

The WTO and the Development of the Rule of Law in East Asia

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I. Introduction

In the year 2001, for the first time in recent history, all of the major economies of East Asia amalgamated under the umbrella of the World Trade Organization (WTO). Some have heralded the WTO as an example of an international agreement¹ that is based upon conceptions of the Rule of law, and one which could foster the Rule of law in the legal systems of its Members. For example, in 1999, in the context of China's accession to the WTO, Martin Lee, the Chairman of the Democratic Party of Hong Kong, stated in a letter to then U.S. President Bill Clinton, that "the participation of China in the WTO would not only have economic and political benefits, but would also serve to bolster those in China who understand that the country must embrace the rule of law."² Yet, it has also been noted that a number of WTO Members, despite their longstanding membership in the WTO and its precursor, the GATT, have not achieved a significant level in terms of the operation of the Rule of law within their legal systems.³ Thus, this paper addresses two questions:

1. Could membership in the WTO promote the Rule of law in a country?
2. Should the WTO be the vehicle to promote the Rule of law in East Asia?

II. WTO and the Rule of law.

The concept of the Rule of law

Let me begin by stating at least one uncontroversial thought; that the concept of the Rule of law is itself controversial. Unfortunately, given that there is no express reference to the Rule of law in the WTO texts, I have to delve into this controversy in order to build a Rule of law context for the WTO legal system from the various theories about this

¹ The WTO agreements consist of (i) Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), its (ii) four Annexes, and (iii) a number of Decisions, Declarations and Understandings. There are four comprehensive agreements in Annexes 1 and 2: the General Agreement on Tariffs and Trade (GATT) 1994, General Agreements on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). There are also a number of subject-specific Multilateral Agreements on Trade in Goods in Annex 1A, which relate to the provisions of the GATT 1994.

² See, Randall Peerenboom (2001) *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERK. J. INTL L. 161 (footnote no. 496). The case of China is somewhat different than the original WTO Members in that relations between China and its WTO trading partners are based upon not only the WTO agreements, but also China's Protocol of Accession. In this connection, it should be noted that China has undertaken the comprehensive implementation of the Rule of law within its legal system. However, this is not the case for other East Asian members of the WTO.

³ *ibid.*, at footnote no. 497.

concept. The Rule of law is part of both legal and political philosophies.⁴ It is found in some systems of governance, sometimes as an ideal, other times as a deliberate policy choice manifested through and backed by laws, or both. It is important to know our point of departure here, i.e. whether we are discussing the Rule of law from a political or legal perspective, as this will determine, to some extent, conclusions on the role of the WTO in the promotion of the Rule of law in Asia.⁵

From a legal perspective, Professor James Torke has usefully diagrammed the constitutive elements of the Rule of law. Using a three-part pyramidal model, he urges us to think of the top as consisting of ordinary “law -- constitutions, statutes, rules, regulations, doctrines, principles, decisions, and the like. In part, the rule of law is a law of rules and texts.”⁶ These are law’s formal constraints.”⁷ Torke’s model continues with the middle third, which consists of concepts like “constitutionalism, dispersal of power, judicial review by independent courts [and] open governmental processes”.⁸ These provide both a framework and a context within which law becomes operational.⁹ “The bottom and broadest third, upon which the pyramid rests, is the Rule of law culture.”¹⁰ But how do these constituents interact to galvanize the Rule of law?

I would begin the analysis from the bottom third of Torke’s pyramid: cultural perspectives on the Rule of law. For if the development of the Rule of law depends, in some measure, on its normative recognition within the wider culture, then the absence of such cultural proclivities would tend to hinder the development or, skew the focus of the Rule of law. In other words, some cultural impetus (or alternatively, no significant cultural barriers) should be present in order for the Rule of law to flourish.

⁴ On the Rule of law and legal theory, see, James W. Torke (2001) *What is This Thing Called the Rule of Law?* 34 Ind. L. Rev. 1445. On the Rule of law and political theory, see, Steven Kautz (Summer, 1999) *Liberty, Justice, and the Rule of Law*, 11 YALE J.L. & HUMAN. 435.

⁵ The intention here is not to raise the “law vs. politics” or “law as politics” issues and associated debates. The position taken is not that the concept of the Rule of law is separable into a purely legal or political concept. Clearly, as will be discussed, there are elements of both disciplines that inform the subject of the Rule of law. However, stating the original perspective, whether legal or political, would hopefully clarify the focus of the analysis, and explain the conclusions in terms of the effects of the concept of the Rule of law on the legal system, the political system, or both.

⁶ Antonin Scalia (1989) *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (Torke, *supra* fn. 4, see, footnote no. 18 in the original text).

⁷ Torke, *supra* fn. 4, p. 1448.

⁸ *ibid.*; see also, Robert S. Summers (1993) *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 130 (Torke, *supra* fn. 4, p. 1448, see, footnote no. 19 in the original text).

⁹ Torke calls them the “law’s institutional constraints”, *ibid.* It should be recognized that the legal framework -- these institutional constraints -- are in part affected by the political system. For example, constitutionalism is a political concept, which is sometimes given effect through laws. Likewise, dispersal of power depends upon the political regime of a given nation.

¹⁰ This is called the law’s informal constraint, *ibid.*; see e.g., Paul W. Kahn (1997) “The Reign of Law: *Marbury v. Madison* and the Construction of America” (Torke, *supra* fn. 4, p. 1448, see, footnote no. 20 in the original text). This constraint has social dimensions, yet, it could also be formalized in the political, as well as legal systems within a nation.

The Rule of law and its Cultural Prerequisites

Has the notion of the Rule of law been embedded in many cultures? Americans are often considered to have a Rule of law culture. Alexis de Tocqueville remarked "in the United States, ... it is impossible ... not to perceive that all classes display the utmost reliance upon the legislation of their country and are attached to it by a kind of parental affection".¹¹ Torke describes it as "when other nations call out the troops, we call in the lawyers. In other words, we resort to the rule of law". Conversely, it has been observed that in China, Confucianism has contributed to the relegation of the Rule of law to a culturally less desirable means of social control and administration of justice.¹² The implication need not necessarily be that the Rule of law can never be effectively established in China. It does mean that additional processes and institutions might be needed to legitimize the Rule of law within the Chinese culture. Indeed, statistics reveal that since the introduction of the Administrative Litigation Law (ALL) in China, the "number of administrative cases has been growing year by year. In 1995, there were 51,373 ALL suits, an increase of 48% over the previous year. In 1997, there were 90,557 cases, a 13% increase over 1996."¹³ Thus, even in China, cultural resistance to resorting to the Rule of law may be lowering. But what of East Asia, generally? Arguments similar to that about the Chinese culture are offered with respect to the viability of a Rule of law culture in East Asia. For example, it is observed that East Asians prefer Confucian ideals such as an orderly society, harmony and accountability of public values, while Americans prefer individual rights and autonomy.¹⁴ Yet, these findings cannot *ipso facto* rule out the possibility of a Rule of law culture in East Asia, because East Asian values do not necessarily exclude the operability of the Rule of law.¹⁵

General cultural inclinations notwithstanding, a Rule of law culture is more heavily dependent on the attitudes of what I call "the agents of governance". They include legislators, political, business and community leaders, government officials, civil servants, judges, lawyers, the police, and the like. Thus, the determinative measure would be the normative force of the Rule of law within administrative or institutional cultures in society. This means that processes need to be in place in order to foster a Rule of law culture in agents of governance. For example, the Israeli judiciary underwent analogous processes, which included strict self-regulation, production of relevant, independent knowledge bases and expertise for the profession, continuous professional education and training, and the establishment of an independent, de-politicized career-path.¹⁶

¹¹ Alexis de Tocqueville (1945 ed.) "Democracy in America", Vol.1, pp. 283-290.

¹² Alice E. S. Tay (1998) "Asian-Pacific Handbook, Volume I, People's Republic of China".

¹³ Peerenboom, *supra* fn. 2, p. 224 (footnotes omitted).

¹⁴ Francis Fukuyama (1995) *Confucianism and Democracy*, 6 J. DEMOCRACY 20.

¹⁵ However, there might be a reluctance to resort to some of the mechanisms available under the Rule of law, such as private litigation.

¹⁶ Issachar Rosen-Zvi (2001) *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760.

The Nature, Function and Purposes of the Rule of law

The real question then becomes, assuming there is no impenetrable cultural barrier to the Rule of law in East Asia, what shape might it take? This takes the analysis to the middle part of the pyramid. Here, I am going to make a necessary amplification of Torke's model, and that is the institutional requirements for the development of the Rule of law. While "judicial review by independent courts" is part and parcel of the larger concept of legal review, I would suggest that the entire notion of the Rule of law is predicated upon the availability of legal review. Regardless of the existence of laws and the propensity of people to resort to them, the Rule of law would be non-existent without the possibility of revision, which includes the existence of appropriate institutions for legal review, including, but not limited to courts of law. Much of this might have been implicit in Torke's U.S.-based analysis, but the universal existence of review mechanisms and associated institutions can by no means be taken for granted. Indeed, a number of WTO provisions impose these very obligations on its Member States. The nature of institutions for legal review depends upon social, political and, to a lesser extent, financial factors which are unique to a nation or to a region. But the one immutable functional criterion for such institutions is the competence to conduct a legal review.¹⁷

How do revision and the Rule of law interrelate? The relationship is both functional and purposive. The function of legal review is to subject all decisions and actions, including those of the agents of governance, to scrutiny. The purpose of such review would be to assess the 'legality' and 'legitimacy' of decisions and actions. To put it another way, recourse to legal review for the purposes of assessing the legality and legitimacy of governmental measures animates the Rule of law. But what exactly do 'legality' and 'legitimacy' mean? Well, as the Hart-Fuller debates attest,¹⁸ there is no exactitude when it comes to the question of 'legality'. 'Legitimacy' is even more ambiguous and problematic. I suggest the following definitions:

1. Legality in the sense that the acts of government must consistently be in accordance with the laws.¹⁹ This definition reflects an instrumental view of law as a tool of government to achieve predictability and efficiency.
2. Legitimacy can be subdivided into two categories: procedural and substantive.

¹⁷ Thus, I do not believe that there is the absolute necessity for institutional separation for legal review (although that might be more convenient and less controversial in terms of conflicts of interest).

¹⁸ J. Coleman and E. F. Paul (1987) "Philosophy and Law".

¹⁹ Of course, here the existence of law in some form, be it legislative, common or customary, is presupposed, as opposed to a completely ad hoc, unsystematic government.

- 2.1. Procedural legitimacy refers to the rationality of the lawmaking process and the formulation, interpretation and application of the laws. A good point of departure here might be Professor Fuller's "Eight Ways to Fail to Make Law".²⁰ MacCormick's conditions for consistency and coherence in the interpretation of the laws bolster the requirements of procedural legitimacy.²¹ Finally, review of the nature, scope and limits of discretion in the application of the laws would be indispensable for procedural legitimacy.²²

- 2.2. Substantive legitimacy refers to values (political, moral, ethical, religious, cultural, etc.) against which the content and purpose of a law, in general terms, and the consequence of its application in a particular case, are judged.²³ This is by far the most contentious component of the concept of the Rule of law, because it seems that there could never be universal consensus about such values.²⁴

Thus, the Rule of law becomes operational as a result of some or all of these components of legal review. It should be noted here that by incorporating both legality **and** legitimacy within the purposes of legal review, the possibility of a Rule of law conception that is based solely upon predictability and efficiency of governmental acts is eliminated. I simply reject that predictability and efficiency, while necessary elements for a Rule of law conception are, by themselves sufficient. In other words, governance subject to the sole principle that the acts of government must consistently be in accordance with the laws is not a conception of the Rule *of* Law, but of a qualitatively different concept of *Rule by (or through) Law*. While this distinction might be a product of Western liberal traditions, I agree with Professor Albert Chen's remark that, at least some of the principles associated with the Rule of law which go beyond 'legality', as I have defined it, "do have transcultural and universal validity".²⁵

²⁰ Lon L. Fuller (1969) "The Morality of Law". From Rex's misfortunes as legislator and judge, the following principles could be derived: (i) there must be rules promulgated by officials, (ii) the rules must be published, (iii) there must be a degree of durability to the rules, (iv) rules must be comprehensible, (v) rules must not be contradictory, (vi) rules must be capable of being observed, (vii) rules as promulgated and as applied must show a high degree of correspondence, and, (viii) rules must not be retroactive.

²¹ Neil MacCormick (1978) "Legal Reasoning and Legal Theory".

²² Edward L. Rubin (1997) *Discretion and Its Discontents*, 72 CHL.-KENT L. REV. 1299; Steven J. Burton (1994) *Particularism, Discretion, and the Rule of Law*, in "The Rule of Law" (Ian Shapiro ed.).

²³ It should be noted that the analysis at this point also begins to address issues related to the top tier of Torke's pyramid.

²⁴ Compare, Jeremy Bentham (1789) "An Introduction to the Principles of Morals and Legislation (Burns and Hart, eds., 1970 ed.) on utilitarianism; F. A. Hayek (1973) "Law, Legislation and Liberty" on contractual liberalism, John Rawls (1972) "A Theory of Justice" on reflective egalitarianism, and Robert Nozick (1974) "Anarchy, State and Utopia" on libertarianism. See also, Alf Ross (1958) "On Law and Justice" on the need to eliminate the employment of 'justice' in legal discourse (pp. 274-275). It is recognized that by including political values under substantive legitimacy, all other institutional constraints indicated by Torke are subsumed under this definition, except "open governmental processes", which will be discussed *infra*.

²⁵ Albert HY Chen (1998) "An Introduction to the Legal System of the People's Republic of China", p. 4.

It is also recognized that for the institutions of legal review to perform their function, another necessary “institutional constraint”, in Torke’s terminology, would be ‘open governmental processes’. At a minimum, this requires systematic keeping of complete, accurate and accessible records of decisions and acts, together with their accompanying reasons. Legal review would be virtually meaningless if official records were nonexistent, incomplete, inaccurate, or worse, corrupted or corruptible. Equally important are safeguards designed to protect the integrity of the processes of legal review. These include, at a minimum, the opportunity to ascertain and present evidence and the availability of legal expertise for all parties to a review process. In short, the Rule of law becomes effective as a result of the transparency of the acts and decisions of agents of governance, coupled with principled processes of legal review.

While I have tried to sketch the contours of the Rule of law in Asia, the actual shape would, as indicated earlier, depend on a nation’s internal social, political, legal and financial factors. Yet, the WTO adds external obligations, compliance with which could affect the shape of the Rule of law in its Member countries.

WTO and the Rule of law in its Member States

There are at least 40 provisions within the WTO agreements that relate to the Rule of law.²⁶ It might be useful to first note the general obligation of every WTO Member to “... ensure the conformity of its laws, regulations and administrative procedures with ...” the WTO agreements.²⁷ There are concerns with respect to the reach of WTO legal obligations where regional or local political entities or public authorities within the territories of Members enjoy *de jure* or *de facto* autonomy in taking measures that come within the ambit of the WTO agreements. In other words, how deep does the Rule of law reach within each WTO Member?

Certainly, under international law, unless otherwise provided for in an agreement, a State has a duty to ensure that all matters within its territory are conducted in conformity with its international obligations, failure of which will give rise to the international responsibility of that State. This is reflected in some WTO provisions. For example, “each Member is fully responsible under the GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory”.²⁸

Even more specifically, in some cases, “Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-

²⁶ This excludes the WTO Plurilateral Trade Agreements (Annex 4 WTO Agreement).

²⁷ Article XVI (4) WTO.

²⁸ Article XXIV:12 GATT 1994 (para. 13, introduced by Understanding on the Interpretation of Article XXIV of GATT '94).

governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.”²⁹ It should be noted that these detailed obligations cover not only the acts of regional or local governments and authorities, but they extend to the act of non-governmental entities. Furthermore, the duties are both positive and negative. Interestingly, when it comes to lower governmental entities, a WTO Member’s duty seems to be less equivocal as compared to private entities, where the Member is required only to use reasonable measures available to it.³⁰ Nevertheless, in all cases, failure of regional and local entities and authorities located within the territory of a WTO Member to observe its related obligations will subject that Member to mandatory and binding dispute settlement processes.³¹

The *sine qua non* of the Rule of law, the availability of legal review, is a main feature of the WTO agreements. Article X(3) of GATT 1994 provides: “(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.” It should be noted that independence of tribunals does not require institutional separation from the agency whose decisions, practices or procedures are contested.³² A number of other provisions echo an analogous obligation.³³ The commonalities amongst these provisions are that:

²⁹ Article 13 Agreement on the Application Sanitary and Phytosanitary Measures (“SPS Code”).

³⁰ Other examples include Articles 3, 4.1, 7, and 8 Agreement on Technical Barriers to Trade (“TBT Code”).

³¹ See, e.g., Articles XXII and XXIII GATT 1994, Articles XXII and XXIII GATS, and Article 64 TRIPs, as well as the DSU.

³² Article X(3)(c) GATT 1994 and Article 41(5) TRIPs.

³³ Article 8 SPS Code (referring to its Annex C, see para. 1(i)); Article 5.2.8 TBT Code; Article 13 of the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Code), the Anti-Dumping Code is very similar in structure to the Agreement on Subsidies and Countervailing Measures and therefore, the latter will only be cited where a unique issue arises; Articles 11(1) and 11(2) of the Agreement on Implementation of Article VII of GATT 1994 (“Customs Valuation Code”); Article 21 of the Agreement on Preshipment Inspection (“API”); Articles 2(j) and 3(h) of the Agreement on Rules of Origin; Article 3(5)(e) of the Agreement on Import Licensing (“Import Licensing Agreement”); Article VI(2) GATS; and, Articles 31(i), 31(j), 32, 41(4), and 49 TRIPs.

- there must be tribunals or procedures;
- the nature of tribunals or procedures are left to the Members, provided that they be judicial, arbitral or administrative, and that they are of a higher authority or superior jurisdiction, as compared to the affected governmental entities;³⁴
- the tribunal or procedures must be functionally independent from the affected governmental entities;
- the scope of the review procedures must include authority to modify, nullify or reverse challenged decisions and to take corrective action; and,
- the decision of tribunals must be implemented and govern the practices of the affected government bodies.

In support of the Rule of law, the WTO also requires, as indicated previously, its Members to take positive “measures”, which in WTO parlance, includes the formulation and implementation of laws, regulation and practices.³⁵ The publication of laws is part of “transparency” requirements of the WTO.³⁶ The three prominent provisions are Article X(1) of GATT 1994,³⁷ Article III(1) and (2) of GATS,³⁸ and Article 63(1) of TRIPs.³⁹ It

³⁴ In some cases, appeal to a **judicial** authority is specified; see, e.g., Article 11(2) Customs Valuation Code. As well, Article 31(g) TRIPs requires that the original decision-maker also have the authority to reconsider its own decision. This is particularly important where appeal is restricted to issues of law.

³⁵ See also, Article 2(f) Agreement on Rules of Origin.

³⁶ This fulfills one of Fuller’s 8 principles. Indeed, the WTO Transparency principle, together with non-discrimination, market access, and mandatory and binding dispute settlement procedures, forms the foundation of legal relations between its Members.

³⁷ Article X(1) GATT 1994 provides:

“Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.”

³⁸ The relevant provisions of Article III provide:

“Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.”

³⁹ Article 63(1) provides:

“Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the

is interesting to note that both the GATT 1994 and TRIPs require that publication must be done in such fashion to allow interested parties to become acquainted with them; i.e., the rules must be intelligible, another one of Fuller's criteria.⁴⁰ The principle that compliance with the rules must be possible is implicit in, for example, the WTO requirement that "... Members shall allow a reasonable interval between the publication of sanitary and phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member".⁴¹ Of course, Fuller thought of the instance where compliance with a rule is impossible. However, allowing those affected by the rules to prepare for compliance provides a reliable measure of the extent to which observance of the rule is possible.⁴² Similarly, a few of the WTO provisions implicitly relate to the principle that rules must not continually fluctuate.⁴³ *Ex-post facto* or retroactive laws are also of concern for the Rule of law, and their prohibition is another of Fuller's criteria. In a number of instances, WTO law proscribes retroactive application of rules.⁴⁴

Some WTO obligations corresponding to the Rule of law go beyond Fuller's 8 principles. For example, on a few occasions, Members are required to establish official points of enquiry (in most cases, a 'one-stop shop' approach is indicated) to respond to relevant questions and provide necessary documentation.⁴⁵ From the standpoint of the Rule of law, such provisions would make the publication process more effective by taking positive steps to make the laws more accessible. Furthermore, under some provisions, WTO Members are required to ensure that their laws "are administered in a consistent, uniform, impartial and reasonable manner".⁴⁶ Another formulation requires the laws of WTO Members "be neutral in application and administered in a fair and equitable manner".⁴⁷ Notwithstanding the differences in formulation, implicit in these obligations are the requirements of 'consistency' and 'coherence' in the application of laws, which are also embedded in the notion of procedural legitimacy. Briefly put, the most basic conditions are that:

1. any principle used to interpret and apply a rule, or justify governmental action which is based on the rule, must be consistent with other principles and rules within an identifiable, larger legal system to which the rule belongs; and,

subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published."

⁴⁰ Other similar WTO provisions include: Article 7 SPS Code (referring to para. 1 of its Annex B); Articles 2.9.1, 2.11, 4 (referring to para. 'O' of its Annex 3), 5.6.1, and 5.8 TBT Code; Article 12 Customs Valuation Code, Articles 2(8) and 3(2) API; Articles 2(g) and 3(e) of the Agreement on Rules of Origin; and, Article 1(4)(a) Import Licensing Agreement.

⁴¹ Article 7 SPS Code (referring to para. 2 of its Annex B).

⁴² Other examples of this approach include: Article 5.9 TBT Code; and, Articles 3(3), 3(4), 5(b) and 5(d) Import Licensing Agreement.

⁴³ See, e.g., Article 2(h) Agreement on Rules of Origin.

⁴⁴ See, e.g., Articles 2(i) and 3(g) Agreement on Rules of Origin.

⁴⁵ See, e.g., Article 10 TBT Code and Article 2(7) API.

⁴⁶ See, e.g., Articles 2(e) and 3(d) Agreement on Rules of Origin and Article VI(1) GATS.

⁴⁷ See, e.g., Article 1(3) Import Licensing Agreement and Article 41(2) TRIPs.

2. the identified larger legal system can be justified by reference to its internal coherence.⁴⁸

Undoubtedly, legal review under these principles would give rise to an examination of the nature, scope and limits of discretion in the application of the laws. The WTO rules address this issue in a number of ways. In some cases, detailed substantive criteria are provided which limit the discretion of authorities.⁴⁹ In other cases, evidentiary conditions are placed on the decision-making processes of authorities. For example, with respect to the discretion of authorities to initiate investigation of a harmful pricing practice known as ‘dumping’, they may do so of their own accord or, “upon a written application by or on behalf of the domestic industry”.⁵⁰ However, in both cases, the authorities may proceed only if they have before them evidence (as compared to unsubstantiated allegations) of dumping, injury to domestic producers, and a causal link between the dumping and the injury.⁵¹ Finally, there may be instances where authorities’ refusal to take action might be an abuse of discretion. In this respect, the WTO requires administrative action in a number of circumstances.⁵²

The WTO advocates open governmental processes beyond its transparency obligations. This includes, for example, the requirement that in processes leading to the enactment of laws, stakeholders be notified and consulted, and that their opinions be considered.⁵³

⁴⁸ Of course, while internal coherence ultimately rests upon a particular conception of how certain values are to be preferred over others, all that procedural legitimacy requires is that the dominant values, taken as a whole, present a coherent philosophy. However, this should not be confused with substantive legitimacy, which assesses a government official’s decision attributable to a particular conception of internal coherence of the identified legal system in relation to other (alternative, competing, or incongruous) conceptions that could equally espouse or accommodate that legal system. A more detailed analysis of the WTO standards for review of national administrative action is offered in a separate paper I presented at the AIIFL Public Lecture Series on *China WTO: Trade Law and Policy* (16 January 2002, Hong Kong).

⁴⁹ See, e.g., Article 20 API.

⁵⁰ Articles 5.1 and 5.6 Anti-Dumping Code.

⁵¹ Article 5.2 Anti-Dumping Code.

⁵² See, e.g., Articles 2(h) and 3(f) Agreement on Rules of Origin, and Article 2(17) API.

⁵³ In this respect, see, e.g., Article 4 TBT Code, which by reference to its Annex 3, paragraphs J, L, M, N and P provides:

“J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the

Furthermore, in some cases, WTO Members are required to provide the most current information concerning their legal requirements to individual parties affected by such requirements.⁵⁴ Finally, WTO Members have agreed to a normative stipulation with respect to domestic transparency in the conduct of their respective trade policy matters. Specifically, Annex 3 to the WTO Agreement provides:

“B. Domestic transparency

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.”

As indicated earlier, legal review would be meaningless without the availability of records concerning the challenged governmental action, coupled with conditions that safeguard administrative and review procedures. In this regard, the following requirements could be extracted from a cross-section of relevant WTO rules:

ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.”

⁵⁴ See, e.g., Article 2(6) API;

- notification to an affected party that official procedures are impending;⁵⁵
- notice of information required by the authorities, together with opportunity for interested parties to present and reply to written evidence which they consider relevant;⁵⁶
- parties to have the opportunity to be represented by independent legal counsel;⁵⁷
- upon a consideration of a party's dossier, notification setting forth in precise and complete terms any deficiency that might adversely affect a party;⁵⁸
- communication of the stage of the procedures, at the request of a party;⁵⁹
- notification of the finding of essential facts under consideration which form the basis for the imminent final determination;⁶⁰
- where corrective action by an affected party is possible and permitted, notification of a tentative decision, subject to the affected party taking corrective action;⁶¹ and,
- transmission of decisions, in writing, setting forth findings and reasoned conclusions in support of such decisions, to the affected party.⁶²

The Emerging Shape of the Rule of law under the WTO

As has been shown, WTO obligations, taken as a whole, provide for a minimalist version of the Rule of law under which its Members must operate. This is clear in a number of ways. First, while almost all elements of the Rule of law are present, they are fragmented. There is no comprehensive code that requires compliance with all the basic Rule of Law-related WTO requirements in all cases. For example, while the TBT Code, in its Annex 'C', paragraphs L and N, provides for the opportunity for interested stakeholders, including private enterprises, to review and comment upon proposed product standards,⁶³ that opportunity is reserved for WTO Members with respect to technical regulations.⁶⁴

⁵⁵ See, e.g., Article 5.2.2 TBT Code; Article 12 Anti-Dumping Code; Article 3(1) of the Agreement on Safeguards; and, Articles 31(b) and 42 TRIPs.

⁵⁶ Article 6 Anti-Dumping Code; Article 3(1) Agreement on Safeguards; Article 2(20)(iv) API; and, Article 42 TRIPs.

⁵⁷ Article 42 TRIPs.

⁵⁸ Article 5.2.2 TBT Code.

⁵⁹ *ibid.*; see also, Article VI(3) GATS.

⁶⁰ Article 6.9 Anti-Dumping Code.

⁶¹ See e.g., Article 5.2.2 TBT Code; Article 2(16) API; Paragraph 1 of the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value; and, Article 15(5) TRIPs.

⁶² Article 5.2.2 TBT Code; Article 16 Customs Valuation Code; Article 3(1) Agreement on Safeguards; Article VI(3) GATS; and Article 41(3) TRIPs; see also, Article 11(3) Customs Valuation Code with respect to decisions on appeal.

⁶³ In this case, standards are defined as non-mandatory rules or specifications, as opposed to technical regulations, which are mandatory.

⁶⁴ Articles 2.9.2 and 2.9.4 TBT Code.

The arguments in support of this paradoxical conception of the Rule of law are indeed weak. Secondly, and rightly, I might add, nothing in the WTO agreements addresses legal review for the purposes of assessing substantive legitimacy. At best, the right of a WTO Member to proceed with the dispute settlement procedures of the WTO could provide an indirect path to test the content, purposes and consequences of the application of governmental measures of other Members against certain values embedded in the WTO legal order. This brings me to the second theme: the suitability of the WTO as a vehicle to promote the Rule of law in East Asia.

III. Rule of law based on the WTO model?

A number of problems need to be considered with respect to the sufficiency of the WTO regime as a model of a legal order based on the notion of the Rule of law. As indicated earlier, one concern is the fragmentation of procedural safeguards amongst the various WTO agreements, and the existence of inconsistencies in a given agreement. For example, while Article 42 TRIPs requires Members to allow parties to civil and administrative proceedings concerning the enforcement of any intellectual property right covered under the agreement to be represented by independent legal counsel, the same obligation is not specified under Article 61 TRIPs, which requires Members to provide for criminal procedures and penalties, including imprisonment and/or monetary fines, for the prosecution of willful violation of trademark rights and copyrights on a commercial scale. Such an omission could be construed as selectiveness of the sort that undermines the very notion of the Rule of law. A potentially devastating suggestion could be made that the WTO Rule of law model protects the rights of an intellectual property owner while at the same time, does nothing to safeguard the interests of one accused of violating those same rights.

A second issue is the potential disparity in the operation of the Rule of law between foreign and domestic private parties. Private parties do not have direct access to the WTO dispute settlement procedures. The right of access is exclusive to WTO Members; namely, States and governments. Thus, an allegation by a private party of a violation of a provision of a WTO agreement would need to be espoused by that party's Member government. In other words, the measures of a Member can be reviewed under the WTO DSU only on behalf of traders from other Members, not the first Member's own traders. In this way, the WTO Rule of law model would tend to favor a foreign party over a domestic party.

The third problem is more abstract; the WTO Rule of law model requires that a person's interests be reducible to issues of trade in goods or services, or the ownership of intellectual property rights.⁶⁵ Put in the form of a more general question, does the WTO Rule of law model internationalize unfettered, multinational corporate capitalism through a process of legalization and if so, does it legitimate the underlying political and

⁶⁵ This leads into a larger critique, usually within the post-modern, deconstructionist tradition, which is also related to the notion of substantive legitimacy. See, e.g., Michael H. Davis & Dana Neacsu (Summer 2001) *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733.

economic choices of multinational corporate capitalism through the operation of the Rule of law while foreclosing debate on alternative conceptions and models of the Rule of law? In short, does the WTO Rule of law model best suit East Asia?

This debate will necessarily require a political perspective of the Rule of law, which is outside the scope of this paper. I will just venture some thoughts. To be sure, East Asian capitalism may be of a different style to American capitalism. For that matter, some have argued that European capitalism is also a breed apart. However, the entire ethos of the WTO is the minimization of the degree, manner and frequency of government intervention in international trade in goods and services. There are a number of theories, such as comparative advantages, political economy or corporate growth in the post-industrial era, which could justify non-intervention in international trade. Capitalism, in one form or another, is embedded in each of these theories. So could be the concept of the Rule of law. Various conceptions of the Rule of law, for example one based upon the balancing between individual and community-based rights, or on the enumeration of a set of basic, but fundamental human rights, are not necessarily antagonistic to either non-intervention or capitalism. The challenge then is to find a consistent, coherent and comprehensive Rule of law policy that fits in best with the other parameters, including capitalism and non-intervention. Recalling the first two concerns, it seems that the WTO provides a rudimentary and incomplete Rule of law model, which would benefit from being more consistent and comprehensive in its coverage.

IV. Conclusion

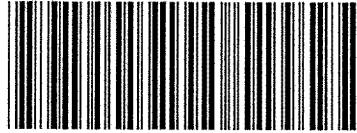
So where does all this lead? The WTO Rule of law model does allow for more predictable, non-discriminatory international trade relations and policy-making. It helps the WTO Members achieve their goals in terms of compliance with the substantive rules. This is particularly true with respect to the interests of foreign traders. The Rule of law concept is approached from a practical and pragmatic perspective of requiring only that which is necessary to ensure the smooth functioning of the WTO rules within each Member's legal system.

There is no general policy for the Rule of law at the WTO that is based on a particular Rule of law conception. I would argue that before it could be a credible vehicle, the Rule of law model of the WTO would need to reflect such a general policy.

In the meanwhile, it is of limited benefit to the some countries of East Asia with no significant Rule of law policy by perhaps, acclimatizing them to some of the rigors and requirements of the Rule of law.

Thank you very much for your attention.

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