Behind the Multilateral Trading System

Legal Indigenization and the WTO in Comparative Perspective

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Abbreviations

AD	Anti-dumping
ADA	Anti-dumping Agreement
ASCM	Agreement on Subsidy and Countervailing Measures
ASEAN	Association of Southeast Asian Nations
CAFC	Court of Appeals for the Federal Circuit
CAP	Common Agricultural Policy
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CBP	Customs and Border Protection
CCL	Commerce Control List
CCP	Common Commercial Policy
CISADA	Comprehensive Iran Sanctions, Accountability, and Divestment Act
CIT	Court of International Trade
COP	Conference of the Parties
CTD	Committee on Trade and Development
CVD	Countervailing Duties
DDA	Doha Development Agenda
DOA	Department of Agriculture
DOC	Department of Commerce
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAR	Export Administration Regulations
EC	European Community or European Communities
EC Treaty	Treaty Establishing the European Community
ECJ	European Court of Justice
EEC Treaty	Treaty Establishing the European Economic Community
EEZ	Exclusive Economic Zones
EU	European Union
FTA	Free Trade Agreement
G20	The Group of Twenty Finance Ministers and Central Bank Governors
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preference
IMF	International Monetary Fund
IPR	Intellectual Property Rights
ISA	Iran Sanctions Act

ITC	International Trade Commission
ITO	International Trade Organizations
LDCs	Least-Developed Countries
MEA	Multilateral Environmental Agreement
MFN	Most-Favored-Nation
MOC	Ministry of Commerce
NAFTA	North American Free Trade Agreement
NPC	National People's Congress
OCT	Overseas Countries and Territories
PRC	People's Republic of China
S&D treatment	Special and Differential Treatment
SDS	Sustainable Development Strategy
SIAs	Sustainability Impact Assessments
SPC	Supreme People's Court
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
STO	Special Trade Obligation
TBT Agreement	Agreement on Technical Barriers to Trade
TEU	Treaty on European Union
TPRM	Trade Policy Review Mechanism
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWEA	Trading With the Enemy Act
UN	United Nations
URAA	Uruguay Round Agreements Act
USTR	Office of the United States Trade Representative
WTO	World Trade Organization
WWII	World War II

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Abstract and Overview

This book offers a new perspective from which to view and understand the World Trade Organization (WTO) regime and its participants. The central feature of this new perspective is the concept of legal indigenization. The term "legal indigenization" generally refers to the process or ideology with which domestic authorities make and implement international or domestic rules in a way appealing to their native characteristics (especially legal traditions), as responses to globalization led by a defective global legal system. The core thesis of the book is that the key elements of the legal tradition and culture of a country or a region inevitably and fundamentally influence the ways in which it participates in WTO activities and implements its WTO obligations. These ways, however, have not been adequately explored and explained in the extensive literature relating to developing and implementing international trade rules.

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

Chapter 1, *Review of Literature*, comprises two parts. The first part surveys the key academic, professional, and official literature regarding a range of issues pertinent to this book. These include such topics as (1) the general character and structure of the WTO regime, (2) specific trade mechanisms, (3) the relationship between WTO law and domestic law, (4) the relationship between WTO law and general international law, (5) legal principles and the interpretation of the WTO agreements, (6) the position of developing countries in the multilateral trading system, (7) strategies pursued by individual members in international trade negotiations, (8) examinations of domestic trade legislation, (9) Free Trade Agreements (FTAs), (10) the WTO dispute settlement mechanism, and (11) domestic adjudication of trade issues. The second part of the chapter offers the main findings of the literature introduced in the first part. It is those findings, of course, that serve as the foundation as well as the starting point for further research as reflected in this book. The findings of pertinent literature have helped me formulate two assumptions of the book. One is that the deficiencies of the current WTO legal regime have made it possible, and even necessary, for a WTO member to indigenize WTO law by resorting to its own legal tradition and culture. The other assumption is that some WTO members' practices in dealing with the WTO have demonstrated their willingness and efforts to indigenize WTO law.

Chapter 2, *The Concept of Legal Indigenization*, develops the fundamental concept of this book—legal indigenization. The chapter starts in Section I by reviewing legal fragmentation in international trade before World War II (WWII). The disaster of world war, which is said to be brought about by legal fragmentation, necessitated international responses to such fragmentation. The responses made subsequently by international participants resulted in the globalization of trade. Then, the section proceeds into the exploration of the inherent and acquired problems of that globalization, explaining the need of a WTO member to rely on legal indigenization. Section II of the chapter defines the concept of "legal indigenization," based on the various concepts of "indigenization"

that exist in different contexts and dissects the concept of "legal indigenization" for further understanding. In that same vein, the latter part of the section compares this central term with two other relevant terms—"globalization" and "localization."

Based on the concept of "legal indigenization" defined in Chapter 2, the three succeeding chapters proceed to apply this concept to the specific actions adopted by China, the United States, and the European Union (EU) regarding their interactions with the WTO. Chapter 3, *Legal Indigenization of WTO Law in China*, examines four aspects of legal indigenization within China. Section I focuses on China's participation in international trade rule-making. It explains how China emphasizes Special and Differential (S&D) treatment as well as discussing substantive and procedural issues in the Chinese proposals submitted to the WTO. The sources of pertinent features of the Chinese proposals submitted to the WTO are located, partially, in Chinese legal tradition and culture. Section II of Chapter 3 finds that China's participation in international trade dispute settlement has designated the Chinese ideologies challenged by its trading partners. Those ideologies bear on such issues as (1) whether legal protection is to be provided for subjects of law involving illegal elements, (2) the relationship between publications and public morality, (3) state control of trading rights, and (4) the necessity of criminal thresholds regarding the protection of intellectual property rights (IPR). The section examines how these features have taken shape, based on Chinese legal tradition and culture. Section III examines key characteristics of the overall trade legislation in China, such as (1) the degree of specification of laws at different levels, (2) the use of "temporary" legislation, and (3) a focus on "management." The section explains these features from the perspective of Chinese legal tradition, focusing specifically on various forms of law in dynastic China and China's contemporary legal system. Section IV examines domestic adjudication of trade disputes arising within China. It reviews administrative and judicial regimes relating to trade issues. Although China has complied with its WTO obligation to provide judicial review of administrative determinations relating to trade issues, it still treats adjudication of trade issues as having unique characteristics that other members of the WTO might find odd or objectionable, which reflects deeply-rooted elements of Chinese legal tradition and culture.

Chapter 4, *Legal Indigenization of WTO Law in the United States*, examines the process of legal indigenization (again, relating to trade law) taking place within that country. Section I explores several aspects of U.S. proposals submitted to the WTO on both substantive and procedural issues, as well as S&D treatment. It also gives some attention to U.S. FTA negotiations. The section characterizes U.S. proposals to the WTO from several perspectives and points out the preference of the United States for (1) submitting a series of proposals, (2) exhibiting cautiousness toward S&D treatment, (3) addressing institutional reform, (4) emphasizing the international rule of law, (5) pursuing procedural justice, etc. The section traces these practices to their roots in U.S. legal tradition and culture, specifically (1) the emphasis on procedural fairness in the common law tradition, (2) the U.S. leadership in the WTO, (3) U.S. reliance on reciprocity, (4) its belief in the rule of law, and (5) segmentation of power in its political regime. Section II examines international trade disputes involving the United States as respondent and reveals certain U.S. ideologies challenged by its trading partners, such as the relationship between sovereignty and unilateralism and the extra-territorial application of U.S. domestic law. The section also attributes these features to U.S. legal tradition and culture, especially to vestiges of unilateralism. Section III explores domestic legislation on trade within the United States and highlights some of its key characteristics, such as the urge for comprehensive content and codification as well as a subordinate status of international trade agreements. The origins of these characteristics in U.S. legal tradition and culture mainly involve (1) a mixture of the civil law and common law traditions, (2) the fluctuation

of trade policies in U.S. legal history, and (3) dualism adopted by the country with respect to the relationship between international law and domestic law. Section IV examines domestic adjudication of trade issues arising within the United States. After reviewing pertinent administrative agencies and judicial bodies relating to trade adjudication, the discussion emphasizes certain characteristics of domestic adjudication of trade issues within the country, such as the use of administrative segmentation and specialized courts. U.S. legal tradition and culture can help explain these characteristics, for example, deference to "expertise" in U.S. courts.

Chapter 5, *Legal Indigenization of WTO Law in the European Union*, analyzes the process of legal indigenization of WTO law within the EU. Section I examines how the EU has participated in international trade rule-making and explains the EU's emphasis on certain topics, such as (1) constituents of the Dispute Settlement Body (DSB), (2) the style of proposals, (3) the importance of sustainable development and S&D treatment, (4) the establishment of principles guiding negotiations of specific rules, and (5) the role of independent experts in the multilateral dispute settlement mechanism. The origins of the special attention accorded to these topics by the EU can be found in the EU's legal tradition and culture, particularly in (1) the role of judges in the civil law tradition, (2) the center stage given to general principles, (3) a high status given to jurists, and (4) the great importance attached to sustainable development. Section II discusses international trade disputes involving the EU as respondent. On the grounds of a review of pertinent cases, the section identifies some EU ideologies that seem conflicting with those of its trading partners, such as (1) its various approaches of interpreting the WTO agreements, (2) its attitude toward the relationship between multilateral principles and trade preferences in FTAs, and (3) the application of general principles of law in its arguments. Some of the factors contributing to the formulation of these features appear also in continental European legal tradition and culture, especially in the civil law's approach of interpreting international agreements. Section III of the chapter explores the "domestic" trade legislation within the EU.[1] Based on an overview of its trade legislation, the section points out some EU-specific approaches to trade legislation. These approaches find their roots in continental European legal tradition and culture, especially in the concept of law as adopted by the civil law tradition and in theories about the relationship between EU law and the domestic laws of its Member States. Section IV, after reviewing pertinent administrative agencies and courts involved in adjudication of trade issues within the EU, characterizes such "domestic" adjudication of trade issues as giving special emphasis to (1) the judicial protection of individual rights, (2) the application of general principles of law, (3) procedural justice, and (4) direct application of the WTO agreements. Once again, the shared corpus of legal tradition and culture that predominates in the EU can partially account for these features, as explained at the end of Chapter 5.

Chapter 6, *Legal Indigenization and the WTO*, explores legal indigenization of WTO law from an integrated perspective. Its aim is to explain how, at the multilateral level, the WTO provisions have been indigenized by each of these three individual members' legal traditions and cultures. Section I reviews how existing WTO provisions and practices were influenced by the legal traditions and cultures of certain members. It does this by studying three examples: (1) the United States and the multilateral anti-dumping (AD) mechanism, (2) rules developed by the DSB for applying the principle of "legitimate expectations," and (3) the admissibility of amicus curiae submissions in the DSB. Section II focuses on legal indigenization in the context of negotiations for prospective multilateral

1. For a discussion of reasons for describing EU legislation and adjudication as "domestic" in this book, *see infra* Chapter 5.

rules. The section examines competing (indigenized) views from three participants—China, the United States, and the EU—on S&D treatment, environmental issues, fisheries subsidies, and reform of the DSB. Section III addresses the general implications of legal indigenization for the WTO both in the short term and in the long run.

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