture is not set up to allow a large role for women in such economic enterprises. Indeed, in some of the legal cultures, there may be explicit legal cultural and substantive obstacles to the role of women in any microtrade policies.[76] This may be particularly the case where religious law intrudes into the commercial arena. Though, because microtrade may permit enterprises to operate out of the home, microtrade may be a vehicle to permit women to have access to economic opportunities in countries where women may historically have encountered cultural barriers to their work outside the home.[77]

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[71] *See, e.g.*, G. C. Shaffer, and M. A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minnesota Law Review, no. 3 (2010), 706.
[72] *See, e.g.*, P. Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale Journal of International Law, no. 2 (2007), 301, 304.
[73] Brummer, *supra* note 68.
[74] *See generally*, Hofstetter, *supra* note 8.
[75] *Ibid*.
[76] *Ibid*.
[77] A. K. Wing, and P. P. Nadimi, *Women's Rights in the Muslim World and the Age of Obama*, 20 Transnational Law & Contemporary Problems, no. 2 (2011), 431, 456 (noting the issue with respect to microfinance).

Of course, the legal cultural issues involved are sensitive ones that run deep within many of those communities, and, like so much in the cultural and legal cultural arena, may not be well understood by external observers. Furthermore, this article cannot begin to touch on this complex issue, so much as raise it for others more expert with these issues to pursue. So, just as with most of the issues raised in this article, those involved in creating and implementing a microtrade policy need to be aware of this issue and seek ways to resolve it that are respectful of the deep-seated local cultural and legal cultural attitudes.

5. Legal cultural issues of a microtrade organization

The early work on microtrade has included within it the proposal for the creation of an international organization whose responsibility would be to foster microtrade. As Lee suggests:

> The proposed microtrade organization will not only be expected to perform logistical functions to promote microtrade worldwide, but also to cooperate with sovereign states on regulatory issues for importation . . . . The microtrade organization will also be expected to cooperate with relevant international bodies on international trade, including the [WTO and UNCTAD]. . . One possible form of the microtrade organization will be a non-profit, a [NGO] . . . operating on a global scale . . . Another possible form . . . will be an intergovernmental organization . . . that has a recognized international legal status as an intergovernmental agency, such as various agencies of the United Nations and the WTO.[78]

It has recently been argued that international organizations have their own legal culture, and that their legal culture can be a factor in their effective operations.[79] As such, it is imperative to identify and understand the legal culture of an international organization.

An international organization's legal culture is derived from numerous sources. As an initial matter, the international organization officials and civil servants will themselves contribute to the legal culture through their conscious and subconscious use of their own original home legal culture. This is true even for non-lawyers, for all members of society retain within themselves a reflection of their home country legal culture. This is important for even non-lawyers within international organizations are called on to act in legal ways or in ways with legal effect as part of their jobs—from negotiating to implementing international legal obligations and relationships. Reflecting the state power

[78] *See* Lee, *supra* note 1, p. 14.
[79] *See* Picker (IO), *supra* note 6.

structures of the world and western legal imperialism, it is probably safe to assume that the vast majority of international organization officials and civil servants will have a legal culture that is western, or more specifically that is continental or common law in style and that they will impart aspects of that legal culture within the organization.

Furthermore, to the extent the international organization recruits from certain regions more than others, even within the western legal environment, that will mean the legal culture of that region has a greater presence in the international organization. Similarly, if the organization's recruitment process tends to favor a certain approach, say through an entrance exam that favors one legal culture over another or through a demand for specific credentials associated with a region or system, then there will be a shift within that organization towards specific legal cultures. An example that has been suggested of this issue is that the WTO's recruitment process may be resulting in a Secretariat more common law than civil law in style.[80] Indeed, the issue is not just the presence of the legal culture, but the concomitant lesser presence of other supposedly equal legal cultures in international organizations that should reflect their entire membership.

In addition, to the extent the international organization has a specific headquarters then we can expect that legal culture to somehow permeate the organization, even through such innocuous mechanisms as the organization's local and necessarily often legal relationships with domestic vendors. Of course, although it is typical to try to insulate international organizations from host state's influences, that isolation will not be total, and will over time infiltrate the international organization. This will especially be the case to when the organization's officials live for extended periods of time in the host state, as they will necessarily absorb some aspects of that legal culture.

Another factor that may influence the development of an international organization's legal culture is the language of the organization itself. As noted in a recent legal cultural analysis of international organizations:

> Language and legal tradition are closely tied together, with, for example, English associated with the common law and French, German, Spanish and Italian tied to the civil law tradition. Furthermore, Chinese and Arabic are also typically associated with non-common law legal systems—be they civilian, socialist, or Islamic legal systems. Indeed, any major western language employed other than English will tend to end up reflecting more civilian, or rather, less Anglo-American and hence common law legal culture within the institution. Whereas the use of English will tend to strengthen the emergence and perhaps dominance of a common law legal

[80] See Picker (WTO), *surpa* note 64, pp. 133-34.

> culture. . . Thus, language is visibly a very strong factor in predicting the trend and eventual legal culture and tradition of an [international organization]. [81]

The legal culture of a future microtrade organization will be critical as it will need to work across very different legal cultures and create and assist in the implementation of policies at the micro level. Failure of the microtrade organization to either walk that fine line between the different legal cultures or to appropriately handle the differences between its own legal culture and that of the LDCs or target developed markets will necessarily undermine the organization's mission and skew the even application of microtrade policies. Thus, the above and other factors, such as the role of the substantive law at the heart of the mission of the organization or the role of significant states in the organization, all discussed at length in the earlier legal cultural analysis of international organizations, needs to be considered in order to ensure any future microtrade organization works as effectively as possible.

IV. CONCLUSIONS

The above examination was necessarily brief and introductory, seeking to convey a few simple points directly and through brief examples. One goal of this work is to show that microtrade-related legal cultural issues can be identified and that legal cultural factors and characteristics will exist among all constituents, fora and regions that would be involved in any microtrade policies. Another critical point is that those legal cultural characteristics can be important factors in the effective *implementation* of microtrade policies. Furthermore, if identified early enough they can then be taken into account in the *creation* of microtrade policies, hopefully ameliorating any negative impact of potential clashes or disconnects between the different legal cultures. Or, best of all, identified legal cultural characteristics may in some circumstance be harnessed to enhance the effectiveness of microtrade policies.

This examination was also the latest in a series of legal cultural analyses designed to highlight the legal cultural methodology through application across the many different areas of IEL, from existing fields and institutions[82] within IEL to ones merely at the design stage, as is the case with microtrade. Though, in

[81] Picker (IOs), *supra* note 6, p. __.
[82] *See, e.g.*, C. B. Picker, "International Investment Law: Some Legal Cultural Insights" in L. Trakman and N. Ranieri (eds.), *International Trade and Investment Law: Development and Directions* (Oxford Univ. Press, forthcoming 2012); Picker (WTO), *supra* note 64.

addition to its wider utility within and without international trade and IEL, this brief application of legal culture to microtrade may also be specifically relevant to microfinance, as well as any of the other nascent micro-IEL fields, such as micro-investment[83] and micro-insurance.[84] These micro-fields, like microtrade, are especially susceptible to legal cultural issues for they work most directly with communities and individuals, all of whom will more likely "wear their legal culture on their sleeves" than would the usual cast of characters in IEL, such as governments, international organizations, industry associations or large multinationals. Accordingly, in these early years of its development, microtrade would benefit greatly from a more detailed consideration of the many different legal cultures that will envelope its future operations. It would further function most effectively were it to include legal cultural analyses prior to the creation and implementation of specific microtrade projects.

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[83] *See, e.g.*, P. Bechky, *Microinvestment Disputes*, presented at the 2011 Law and Development Institute Conference: Law and Development at the Microlevel: From Microtrade to Current Issues in Law and Development, available at: <http://www.lawanddevelopment.net/2011Conference.php>.

[84] *See* International Labor Organization's Microinsurance Innovation Facility, available at: <http://www.ilo.org/public/english/employment/mifacility/>.

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Chapter 9. *Conclusions, Specific Insights and Recommendations*

I. Introduction

In this final chapter, many of the dissertation's conclusions and insights about legal culture, legal cultural analyses, and about international economic law ("IEL") will be gathered in summary form, showing the vast range revealed in the dissertation.[1] Also, based on and expanding the individual chapters' recommendations, this conclusion chapter will suggest some possible approaches to ameliorating the consequences of legal cultural conflicts that arise in the development and implementation of IEL. Finally, the appendix to this chapter provides a proposed legal cultural impact analyses table that can be employed to identify and handle legal cultural conflicts in the context of specific IEL projects and policies.

II Legal Cultural Insights

This dissertation concerns the application of legal cultural analyses to IEL—whether the methodology could be usefully applied to such an unusual area of the law. The positive answer to that question being evident from the many insights generated during the preliminary analyses found within the case-studies. This section will provide a cross section of examples of those insights.

A. Insights On Legal Culture as a Methodology

A legal cultural analysis is a difficult and unusual methodology. As discussed in Chapter 1 of this dissertation, much has been written about the obstacles to the widespread or accessible use of the methodology. Yet much of those discussions about legal cultural analyses are theoretical.[2] As with so many other aspects of life, understanding can only begin to be achieved when one "stops talking and begins doing". In this case that means

[1] The citations provided at each point then permit reference back into the earlier chapters and case-studies where the issues are presented in context and in greater detail.

[2] *See* Chapter 1, Part V.

that a better understanding of the methodology can only be achieved when one stops theorizing and actually uses the methodology in real case-studies of the sort found in this dissertation. Indeed, the application of what had previously been primarily theoretical considerations of legal culture, bringing those concepts into the practical world to help develop the law and our understandings of the fields and the methodology, is another of the ways in which this dissertation is a novel contribution to those fields.

The legal cultural analyses in the prior chapters of this dissertation have covered a variety of different international fields and institutions, permitting the methodology to be tested across a disparate landscape. That was a severe test for the methodology—despite the comparability of international law fields with other legal systems,[3] international law and its fields are still different in many special and unique ways from domestic legal systems and fields.[4] Nonetheless, a number of important insights into the methodology have been uncovered. Those include:

> **Maturity**. The methodology may work best with more mature fields of study. Relatively new or less sophisticated or developed fields may similarly be more difficult. In addition, lack of institutional or centralized structure within the field under study makes the analyses more difficult and less focused. For example, Chapter 6's analysis of international investment law was correspondingly more difficult than in those chapters concerned with the WTO or international trade law.[5]
>
> **Role of Domestic Law**. As was noted with respect to international development law in Chapter 3, when there are many different domestic legal systems involved, each with their own different legal cultures, it can be harder to identify a consistent legal cultural relationship between the international field/ institution and the domestic participants.[6]
>
> **Western Legal Cultures**. The methodology specifically brings to the fore the legal culture conflicts that arise when the domestic systems involved are non-Western or one with significant non-western components. For example, those domestic systems too often the focus of IEL's poverty reduction efforts described in Chapter 7.[7]
>
> **Traditional & Historical Legal Cultures**. The legal cultural analysis will be more complete and accurate when it includes consideration of traditional and

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[3] *See generally* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1083 (2008) (hereinafter "Picker (International Law)").

[4] *See*, *e.g.*, William E. Butler, *International Law and the Comparative Method*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 25, 28 (William E. Butler ed., 1980); *see also* Chapter 2, Part III.

[5] *See*, *e.g.*, Chapter 6, Part III. The citations in this section and throughout will typically just cite one chapter as an illustration of the point, despite the fact that many of the other chapters will likely have considered the issue as well.

[6] *See*, *e.g.*, Chapter 3, Part IIIB.

[7] *See*, *e.g.*, Chapter 7, Part IVC.

historical legal cultures. This is particularly necessary with legal systems which have survived intact or with significant continuity over the centuries. For example, as is the case with Chapter 4's analysis of China.[8]

Aggregation. Legal cultural analyses can be complex. Chapter 8's analysis of microtrade was a perfect example that the legal culture sought or examined is actually the aggregated legal culture of the many different participants—transnationally, internationally and domestically.

Wide Applicability. The example of China and the WTO in Chapter 4 shows the ability of the methodology to stretch beyond the traditional common law/civil law analysis. The analysis can even include such legal cultural characteristics as virtue (a component of Confucianism), not often considered within legal analyses.

Complementarity.[9] The methodology can identify conflicting as well as complimentary legal cultural characteristics. For example, some non-western legal cultural characteristics may support anti-poverty policies, such as communal property rights. Though such communal property rights may themselves clash with the individualism emanating from the liberal economic theory underlying IEL, that is also typically part of the belief structure of western IEL participants.[10]

Improved Communications. Identification and amelioration of conflicts among legal cultures, one of the primary goals of the methodology, can be considered to be a way of improving communication between communities, domestically and internationally.[11] Though, there needs to be care that once communication on the issue is established that the communication is not, as is typically the case, driven by the economically more powerful party, be it an IEL organization or a powerful economy. As noted in Chapter 6's analysis of international investment relationships, the weaker party, and their legal culture, is too often ignored or displaced entirely.[12]

Bridging Difference. Legal cultural analysis can also serve as a way to bridge different and contested understandings of international fields. For example, as was discussed in Chapter 3, the ability of a legal cultural analysis to bypass the contentious issue of whether development should be narrowly or broadly defined.[13]

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[8] *See*, *e.g.*, Chapter 4, Part II1.

[9] Complementarity means, among other things, ~~"a~~ relationship or situation in which two or more different things improve or emphasize each other's qualities", Oxford Dictionaries (available at http://oxforddictionaries.com/definition/english/complementarity).

[10] *See*, *e.g.*, Chapter 7, Part C.

[11] *See*, *e.g.*, Chapter 2, Part VI.

[12] *See*, *e.g.*, Chapter 6, Part IVD2.

[13] *See*, *e.g.*, Chapter 3, Part I.

Observer Effect. The research into the dissertation suggested that the methodology may be subject to the observer effect.[14] Repeatedly, after introducing this work to officials at international organizations,[15] they typically noted that it would henceforth be hard for them to not seriously consider legal culture in their future work.[16] In other words, it may be that a legal cultural discussion/examination may itself lead to changes in the very legal culture being examined.

Cultural Fallacies. When working with the methodology, care must be taken with respect to false or ephemeral cultural characteristics. These can range from erroneous local beliefs about litigiousness or, as was a question in the research on the WTO for this dissertation, the extent of the adversarial or consensual approaches within the WTO.[17] In addition to providing false data, there are also legal culture questions concerning the origin and the real impact of such fallacious views.

Contention, Emotion and Passion. The more contentious a field, whether among academics, practitioners, officials (international and domestic) and the public, the more passion and emotion will be aroused, and hence the more the human-centered legal cultural analysis will be relevant.[18] Thus, for example, the field of investment involving the sometimes conflicting goals of states and foreign investors is one that is surrounded by a great deal of emotion, and hence is a field very closely connected to legal culture.[19]

The Inexpert Researcher. In the process of carrying out the case-studies, numerous issues were confronted that were outside the direct expertise of the researcher. Yet, as is exhibited in Chapter 4's analysis of China's legal culture, important insights were still found despite my relative lack of knowledge of

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[14] The term "observer effect" can refer to the fact that the act of observing something may change it. *See*, *e.g.*, Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 388 (2012).

[15] *See* Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold, eds.)) (Publ. of Swiss Instit. Comp. L) (2010) (hereinafter "Picker (WTO)"), at section 3.

[16] Indeed, after presenting the idea at a conference at the Swiss Institute of Comparative Law, that institute organized a conference the following year to explore the role of legal traditions and cultures within international organizations. *See Comparative Law and International Organisations: Cooperation, Competition and Connections* (Swiss Instit. Comp Law, 9-10 September 2010). Chapter 2 of this dissertation is the result of my participation in that subsequent conference, as I was asked to introduce the methodology to the participants.

[17] *See* Picker (WTO), *supra* note 15 at section 3.4; *see also* Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 Brooklyn J. Int'l L. 67 (2004).

[18] For the role of emotion and passion in international trade, see Colin B. Picker, *Trade & Security: Empiricism, Change, Emotion & Relevancy*, in: TRADE AS THE GUARANTOR OF PEACE, LIBERTY, AND SECURITY? CRITICAL, HISTORICAL, AND EMPIRICAL PERSPECTIVES (American Society of International Law Press, STUDIES IN TRANSNATIONAL LEGAL POLICY: A SERIES OF BOOKS) (2006) (Padideh Alai, Tomer Broude, & Colin B. Picker, eds.).

[19] *See*, *e.g.*, Chapter 6. It is thus no surprise that to the extent there is any substantive work on an IEL field and legal culture it is on investment. Chapter 6, Part 1 (discussing and citing some of the many "guidebooks" for working in international investment law in different legal cultural environments).

> Chinese law. Thus, suggesting that the methodology is powerful enough even for non-experts who can engage in a ~~"s~~see the forest, not the trees" approach.[20]

The above are just a few examples of the insights related to legal cultural analyses. But, perhaps the most significant outcome relates to the fact that by showing that the methodology can be usefully applied to IEL, it is fair to assume that the methodology can be applied in other non-traditional contexts, within public international law or otherwise. In addition, by extending the methodology, the methodology itself is given a new lease of life, being shown to be even more versatile than previously thought.

B. Insights on Legal Culture

Interestingly, while this work was designed to employ legal cultural analyses to further develop an understanding of IEL, the effort has also led to a greater understanding of legal culture. As noted throughout the dissertation, but more specifically in Chapter 1, the concept of legal culture is considered by many to be too vague to be easily usable. But, as is shown in the examples below, the case-studies have helped to put flesh onto that usually elusive concept. Two main areas were especially illuminated: the factors that contribute to the formation and development of a legal culture and the existence of legal subcultures that as minority or highly discrete; and specialized legal cultures within the larger legal system and its overarching legal culture. Both are explored below through examples drawn from the case-studies.

A number of issues related to the development of legal culture were identified in the dissertation. They include:

> **Incidents**. The role of "~~in~~cidents" on the development of legal culture, for both domestic and international legal systems and communities. For example, the impact of Tiananmen Square on the development of modern Chinese legal culture.[21] Or, in the international sphere, the as yet unknown consequence of the impact of the Seattle WTO Ministerial debacle on the long term development of the WTO's legal culture.[22] An incident study could also be used as a different type of "~~c~~ase-study" in helping to identify consistent legal cultural responses and conflicts within or across legal systems.[23]

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[20] *See*, *e.g.*, Chapter 4. Furthermore, this is likely to be the case, for it will be the rare researcher that has facility across all the different legal cultures that arise when considering the legal cultural issues of international legal systems.

[21] *See* Chapter 4, at 86.

[22] *Id*.

[23] "~~I~~ncident studies" are another methodological approach for discerning trends and developments within international law. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984); W.M. Reisman & A.R. Willard (eds), INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (1988); Colin B. Picker, *Fishing for Answers In Canada's Inside Passage: Exploring the Use of the Transit Fee as a Countermeasure*, 21 YALE J. INT'L L. 349 (1996) (an example of an incident study explored under Professor Reisman's supervision).

Legal Cultural Duality. Chapter 4's examination of China's legal culture shows that legal culture is not monolithic within a state—the opposing duality of Confucianism and Legalism existing side by side within today's modern Chinese legal culture shows the complexity of a state's legal culture, in which conflicting legal cultural approaches often coexist.

Colonization. As noted, for example, in Chapter 6's discussion of the development of legal cultures in non-western states, the role of colonization and even neo-colonization can be significant.[24] Furthermore, as noted in Chapter 8's analysis of microtrade, colonization may have had a different impact and role on the different communities of the former colony—perhaps with the greatest impact on urban areas, on the elites and on favored ethnic groups.[25]

Dispute Settlement System. A functioning or extant dispute settlement system, such as that discussed in the chapters concerning the WTO, can have a significant impact on the development of a legal culture. Both at a substantive level through the introduction of such legal culture characteristics as pragmatism, but also through the leadership role that the judges can have on the system's legal culture, as the judges' decisions through de jure or de facto precedent develop the field.[26]

Legal Literacy/Education. Legal literacy and education can play a significant role in the development of legal cultures.[27] Legal illiteracy may lead to a legal culture with a greater belief and utilization of informal mechanisms, or with a greater divide between legal professionals and the public. It may also lead to conflict based on erroneous understandings, as may have been the case with some of the anti-globalization protesters, believing that, for example, the WTO was anti-environmental, despite the Shrimp-Turtle case's pro environment content.[28]

"Smallness". As dealt with at some length in Chapter 8's consideration of microtrade, the size of a relevant community, be it a political entity, such as city or state, or a tribe or other social group, may have specific impact on the development of the legal culture of that entity.[29] Correspondingly, there may be specific legal cultural consequence with large forms of those communities. For example, consider the different legal cultures just related to size that may arise between Singapore or China, between Australia or New Zealand.

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[24] *See also*, Chapter 3, Part IIIA1.

[25] *See*, *e.g.*, Chapter 8, Part IIIA.

[26] *See*, *e.g.*, Chapter 5, Part II.

[27] *See*, *e.g.*, Chapter 8, Part IIIA3b.

[28] *See* United States—Import Prohibition of Certain Shrimp and Shrimp Products (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report) at paras 129, 154 and 185; *see also* Steve Charnovitz, *A New WTO Paradigm for Trade and the Environment*, 11 S.Y.B.I.L. 15, 18-19 (2007).

[29] *See*, *e.g.*, Chapter 8, Part IIIB1.

Informal Law. Many legal systems have a substantial component of the law that is ―informal", such as that reflected in Chapter 4's discussion of Guanxi in China. That informal law can have a significant impact on the legal culture of the entire legal system, but even more so for the specific communities which use it and for related fields of law.[30]

Mixed Legal Cultures. Like other aspects of legal systems, legal cultures are often the product of different legal cultures, often foreign invaders, coming together into a blend.[31] Though it is worth noting that those parts of a legal system more connected to the underlying values/traditions, such as family or inheritance law, may be less influenced by foreign legal cultures.[32]

Language. The role of language looms large in the development of a legal culture.[33] The use of English may bring with it the influence of the Anglo-American legal culture, while the use of French may permit more EU and civil law legal cultural influences.

Institutional structure. As noted in the chapters discussing international development law and international investment law, lack of institutional structure in a legal field or system will likely result in a less clear and developed legal culture.[34]

Law Firm/School Influences. The role of the large Anglo-American law firms and law schools in the development of the legal culture of many of these fields and systems may be significant.[35] This issue has been explicitly discussed in the dissertation in the investment[36] and in the WTO context, [37] where those law firms are particularly critical.

Values. Normative considerations may play a large role in the development of a legal culture, as the legal culture may be divorced or more separated from the typically positivistic legal systems within which it exists.[38] As discussed in Chapter 3, this may be particularly the case in those legal systems with a western legal system that was imposed by colonizers but where non-western legal cultural approaches continue to exist among the general population.

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[30] *See*, *e.g.*, Chapter 4, Part II2.

[31] *See*, *e.g.*, Chapter 2, Part VII.

[32] Picker (International Law), *supra* note 3 at 1124.

[33] *See*, *e.g.*, Chapter 2, Part VI.

[34] *See*, *e.g.*, Chapter 6, Part III.

[35] *See*, *e.g.*, Chapter 6, Part IVC.

[36] *Id.*

[37] *See* Picker (WTO), *supra* note 15 at Part 4 (page 17).

[38] *See*, *e.g.*, Chapter 3, Part IIIB.

> **Corruption**. The relationship between corruption and legal culture, going both directions, can be critical to the development of the legal culture.[39] As discussed at length in Chapter 8's analysis of microtrade, among many impacts, corruption can undermine a rule of law character within the legal culture.

As noted above, the legal culture of a legal system, whether domestic or international, is not monolithic, but will include within it discrete legal subcultures, many of which must be taken into account when considering the legal cultural relationships of that system with other legal cultures, be they international, foreign or domestic. The many discrete legal subcultures identified and considered in the case-studies, and that should therefore be considered when engaging in the methodology, include:

> **Field or Substantive Law Subcultures**. Within a legal system there may be a set of legal cultural characteristics associated with a particular field that is not applicable to other fields within the same legal system. For example, contract/commercial law and family law, while sharing many common legal cultural characteristics, may differ in a few significant legal cultural respects. Within IEL, the differences are starker. While investment, finance and trade all share many characteristics, nonetheless all clearly differ with respect to some legal cultural characteristics. For example, while the legal culture of a WTO-centered international trade law may reflect greater confidence and self assuredness, that of the more anarchic international investment law may reflect much less confidence and certainty.[40]
>
> **Gender Subcultures**. Legal systems may include within them legal cultural characteristics that are associated with men or women, or that apply differently to men or women. As specifically noted in Chapter 8's analysis of microtrade, those legal culture characteristics may play a role in the position of women in society and in the law—both with respect to formal and informal law, regional law, community law, and so on.[41] In that case study, given the likely significant role of women in microtrade, these gender legal cultural issues may be critical to the success of that initiative.
>
> **Class Subcultures**. There may be different legal cultures or legal cultural characteristics for the different socio-economic divisions within a society. For example, the elites and the ordinary people may have different legal cultures.[42]
>
> **Geographic Subcultures**. The different communities associated with different geographies within a legal system may have different legal cultures or legal cultural characteristics.[43] Thus, there may be differences between rural and urban,

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[39] *See*, *e.g.*, Chapter 8, Part IIIA3a.

[40] *See*, *e.g.*, Chapter 6, Part IVD1.

[41] *See*, *e.g.*, Chapter 8, Part IIIB4.

[42] *See*, *e.g.*, Chapter 7, Part IVD.

[43] *See*, *e.g.*, Chapter 8, Part IIIA2.

agricultural and industrial communities, mountainous or plains legal cultures, desert and rain forest, and so on. This is an issue rarely discussed in legal literature, and in particular in IEL, but one that comes to the fore very quickly when one engages in a legal cultural analysis. For example, a desert nomad culture may have radically different notions of geographic boundaries, natural resource allocations and so on.[44]

Professional or Trade Subcultures. For those professions or trades that are sufficiently cohesive or organized, such as those organized around guilds, one should expect to find specific associated legal cultural characteristics.[45]

Ethnic, Religious and other Discrete Minority Subcultures. While one of those aspects of legal culture that does get some attention, it is worth noting that to the extent there are minority communities within a legal system it is likely that they will have their own legal cultural characteristics.[46] As noted in Chapter 3, one of the more common ethnic legal cultural issues would be the utilization of the communities informal legal mechanisms, such as community dispute resolution and community contract/guarantor regimes.

Age and Generational Subcultures. While not noted in the dissertation, but as a natural extension of the legal subcultures above, a legitimate line of inquiry will be whether there are specific legal cultural characteristics associated with the elderly or the young, or even of people of different generations regardless of their progression through life. For example, consideration of whether those who became adults in the 1960s have a different legal cultural attitude to those that became adults in the 1980s or 2000s.[47]

While far from an exhaustive list, it suggests that there is a significant number of very different legal subcultures, generally co-existing peacefully within the larger legal systems' legal cultures. That co-existence may suggest the presence of strong legal cultural pluralism.[48]

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[44] An acceptance of the fact that some nomads' may have different approaches to such thigns as boundaries was noted in the International Court of Justice's Advisory Opinion in the Western Sahara case. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para 81 (Oct. 16); s*ee*, *also,* John C. Duncan, Jr. *Following a Sigmoid Progression: Some Jurisprudential and Pragmatic Considerations Regarding Territorial Acquisition Among Nation-States*, 35 B.C. INT'L & COMP. L. REV. 1, 19 (2012).

[45] *See*, *e.g.*, Chapter 8, Part IIIB1.

[46] *See*, *e.g.*, Chapter 7, Part II.

[47] For example, it has been argued that Gorbachev's different approach to the rule of law from his immediate predecessors in the Kremlin was due in significant part to a generational difference. Might then Putin reflect yet a different generation with correspondingly different legal cultural attitudes.

[48] Legal pluralism is an important legal cultural characteristic, and is one of the defining characteristics of western legal systems. *See* Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983) at 10. That potential legal cultural pluralism raises many questions such as:

> What is the extent of legal cultural pluralism?
>
> Given the axiomatic nature of legal pluralism within the western legal tradition, should we expect legal cultural pluralism within the western systems and legal cultures?

As the above identification of legal subcultures suggests, the role of often hidden legal subcultures are clearly as complex as is the case for larger legal cultures. Despite those difficulties, the many internal legal subcultures must all be identified and examined. They must then be taken into account, both to understand their discrete interactions with other legal cultures and for their contribution, along with the other factors noted above, to the development of the aggregate legal culture of the larger legal system.

As is clear from the order of the chapters, legal subcultures figure more in the later works. Indeed, legal culture as a whole has a stronger presence in those later chapters—reflecting the development of the methodology over the period of the PhD. The earlier chapters were more clearly comparative analyses of international law, that touched on legal culture and legal cultural analyses in addition to other comparative approaches. But, by the time the work on the last four chapters was undertaken, legal culture, legal subcultures and legal cultural methodology were much more developed. The last piece, on microtrade, in particular shows the versatility and power of the methodology, its ability to provide deep contextual analysis of fields, institutions, organizations and policies within the international legal order.

C. Insights on the International Legal Order

The central goals of the thesis and dissertation involved two related determinations—whether comparative and legal cultural analyses could be applied in the international context *and* if those applications would be valuable. The case-study chapters show the value of the analyses. Despite the fact that each of the case-studies considered a different part of IEL, for a different audience and context, the methodology in each case proved its worth in revealing insights about those fields and issues, and by extension about international law in general. As the examples below show, each of the articles identified specific concrete insights, as well as general insights and suggestions of insights that would be revealed were the methodology to be applied in greater detail to that field. While the dissertation suggested many such insights, space constraints limit this summary to the few examples below, highlighting the very different types of insights that can be derived from the methodology:

> Given that many non-western legal systems reflect strong pluralistic elements (see H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD (4th ed., Oxford, 2010) at 305-07) and also include legal subcultures, might there also be widespread legal cultural pluralism in those systems?
>
> Given that there are also legal systems that may be in some respects less pluralistic, such as some religious legal systems, yet that also will include legal subcultures, might there be broader pluralism at the legal cultural level in those systems than is the case in the overarching legal system itself?
>
> Given the existence of legal cultures associated with international law, might they also be pluralistic or does the supremacy of international law suggest less pluralism than in domestic legal cultures?
>
> Was legal cultural pluralism visible in the case-studies or do we in fact see the opposite (this issue is noted again in the next section with respect to specific findings on this issue.).

These questions will be considered by me in my future research on legal culture.

Implementation of International Law. Legal culture plays a substantial role in the effectiveness and reception of international law within states. For example, China's legal cultural attitude to private law may be playing a role in China's domestic implementation of IEL. As discussed in Chapter 4, the dominance of Guanxi over private law may be undermining the reception of IEL principles that have private-law impact, from investment law guarantees to procedural fairness demands in unfair trade practice areas.[49]

International Organizations. An international organization's legal culture is critical in the development of its character and operation. The dissertation identified specific factors that play a role in the development of that legal culture, including:

> The aggregate composition of the legal cultures of the international organization officials.
>
> The legal educational background of the law trained international organization participants.
>
> The legal cultures of the primary state participants in the international organization.
>
> The physical location of the international organization's headquarters, and the associated legal culture of the jurisdiction within which the headquarters sits.
>
> The legal cultures of the primary scholars of the international organization and its associated field.
>
> The legal cultural backgrounds of the judges/arbitrators/panelists that serve in the international organization's dispute settlement bodies or processes.[50]

Legal Pluralism Issues. A legal cultural insight identified within the international legal order is a potential lack of legal pluralism with respect to the other parts of international law.[51] Thus, for example, trade, and IEL in general, can be thought of as not keen to "work" with other disciplines. Despite the efforts of many, the field's legal culture is less open than many people believe it should be to such issues as the environment, human rights and other ostensibly non-economic issues supposedly outside the bounds of IEL.[52]

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[49] *See*, *e.g.*, Chapter 4, Part IIa.

[50] *See*, *e.g.*, Chapter 6, Parts III and VI.

[51] *See*, *e.g.*, Chapter 6, Part IVD2.

[52] Of course, the issues are debated, and there are many participants in the field that argue for their inclusion, both from substantive and normative positions, and there are the beginnings of a weak introduction of these issues into trade. But, aside from the world of authorized exceptions, such as are found in the GATT's Article XX, we see little effective

Fragmentation Issues. The analyses exposed the legal cultural unevenness of international law, likely reflecting and contributing to the fragmentation of international law.[53] For example, while the legal culture of international trade law reflects public law, centralization, judicialization attributes and is largely non-controversial,[54] international investment law's legal culture can be viewed as more private, contentious, anarchic, and less openly judicialized.[55]

Specialization. One of the most important insights revealed is related to the fact that those that work and study these fields and institutions have become too specialized, even as the field has fragmented—a mutually reinforcing pattern.[56] Thus, it may even be the case that a specialist in GATS may not have sufficient expertise on GATT, let alone on investment or finance, or even public international law and comparative law. Yet, as this dissertation argues, bringing in outside and challenging perspectives can help our understandings of these different fields.

Hard & Soft Law. Legal culture is not only relevant to "hard" international law, but also to the many parts of international law considered "soft".[57] It is also likely that legal culture is relevant in the often subjective assessment of whether a part of international law is hard or soft. That subjective attitude is critical in predicting whether the law will be operational or effective. Relatedly, there may be additional legal cultural disconnects within a field to the extent different legal cultures have opposing views on whether a part of international law is hard or soft. Thus, as discussed in Chapter 7, whether an anti-poverty initiative will be implemented may vary according to whether the relevant parties view it as hard or soft.

Domestic Law Comparisons: Throughout the dissertation, many legal culture aspects of international law, and specifically IEL, are illuminated through comparisons with domestic legal systems and their legal cultures. For example, Chapter 5's case-study of legal culture and the WTO's governance suggested the following potentially fruitful approaches:

> Comparing the WTO's legal cultural relationships with its members and with the many regional trade agreements to the legal cultural issues that

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involvement of these issues at the multilateral level. Even with respect to regional trade agreements, some of which now claim to include labour and environment, they do so in a rather ineffective manner.

[53] *See*, *e.g.*, Chapter 2, Part IVB. *See also*, Eugenia McGill, *Poverty And Social Analysis Of Trade Agreements: A More Coherent Approach?* 27 B.C. INT'L & COMP. L. REV. 371, 385-86 (2004) (discussing policy coherence in IEL).

[54] *See* generally Chapters 3, 4 and 5; Picker (WTO), *supra* note 15 .

[55] *See generaly*, Chapter 6.

[56] *See*, *e.g.*, Chapter 2, Part III.

[57] *See*, *e.g.*, Chapter 7, Parts IIIB3 and IVB; *see also*, Chapter 6, Part III.

> arise in the context of domestic approaches to federalism and subsidiarity.[58]
>
> Viewing the legal culture of the WTO's Appellate Body driven development of WTO law within the context of a constitutional imbalance not present in most legal systems—where there are typically functioning counterbalancing legislative and executive branches, with associated impacts on the legal culture of the system. Relatedly, this brings to mind the early development of the English legal system, with weak legislature and an executive focused on other issues.[59]
>
> Considering the legal cultural role of states in driving litigation at international organizations and in international law fields is akin to the legal cultural issues associated with ~~"p~~rivate attorneys general" in domestic legal systems, where normally it is the executive branch that brings public law cases to trial.[60]

In addition to providing new insights about the international legal order, the dissertation repeatedly shows that the legal cultural methodology is capable of providing fresh insights even to those few parts of international law that have been the subject of previous comparative examination. For example, the dissertation provided multiple instances of novel legal cultural and comparative considerations of the oft-examined issue of the role of precedent and case law in the international legal order.[61]

Finally, through the application of comparative and legal cultural analyses in the case-studies, international law was demystified, brought down to earth, and placed within the world of ~~"n~~ormal" law.[62] As such, once sacrosanct aspects of the international legal order can then be examined anew and challenged in ways never before done.

III. Responses to Legal Cultural Disconnects

As Joel Trachtman notes, ~~"[~~g]ood research illuminates the consequences of policy choices and therefore allows people to make better policy choices."[63] But, too often academics do not make that next step of actually considering or suggesting the ~~"b~~etter

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[58] *See* Chapter 5, Part III2.

[59] *See* Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker , COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW, 3rd Edition (American Casebook Series) (Thomson West Publishing 2007) at 307-310.

[60] *See*, *e.g.*, Chapter 5, Part III.

[61] *See*, *e.g.*, Chapter 6, Part IVE; *see also*, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker, Isabella D. Bunn, & Douglas W. Arner eds., 2008); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999).

[62] *See*, *e.g.*, Chapter 2's application of ~~"o~~rdinary" comparative law techniques to international organizations.

[63] Joel P. Trachtman, *International Economic Law Research: A Taxonomy* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (2008) at 51.

policy choices", stopping instead at identification of the problems and obstacles of existing policy choices. Too rarely are solutions suggested. It is indeed easier to tear down a house than to build one. Lest this dissertation be accused of such an approach, adding to those already provided in the case-notes this section will suggest some additional potential mechanisms to ameliorate some of the legal cultural obstacles identified by the legal cultural analyses.

As an initial matter, because legal cultural analyses are a part of comparative law it would be remiss not to consider looking at how other legal systems have handled such issues when seeking solutions to legal cultural conflicts. This applies equally to international legal systems that borrow solutions from domestic systems as well as domestic systems that often borrow solutions from other domestic systems. For example, as noted in the dissertation and noted above, the legal cultural isolationism or legal chauvinism that are present in some international fields, especially some IEL fields, can perhaps be tackled in the same manner as equivalent issues in domestic systems. One of the best examples of a legal system that is often considered to be isolationist and chauvinistic is the United States. Proposed approaches to America's isolationism and chauvinism, even though of a different form, may therefore be relevant for this issue within IEL. One proposed approach in the American context is quite simply for American legal actors (legislators, judges, academics, practitioners and law students) to learn more about and experience other legal systems.[64] A comparable approach in the IEL context could be efforts to promote greater interdisciplinarity. For example, WTO officials or likely DSB panelists could be encouraged to spend some time with officials at the International Labor Organization or with the ICSID. This does not mean adoption of the "foreign" principles in a later WTO case that involves labor or investment issues, but it may make for a more nuanced interaction with those principles.

Of course, to the extent these international legal systems borrow from domestic legal systems or domestic legal systems borrow from or implement aspects of international legal systems when seeking to mitigate legal cultural conflict, the wider legal culture must be taken into account to ensure a smooth and effective fit.[65] After all, such borrowing and transplantation will not work well if the relevant domestic system has a legal culture in opposition to that of the international organization or field. This is especially the case for domestically implemented international law that may be at odds with the local legal culture. When such borrowing takes place, the legal cultures in the domestic system and the international institution must be taken into account. "Taken into account" does not mean that the underlying cultures must be changed, or that one must conform to the other—even assuming that culture can be changed in those ways.[66] Rather, other less culturally destructive options should be pursued, such as are suggested below.

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[64] Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles and Opportunities*, 16 ROGER WILLIAMS UNIV L. REV 86, 94-96 (2011).

[65] *See* Chapter 1 concerning Pierre Legrande's cultural critique of transplantation.

[66] *See* Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 543 (2009) (providing history of "neoculturalists", historically and recently, and their attempts to change culture in efforts to promote development and rule of law.).

As noted earlier, one of the best ways to figure things out is "by doing" and thus the remainder of this section will explore solutions through consideration of the legal cultural conflicts identified in the dissertation. But, because so many legal cultural conflicts, disconnects and discontinuities were identified throughout the dissertation, this section will, for illustrative purposes only, focus on the previous chapter's identified legal cultural conflicts and will then propose solutions to ameliorate those conflicts—beyond those solutions proposed in that chapter.[67] In that chapter, a legal cultural analysis of microtrade, the legal cultural conflicts that were identified were associated with: legal illiteracy; gender; a nascent organization; rural and agricultural communities; artisan communities; corruption; and small communities. Of course, many of those issues were also sources of legal cultural conflict in some of the other case-studies,[68] and so the solutions suggested below may equally be applicable in those and other case-studies.

Because legal cultural issues are "sticky", less easily modified by formal law, whether through judicial, parliamentary or executive action, they are tougher to change than case law, statutes, or regulations. Nonetheless, legal cultural conflicts can be ameliorated in two essential ways—systemically and topically. The first and perhaps the most effective way is by tackling the systemic issues which have led to the legal culture characteristics at issue. Thus, for example, legal illiteracy was identified as a legal cultural issue that will impact on microtrade transactions.[69] Legal illiteracy may be caused by failings in the education system or by poverty that requires children to begin earning income instead of staying in school, or through cultural factors that may not consider education suitable or worthwhile for parts of society. Those systemic issues can be tackled, but not in the short term, not just by IEL policies, and not easily in the discrete cases that will arise with respect to specific microtrade transactions or, indeed, other international economic policies. Conversely, while the above example of legal illiteracy is not one that appears to have a positive side to it, there are some legal culture characteristics that while harmful to microtrade policies may contribute to the development or welfare of the country in other ways. Thus, before the eradication or diminishment of those legal culture characteristics is undertaken there must be careful consideration of the benefits versus the harms of such legal culture characteristics. For example, while a country may benefit from the maintenance of traditional agrarian cultures that add to the cultural diversity of the country and that maintain close links with a cherished past, such traditional cultures may lead to legal culture characteristics that are not supportive of modern global transactions, such as those at the heart of microtrade and other IEL policies.

While the systemic issues cannot easily be tackled, there are some concrete and localized mechanisms that could be considered in order to ameliorate the harm caused by specific legal culture characteristics. Thus, while legal literacy has a generalized impact on the

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[67] Drawing on a later publication (too lengthy to be included in this dissertation). Colin B. Picker, *Chapter 6, Microtrade and Legal Cultural Considerations* in MICROTRADE: A NEW SYSTEM OF INTERNATIONAL TRADE WITH VOLUNTEERISM TOWARDS POVERTY ELIMINATION (Yong-Shik Lee, ed.) (Routledge, forthcoming 2013).

[68] *See*, *e.g.*, Chapter 7.

[69] *See*, *e.g.*, Chapter 8, Part IIIA3b.

overall context within which microtrade must operate, such as the marginalization of those with legal illiteracy or the overall "dumbing down" of the legal culture, there are some specific and localized consequences of legal literacy that can be ameliorated. For example, while legal illiteracy undermines effective assistance and monitoring of legal counsel, those harms can be tackled through training designated and dedicated counsel in the issues associated with legal illiteracy. This can help by changing the legal culture of the lawyers as opposed to the culture of their clients. But, the legal illiteracy culture of the developing country microtrade participants can also be tackled in discrete, transaction specific ways. For example, requiring and providing basic training for microtrade participants in those legal issues relevant for their microtrade transactions can permit participants to better monitor their counsel, as well as to better understand the transactions, and can slowly erode the legal culture of illiteracy. At the national level, there are some discrete policies that could also help with the problems caused by legal illiteracy in the context of such transactions, such as providing dedicated legal aid for microtrade participants and simplification of the law for the low level transactions involved (just as small claims courts employ simplified procedures).[70]

Many of the potential solutions discussed above could also help ameliorate the conflicts caused by some of the other legal culture characteristics. For example, many of the legal culture concerns raised by the "smallness" of microtrade transactions,[71] could be handled in similar ways to the above. Thus, the fact that the legal culture surrounding smaller transactions tends to result in a diminished participation of counsel could be assisted through the legal aid suggestion above. Of course, each of the legal culture characteristics has its own unique issues. Thus, the fact that the issue of smallness is associated with a different legal cultural approach to risk analyses[72] suggests that a different approach is required. For example, in that case it could be that provision of insurance, guarantors, pooled risk and other devices could be incorporated into the microtrade project to counter any risk aversion. Also, the impact of artisan and craftsman legal culture in the microtrade context[73] will doubtless require its own unique solutions. Though without an understanding of the legal culture associated with artisans and craftsmen we cannot make any progress on developing such solutions. Hence, as an initial matter their legal culture must first be studied and understood.

Another source of legal cultural conflict that may arise in the microtrade context relates to the disconnect between legal cultures that are heavily influenced by informal sources of law and those where formal law plays a greater role.[74] While not absolute, legal cultures associated with informal law are more often associated with developing and non-western states, and hence are of direct relevance to microtrade—a development policy

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[70] Though, there are no solutions that do not themselves potentially create new problems. Thus, greater governmental oversight may lead to increased costs and bureaucratization, while capture of microtrade by a closed group of lawyers may create a whole series of other problems.

[71] *See*, *e.g.*, Chapter 8, Part IIIB1.

[72] *Id*.

[73] *Id*.

[74] *Id*.

initiative with particular relevance in non-Western systems. One possible solution within the specific context of an actual microtrade project may be to employ intermediaries, such as the proposed microtrade organization,[75] that can mediate between the formal and the informal approaches of the different participants. Indeed, the need for the microtrade organization to play that role may be one of the major reasons for such an organization.

Of course, the role of the microtrade organization in mediating such conflicts and in all other matters will depend to some extent on its own legal culture and its fit with the other participants and related fields. While not possible to predict at this stage of the development of the microtrade idea, the legal culture of a future microtrade organization can be anticipated to some extent. Procedures can then be implemented to mitigate any negative consequences or disconnects with the other microtrade participants and fields. For example, the legal culture background of the individuals involved or of those states that are most active in setting up and supporting the new organization will be critical in setting the tone of the legal culture of the new organization. Similarly, but at a substantive level, by carefully considering the source of the substantive mechanisms and procedures imported into the new organization‘s methods and substantive law, it may be possible to identify imported legal culture characteristics. Also, as discussed in previous analyses of the legal culture of international organizations, the languages employed within the organization can become strong indicators of the eventual legal culture of the organization.[76]

By overtly manipulating these and other issues in the early days of the organization it may be possible to guide the development of the legal culture of the organization in ways that may better suit microtrade. Thus, if it is felt that the organization should be pragmatic and develop in an organic manner, it may be that a more common law approach would work better which would then more likely be supported through use of English, employment of officials with common law background (by origin or training), locating the organization‘s headquarters in a common law country, and so on. Similarly, identification of civilian/continental characteristics as more suited to the organization might suggest that the new organization use French (or German, Mandarin, etc), predominantly employ civil law trained officials, locate the headquarters of the organization in a civil law jurisdiction and so on. Likewise, if it is felt that the legal culture should reflect more non-Western characteristics then as the organization is being created, it can be set up to enhance the likelihood of those characteristics permeating the organization through similar and other approaches.

The final example of potential solutions or approaches to the legal cultural disconnects that might arise in the microtrade context is that associated with gender. It is quite possible that in many developing countries it will be women that take the initiative in benefiting from microtrade,[77] even as their societies may not permit them to be involved in business to the extent that may be necessary for microtrade to operate to its best effect.

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[75] *See*, *e.g.*, Chapter 8, Part IIIB5.

[76] *See*, *e.g.*, Chapter 2, Part VI.

[77] *See*, *e.g.*, Chapter 8, Part IIIB5.

Gender roles within societies very often reflect deeply held and sensitive beliefs, often emanating from religious precepts or deep seated traditions about the roles of the different genders—in the family, the workplace and in society more generally. Due to the very passionate and emotional attachments associated with these sorts of issues, it would seem that no progress could be made on this issue without the direct and active involvement of those within those communities, and with policies carefully tailored to meet the specific circumstances. Thus, solutions will likely have to involve religious institutions and leaders, specific microtrade initiatives that are gender specific, modification of existing opportunities for women, and so on.

As these few examples of solutions indicate, it is not an easy task to counter the conflicts caused by the interaction of different legal cultures. But, because those conflicts have the potential to seriously undermine or impede IEL policies or projects, it is imperative that solutions be considered and attempted. Yet, as noted throughout the dissertation, the most important step may be the initial identification of the relevant legal cultural disconnects—raising awareness of the issues among those involved in the creation and implementation of international economic policies. For without being aware of the problem, there is no chance that the problems can be resolved. However, such efforts may be assisted in the future through the development of a legal cultural impact analysis for new or ongoing IEL policies. The legal cultural impact analyses could operate in a manner similar to other compliance review mechanisms, such as environmental impact analyses or legislative reviews for constitutionality. The Appendix to this concluding chapter provides a short and workable example of what such a Legal Cultural Impact Analysis might entail.

IV. Conclusion

Taken as a whole, the analyses in the dissertation's case-studies support the validity of the methodology as applied to the international legal order. But, as noted throughout the dissertation, it is not an analysis that leads to certainty in its conclusions. Other comparatists, such as Vivien Curran have noted this issue with respect to legal cultural analyses, recognizing ~~th~~the problem of the lack of scientific verifiability to conclusions about foreign legal cultures."[78] But, she rightfully notes that ~~o~~one needs to distinguish between verification and validity, and to recognize that unverifiability does not imply invalidity, but only uncertainty about validity."[79]

Thus, researchers should consider this methodology when analyzing aspects of IEL, and indeed public international law, either in tandem with other more traditional methods or on its own. Of course, that does not mean that the proposed methodology is always appropriate, or the best initial approach. Nor is it meant to be exclusive, but rather complimentary to other approaches. As Tomer Broude notes, ~~e~~each of the valid,

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[78] Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP L 43, 63 (1998).

[79] *Id*. at 61-62. (She further notes that ~~[~~i]t is important to remember that truth and certainty are separate concepts, and that a conclusion may be true without having been proven true.").

alternative, methodological streams of modern IEL research has weaknesses that must be taken into account in adjusting to the prevailing conditions of uncertainty. And at the same time, each stream has strengths that nevertheless ensure its role in the future of IEL research."[80] Similarly, Greg Shaffer explicitly notes that there is ~~"n~~o single _correct' approach".[81] That sort of respectful openness towards different methodologies and approaches is healthy for the field, even as it is encouraging towards methodological experimentation and such novel methodological approaches as are offered in this dissertation.

Such openness is bolstered by the welcome that this methodology has experienced when presented to those that work and study these fields.[82] It is clear that it is not necessary here to definitively resolve all the issues associated with legal cultural analyses of IEL fields. Merely raising the idea within the field can lead to a flowering of scholarship and consideration of the issues. The present and future publications associated with the dissertation, along with related conference presentations, will hopefully serve to alert the field to the utility of the proposed methodology. The case-studies in the dissertation will be followed by field-specific empirical research to both expand on the works, as well as to continue to test the methodology for validity across a whole range of fields and issues.

The introduction chapter ended with Galileo's development and original use of the telescope as a metaphor for the significantly less grand, but still important, ideas within this dissertation—the novel use of a domestic comparative research methodology in a new setting. This conclusion chapter will also end on a physics metaphor, that once again employs a grander contribution to humanity than is provided for in this dissertation, despite its important contribution to the field, but that captures the essence of the dissertation. While Newtonian physics was sufficient to get the Apollo astronauts to the moon, today's deeper level analyses of the universe requires Einsteinian physics—a radical development in physics.[83] So too, while IEL research has achieved much with formal and traditional research methods and approaches, deeper level understandings of the field will require new and challenging approaches, such as those offered in this dissertation.

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[80] Tomer Broude, *At the End of the Yellow Brick Road*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn, Douglas W Arner, eds) (2008) at 27.

[81] Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds.) (2008) at 41.

[82] *See* note 16 and associated text above.

[83] *See*, *e.g.*, Horizon: What's Wrong with Gravity (BBC, 2008) (discussing that Newtonian mechanics were sufficient to get the Appolo capsule to the moon, but that in fact Newtonian predictions are off by about 10 meters, a difference only really explained by Einsteinian theories).

Appendix

Short Form Legal Cultural Impact Analysis

(first row filled in with an example)

A. ***International Organization ("IO") Issues***

Legal Cultural Issue to be Examined	**Identification of issue**	**Legal Cultural Characteristics**	**Legal Cultural Consequences**	**Amelioration Approaches**
1. IO language	E.g. English	Anglo-American or Common Law approach possible, …	Biased towards specific legal cultural characteristics to detriment of other legal cultures, …	Strong second language, ensure officials from other legal cultures, . . .
2. IO HQ location				
3. Role of NGOs (and their own legal culture)				
4. Primary state participants				
5. Secretariat background				
6. Role of Anglo-American Law firms				
7. Dominant training/education locations				
8. Dispute Settlement Body				
9. Role of developing countries				
10. Non-western influences or interactions				
11.Related IO's influence				
12. Related fields' influences				
13. Contentious or Controversial IO				
14. Role of specific incidents				
15. Financial support				

2. ***Field Specific Issues***

Legal Cultural Issue to be Examined	**Identification of issue**	**Legal Cultural Characteristics**	**Legal Cultural Consequences**	**Amelioration Approaches**
1. Field Isolated				
2. Field developed/new				
3. Field contentious				
4. Substantive law sources				
5. Dominant legal scholars				
6. Fragmentation issues				
7. Hard v Soft Law issues				
8. Role of NGOs (and their own legal culture)				
9. Normative content of field				
10. Developed by case law/disputes				
11. Strong domestic law content				
12. Strong public international law content				
13. Codified				
14. Historical influences				
15. Informal law influences				

3. ***Target Communities***

Legal Cultural Issue to be Examined	**Identification of issue**	**Legal Cultural Characteristics**	**Legal Cultural Consequences**	**Amelioration Approaches**
1. Legal Literacy/education levels				
2. Role of Elites				
3. Associated Corruption				
4. Rural/Urban Issues				
5. Ethnic or Indigenous Issues				
6. Demographic considerations				
7. Size of communities				
8. Relevant professions/artisans				
9. Geographic issues				
10. Agricultural/ Industrial issues				
11. Rule of Law Issues				
12. Common or Civil Law issues				
13. Religious Law issues				
14. Development issues				
15. Poverty issues				

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