

The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective

Shin-yi Peng



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Over the decades, the dispute settlement system under the General Agreement on Tariffs and Trade² ("GATT") underwent a process of legalization, judicialization, and adjudication. The evolution

¹ Shin-yi Peng, S.J.D. 2000, University of Wisconsin Law School. The author has previously lectured on Legal Aspects of Doing Business with Greater China at the University of Wisconsin Law School and will join the faculty of law at the National Tsing Hua University in Taiwan.

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Among the author's other publications are: *The Impact of NAFTA's Rules of Origin in East Asia*, 26 HWA KANG L. REV. 147 (1998); *Agricultural Trade in East Asia after the Uruguay Round*, OCCASIONAL PAPER OF EALSC (East Asian Legal Studies Center, U. of Wisconsin), Dec. 1998; *Economic Regulations Between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy*, 16 WIS. INT'L L.J. 639 (1998).

of the GATT/WTO³ dispute settlement system⁴ encompasses a process of institutional transformation, from state-to-state bargaining to supranational adjudication.⁵ Today, the WTO is a hierarchical and bureaucratic organization with a compulsory dispute resolution mechanism that is crowned by a “court-like” structure. “The dispute settlement mechanism is in fact a, if not the, most important element of the WTO.”⁶ “It is the ‘jewel in the crown’ of the WTO.”⁷ At the time of this writing, the WTO Agreement had been in force for four and a half years, and during this period, there had been over 179 requests for consultations under the Dispute Settlement Understanding (DSU).⁸ The new DSU changes the scheme for settling international trade disputes in three ways: by making adoption of panel decisions by WTO

² GENERAL AGREEMENT ON TARIFFS AND TRADE, opened for signature Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187 [entered into force Jan. 1 1948] [hereinafter GATT].

³ Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiation, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125 (1994) [hereinafter WTO]. For comments on the Marrakesh Declaration, see Joseph F. Dinnin, GENERAL LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION BOOKLET A 1-15 (1995).

The GATT and the WTO were in transitional co-existence in 1995. After the transitional year, the WTO “absorbed” and succeeded the GATT. Currently, the WTO embodies the GATT-1994 (which is essentially GATT-1947 as amended and changed through the Uruguay Round), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-related Intellectual Property Rights (TRIPs), as well as a number of plurilateral agreements. In this article, the term GATT/WTO refers to the GATT-1947 and its successor, the WTO. Only when the discussion focuses on the differences between pre-1994 GATT practice and post-1994 WTO practice is the term “the GATT and WTO” used.

⁴ The term “dispute settlement” or “dispute resolution” requires clarification. A primary problem encountered here is the definition of the key terminology of this thesis—“dispute settlement.” In international law, the Permanent Court of International Justice in the affair *Mavrommattis* defined a dispute as “a disagreement on a point of law of fact, a conflict of legal views or of interests between two persons.” Miquel Montana Mora, *A GATT With Teeth: Law Wins Over Politics In the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT’L L. 103, 115 (1993). In the international trade arena, however, the question of what constitutes a “GATT dispute” was unclear from the beginning of GATT-1947. The GATT provided more than thirty articles outlining various procedures used to resolve different types of disputes. This thesis, therefore, focuses on what have traditionally been considered the central articles on GATT dispute settlement: Articles XXII and XXIII, and the DSU under the WTO.

⁵ Supranational adjudication means “the process by which a triadic dispute resolver authoritatively settles interstate conflicts about the relationship between national and international legal rules.” Alec Stone Sweet, *The New GATT Dispute Resolution and the Judicialization of the Trade Regime*, in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 118 (Mary L. Volcansek et al. eds., 1997).

⁶ SYLVIA OSTRY, REINFORCING THE WTO 21 (1998).

⁷ *Id.* at 20.

⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

member states automatic; by creating a quasi-permanent appeals court to hear appeals of panel decisions; and by making it easier for member states to retaliate when defendant states fail to comply with dispute resolution rulings.

This article will discuss the most pressing challenges facing the East Asian countries⁹ in light of the WTO dispute settlement system: the differences in the legal cultures¹⁰ between East Asia and the West. This cultural dimension study will focus only on the resolution process.¹¹ The attempt to discuss legal cultures, however, requires the use of methodologies that may be criticized as oversimplified. Choosing what sources to use to make sense of culture is a challenging task. Should we concentrate on behaviors, words, or litigation rate?¹² This article is, thus, not a comprehensive overview of the cultural study of East Asian legal systems; instead, it relies on the empirical analysis of legal phenomena.¹³ In one sense, the discussion from the cultural perspective in this article is based on case studies. Chinese societies are the main focus of the discussion, and my focus on Taiwan, China, and APEC is explained,

⁹ The term "East Asia" in this article is defined as Japan, the East Asian Newly Industrialized Economies ("NIEs"), and the new NIEs. The geographical boundary of East Asia is, in general, limited to Japan, Korea, China, Taiwan, Hong Kong, and members of the Association of Southeast Asian Nations ("ASEAN"), of which Korea, Taiwan, Hong Kong, and Singapore are identified as the Asian newly industrializing Economies (NIEs).

The author recognizes that the exclusion of Japan within the scope of the term "East Asia" is in some circumstances necessary since Japan is on an obviously different economic level from other Asian economies. The term "East Asian NIEs and new NIEs" is therefore specified wherever the term "East Asia" would be an oversimplification. Otherwise, Japan is included in the term "East Asia," because a broader meaning of "East Asia" should be attached to this term when discussing the East-Asian countries' shared Confucian tradition and their similar Mercantilist trade policies.

¹⁰ The term "legal culture" is defined in this thesis as legal consciousness, attitudes, values, beliefs, and expectations about law and the legal system. This thesis does not adopt the broader but somewhat vaguer meaning--the living law. The term legal culture used in this thesis describes the legal consciousness: the degree of people's trust in law, people's attitudes and opinions with respect to law, and people's idea and expectations of justice. See generally LAWRENCE M. FRIEDMAN ET AL., *LEGAL CULTURE AND THE LEGAL PROFESSION* (1996). See also JOHANNES FEEST ET AL., *GLOBALIZATION AND LEGAL CULTURES* (1999).

¹¹ Cultural differences may contribute to the creation of disputes as well as their resolution, and the latter concerns both process and outcome. See Pitman Potter, *Cultural Aspects of Trade Dispute Resolution in China*, in *THE ASIA-PACIFIC REGIME AND THE EXPANDING BORDERS OF THE WTO: IMPLICATIONS, CHALLENGES AND OPPORTUNITIES* 135, 135 (Mark A. Buchanan et al. eds., 1996).

¹² For more explanation on this point, see AUSTIN SARAT ET AL., *LAW IN THE DOMAINS OF CULTURE* (1997). See also PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 1-6 (1999).

¹³ Potter, *supra* note 11, at 135.

if not justified, by my personal background and by the overwhelming influence of Confucianism in this region.

From a legal culture perspective, this article examines the implications of the WTO's more ruled-based dispute settlement system for East Asian countries. Part I demonstrates the interrelationship between economic globalization, culture, and law. Part II discusses three examples of how culture affects legal perceptions and identifies some aspects of legal culture approach to law common to all the East Asian and Southeast Asian countries. The third section discusses how the Western/Asian legal culture dichotomy is reflected in the legalistic and non-legalistic features of the WTO's DSU. This section also explains how the pattern of voluntary participation in GATT/WTO reflects this legal culture dichotomy. Part IV presents some strategic suggestions for East Asian countries to improve their participation in the WTO.

I. LAW, CULTURE, AND GLOBALIZATION

The WTO was established to promote economic globalization and trade liberalization. With the highly visible WTO, globalization of world trade has entered a new realm of political sophistication and greater integration. The WTO, responding to the increased economic interdependence of countries, represents the globalization of economic regulation.¹⁴

When scholars focus on trade liberalization and globalization, they tend to overemphasize economics at the expense of political values. From the perspective of globalization of law,¹⁵ one negative aspect of the WTO is that it protects economic globalization without regard for the social, cultural, or environmental concerns of domestic policies. Possibly, trade globalization has converted formerly domestic political decisions—for example, the desirability of maintaining a domestic cultural infrastructure—into narrow economic decisions. Agricultural protectionism in East Asia illustrates how globalization transformed a domestic political decision into a largely economic decision. For example,

¹⁴ See Celso Lafer, *The Role of the WTO in International Trade Regulation*, in *THE WTO AND INTERNATIONAL TRADE REGULATION* 33, 35 (Philip Ruttley ed., 1998).

¹⁵ Scholars in Law and sociology became interested in globalization processes. See generally VOLKMAR GESSNER, *EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW* (1998).

most people in East Asia believe that rice should not be subject to trade liberalization because of its significant social-economic role and the long history of traditional culture surrounding it.¹⁶ Globalization of trade challenges such domestic cultural values.

Economic globalization leads to cultural globalization by discouraging diversity. Culture is not free from the coercion of global forces and a global culture is emerging alongside economic globalization.¹⁷ Although economic globalization has its limits, globalization inevitably leads to some degree of “cultural homogenization.”¹⁸ Although the WTO was established to focus on the globalization of trade and economy between states, it has also promoted cultural globalization, for example, through its dispute settlement mechanism. This mechanism was expected to be an effective global legalistic system dealing only with “trade disputes” but inevitably also dealt with cultural issues.

The cultural dimension of the WTO dispute settlement system can be classified into at least two categories. The first category concerns “trade in cultural products.” The above-mentioned situation regarding rice in East Asia belongs to this category, but the Canada periodical case,¹⁹ discussed below, is more illustrative. The second category concerns “legal culture,” which is the main focus of this section.

The WTO decision on Canada - Measures Concerning Periodicals²⁰ involves a challenge to the Canadian government’s longstanding commitment to offset the overwhelming presentation of U.S.

¹⁶ For the East Asian nations, rice is more than a mere commodity and food source, because it embodies cultural and social values of great importance. Rice farming has been attractive to farmers, because it preserves the rural environment and their rice growing culture. Most people believe that rice should not be subject to liberalization, because of its significant social-economic role and the long history of traditional culture surrounding it. Agriculture is the heart of Asian culture and is deeply connected with other social activities such as religion. Asians believe that the opening of their markets to farm imports, especially rice, will lead to the death of their agriculture and the disappearance of a certain traditional culture. The domestic cultural value is challenged by the trend of trade globalization. See Information Access Company, *Trade-Japan: Row Over Rice Tariffs Entangled In Tradition*, INTER PRESS SERVICE, Dec. 23, 1998, available in 1998 WL 19902126.

¹⁷ See GESSNER, *supra* note 15, at 253.

¹⁸ ROBERT J. HOLTON, GLOBALIZATION AND THE NATION-STATE 167 (1998).

¹⁹ Report of the Panel, Canada - Certain Measures Concerning Periodicals, WT/DS31/R, adopted on Mar. 14, 1997 modified by the Appellate Body Report of the Appellate Body, Canada - Certain Measure Concerning Periodicals, WT/DS31/AB/R (adopted on June 30, 1997), available in WTO Document Dissemination Facility <<http://www.wto.org/ddf/>>.

²⁰ Canadian imposed the excise tax on split-run periodical and granted domestic periodicals a lower postal rate than foreign publications. For comprehensive analysis on this case, see Stephen de Boer, *Trading Culture: The Canada-U.S. Magazine Dispute*, in DISPUTE RESOLUTION IN THE WTO 232 (Cameron et al. eds., 1998).

popular culture in the Canadian marketplace. Canada has a long history of trying to promote a viable domestic periodical industry. Three out of four magazines in Canadian newsstands are of U.S. origin. What Canada calls “culture,” however, the United States calls “business.” As a result, Canada imposed protectionist measures, such as an excise tax on some types of periodicals and postal subsidies for domestic periodicals.²¹ The WTO Panel and Appellate Body both concluded that the Canadian excise tax and the postal subsidies were inconsistent with Canada's obligations under the GATT.²²

States generally pursue a variety of goals in addition to economic development, such as cultural autonomy. A strong rule-based international trade regime limits the ability of nations to structure their own domestic laws, which often reflect the cultural values of that nation. Thus, imposing a superseding international law in the name of free trade undermines the social values reflected in domestic laws. Economic globalization, to some degree, rests on the foundation of cultural imperialism.²³ The arrival of McDonald's in Tiananmen Square not only symbolized the potential profits from joint venture contracts, but also introduced Americanized business methods, life style, and consumerism, all of which McDonald's represent.²⁴

The globalization process brought by the WTO challenges domestic dispute settlement mechanisms. Such mechanisms are not only being Westernized but also Americanized. From the perspective of legal culture, the trend toward legalism means that Western, especially American culture, enjoys an advantage in this new era. The United States has been characterized as a litigious society--with too many lawyers and too much attention to “legalism.”²⁵ Americans sue more than most other people; Americans are more litigious claims-conscious than peoples in other countries are.²⁶ This

²¹ *Id.* at 244.

²² *Id.* at 245.

²³ FEEST, *supra* note 10, at 96.

²⁴ HOLTON, *supra* note 18, at 167.

²⁵ See generally John Jackson, *Perspective on the Jurisprudence on International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984) (quantifying the cost of legalism in the U.S.).

²⁶ LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 3 (1985). In the book, Friedman states that if an observer took the daily newspaper as a guide to events, he or she would conclude that sports and law are the two main topics of interest in the

emphasis on legal process and the obsession with law are features of American society. The impression that “lawyers are running the U.S.” is reinforced by newspaper and magazine articles that talk about the law and the “litigation explosion” in the United States—a tremendous increase in certain uses of the legal process over the last century.²⁷

Of course, the litigation rate must be regarded in relation to the size of the population. The question of litigation rates is quite complicated in ways that go beyond methodology of data gathering, and measuring the litigation rate is problematic.²⁸ Because comparative evidence is inconclusive, some scholars question the assumption that Americans are excessively litigious.²⁹ Yet, in the United States, because the country as a whole pays a high price in economic terms for its litigiousness,³⁰ Americans are criticizing and challenging the legalistic system.

Nevertheless, American people are still much more litigious and claims-conscious than people in East Asia are. This is a legal culture difference.³¹ The United States, comfortable with the notion of a strong legal system serving as a unifying force within its federal system, has viewed a legalistic approach as an effective way to settle disputes in international trade. For East Asian countries, the cultural differences regarding dispute settlement raise a serious issue. The legal traditions in those countries are entirely different from the Western ideal of the rule of law.³² Dispute settlement under the old GATT regime, which aimed at lowering tensions, defusing conflicts, and promoting compromise, was consistent

country, because law even crept into the sports pages, with stories about contracts for basketball players or court struggles over team franchises. Almost every domestic story has a legal angle. Almost every story mentions a judge, a court, a rule, the police, the state legislature congress, or administrative agency.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 37-38 (1986) (examining the assumption that Americans are excessively litigious). See also FRIEDMAN, *supra* note 26, at 17. See also Erhard Blankenburg, *Civil Litigation Rates as Indicators for Legal Cultures*, in COMPARING LEGAL CULTURES 41-68 (David Nelken et al. eds., 1997).

³⁰ Galanter, *supra* note 29, at 37-38.

³¹ Carl J. Green, *APEC and Trans-Pacific Dispute Management*, 26 L. & POL’Y INT’L BUS. 719, 720 (1995). See also Charmaine Chan, *Vagueness As A Virtue*, ASIA INC., May, 1996, available in LEXIS/NEXIS, ASIAPC Library, ASIA File.

³² Green, *supra* note 31, at 730.

with the spirit of East Asian cultures.³³ Under the newly evolved GATT/WTO regime, however, Asian legal culture is not free from the coercion of global forces. In the name of economic globalization, Asian people's legal consciousness, attitudes, and beliefs are experiencing "cultural homogenization."

II. THE WESTERN/ASIAN LEGAL CULTURE DICHOTOMY: THE RULE OF LAW IN EAST ASIA?

A. Confucian Thinking on "Dispute Resolution"³⁴: A Case Study of China

Historical records show that the earliest law in China appeared more than 4000 years ago during the Xia Dynasty, the first dynasty in Chinese history.³⁵ This long-lasting legal history has been labeled the "Chinese legal tradition" and the Chinese legal tradition is distinct from the common and civil law traditions of the West.³⁶ With these 4000 years of legal tradition, however, China has been criticized as a country with laws but no "rule of law."³⁷ Even scholars who oppose this view may still agree that China was a country with an anti-law tradition.³⁸ "Law" has never been central to the Chinese experience. Throughout its history, the concept of law and the notion of the "rule of law" have never taken center stage in society until early this century.³⁹

³³ The GATT exhorted members to "consult" with each other about trade disputes, and to take disputes to the membership "as a whole" if resolution was not forthcoming. The legal system relied on a more or less power-based diplomacy: disputing states were to work out their disagreements diplomatically, on the basis of mutual interests. See Sweet, *supra* note 5, at 120.

³⁴ The term "China" in this section primarily refers to China existent through 1911. The goal is to discuss the traditional Confucian thinking. The People's Republic China, the contemporary China, is referred to as the "PRC" when necessary.

³⁵ See GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 2-4 (1996); WANG CHENGUANG, *INTRODUCTION TO CHINESE LAW* 2 (1997).

³⁶ See generally DERK BODDE ET AL., *LAW IN IMPERIAL CHINA* (1967). See also TANG JUN, *A HISTORICAL, PHILOSOPHICAL AND LEGAL ANALYSIS OF CHINESE MEDIATION* 135-140 (1997).

³⁷ See generally WANG, *supra* note 35, at 2. See also RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* 1-5 (1995). See also JIANFU CHEN, *CHINESE LAW* 6 (1999).

³⁸ See WANG, *supra* note 35, at 2.

³⁹ See HUNGDAH CHIU ET AL., *Taiwan's Legal System and Legal Profession*, in *TAIWAN TRADE AND INVESTMENT LAW* 21-24 (Mitchell A. Silk ed., 1994).

Traditionally, Confucianism⁴⁰ has dominated other schools of thought.⁴¹ The imperial rulers used Confucian values to legitimize their governmental structure and their own authority.⁴² The introduction of Western civilization into China during the eighteenth and nineteenth centuries resulted in significant changes within the political, economic, and cultural structures of society. Much of the preexisting social order was destroyed. Confucianism, the heart of ancient Chinese law, however, remains influential today. Moreover, although communists attempted to replace Confucian values with their own ideology and succeeded in destroying many Confucian traditions, most of the traditional values survived.⁴³

Thus, Confucianism remains the foundation for Chinese attitudes and values, providing the basis for the norms of Chinese behavior. Confucian values, identified as the foundation of China's great cultural tradition, have controlled the social order and regulated people in all activities of their day to day lives, including the people's legal consciousness, expectations of justice, and trust in law. Of course, cultural awareness is significant to any international venture. It is, however, of particular importance in Chinese societies.⁴⁴ China's unique culture and social values account for the relationship between law and other social factors. These values, to a significant degree, determine how Chinese laws operate

⁴⁰ Confucianism is based on *li*, and emphasizes virtue, modal behavior, reason, education, and rule of man. See ZIN REN, *TRADITION OF THE LAW AND LAW OF THE TRADITION* 20-21 (1997).

⁴¹ Confucianism and Legalism have existed side by side, although not with equal influence, throughout Chinese history. Historically, these two philosophies have blended over the centuries with different emphases during various periods of history. Legalism is based on *fa*, emphasizing punishment and rule by law but not rule of law. To maintain order, the legalist tradition uses written law as a standard, strict enforcement, and imposition of severe punishment. Legalism emphasized state power and control, rather than imposing moral standard. Largely for this reason, law has been typically applied to the people rather than applied by the people. Therefore, it was rule by law, not rule of law. See KEITH, *supra* note 37, at 15-16.

⁴² In the anti-law tradition, the imperial rulers controlled the social order by imposing Confucianism. See *id.* The ruling class has used the Confucian sayings to brainwash the masses. See *id.*

⁴³ For example, law schools were closed and judges were jailed during the Cultural Revolution (1966-1976). See Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 754 (1999).

⁴⁴ The "traditional legal culture" has exerted a great impact and influence on Chinese society. Since the PRC began its "open door" policy, foreign investors have recognized that knowledge of China's cultural background is as important as knowledge of its political background. The records have shown that one will accomplish little if one attempts to impose Western cultural values on the Chinese. See Tze-hun Chou, *Private Copyright Investment in China*, 1 J. SMALL & EMERGING BUS. L. 375, 390-91 (1997).

domestically and internationally. For instance, traditional legal thinking, or the legal legacy, contributes substantially to the Chinese attitude toward “disputes” and the Chinese approach to ‘settling” disputes.

A significant aspect of the Confucian attitude toward dispute resolution is Confucianism’s emphasis on the principle of harmony.⁴⁵ For example, even if a party was believed to be in the right, it was better for him or her to be merciful to the wrong party and suffer a little.⁴⁶ Forbearance was expected and such behavior was appreciated and highly praised by Confucius. In Confucianism, a decent man was expected to be gentle, selfless, and forbearing.⁴⁷ Only an indecent man valued profits. A person preoccupied with his own personal gains and losses was discriminated against by the whole society.

Under Confucianism, traditional Chinese people behaved themselves properly and preserved social harmony. Maintaining social order and preventing disputes from occurring in society was a collective social responsibility. If disputes arose, the parties, their relatives, and friends participated in mediating the dispute actively and voluntarily.⁴⁸ In settling a dispute, mutual concession was always expected and encouraged. Social order, therefore, started from the idea that harmony should prevail between individuals.⁴⁹ Dispute should be dissolved rather than resolved. Law was viewed negatively, because it was not virtuous for one to assert one’s rights.

Litigation was also viewed negatively, because it was not the normal instrument for resolving disputes among individuals.⁵⁰ In traditional China, failure at compromise resulted in a lawsuit, which

⁴⁵ In Confucianism, the ultimate political goal was to create great harmony in the world, where “everyone all over the world ought to be brothers.” See *Analects* (visited Nov. 10, 1999.) <<http://www.confucius.org/english/lange.htm>>.

⁴⁶ Confucius said: “Gentlemen are harmonious and not clannish; Petty men are clannish and not harmonious.” See *id.*

⁴⁷ Confucius said: “The gentleman understands righteousness; the petty man understand profit.” See *id.*

⁴⁸ Law was only one of several sources of dispute resolution and informal approaches to dispute resolution have been the preferred way for Chinese. See generally WANG, *supra* note 35, at 367.

⁴⁹ See REN, *supra* note 40, at 27-28.

⁵⁰ Confucius said: “In hearing litigation, I am just like other men, but I try always to eliminate the need for litigation too.” See *Analects*, *supra* note 45.

caused both sides to “lose face” and ruined a person’s reputation in society. The winning party lost face by bringing a lawsuit against the other party for his or her profit.

The harmony principle partly explains the current jurisprudence in Chinese societies. Contemporary Chinese still value a conflict-free, group-based system of social relations. Modern Chinese ideologies have not challenged this harmony principle, in the PRC, Taiwan, or Singapore.⁵¹ Since conflict is perceived as disruptive to social harmony, people place great emphasis on resolving disputes outside the formal justice system, where social harmony might be better achieved.⁵² Although social and economic changes have mitigated the negative opinion about lawsuits, the traditional perception of a lawsuit as a loss of face has not vanished entirely in today’s Chinese societies. Many Chinese still prefer informal dispute resolution approaches, such as offering compensation in subsequent transactions.⁵³

A second significant feature of Confucian thinking on dispute resolution is the traditional perception that Chinese law was primarily criminal. The emphasis on the penal code in Chinese law meant that civil matters were either ignored entirely or subsumed under the criminal codes.⁵⁴ Ancient Chinese civil codes were very few in number and they were not independent of the criminal code. To Confucian thinkers, law was for barbarians, not for Confucians.⁵⁵ The ancient Chinese believed that an ideal society did not require extensive legislation or litigation, and that law was an instrument of last

⁵¹ Since the 1980s, the Chinese governments began to promote Confucianism, with party leaders declaring it the “mainstream” of Chinese culture. Lee Kuan Yew, Singapore’s senior minister, considered Confucianism the source of Singapore’s success. Taiwan President, Lee Teng-hui, also identified Confucianism as the root of Taiwan’s democratization. It is interesting to note that modern Chinese leaders still justify their authorization and legitimation with their common Chinese culture, not with imported Western concepts. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 106 (1997).

⁵² Of course today in Chinese societies, lawsuits are not seen as negatively as in the past, but they are still matters to be avoided whenever possible. See Glenn R. Butters, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1119-20 (1996).

⁵³ See JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK* 459 (1999).

⁵⁴ See *id.* at 40.

⁵⁵ See REN, *supra* note 40, at 38. To Confucian thinkers, law was for barbarians, not Confucians. Confucianism emphasizes using reason to educate. Confucianists believed that education was the most essential and effective way to reach their social aims. Confucians believed that education prevents what is going to happen, while law prevents what has already happened. Law is used to punish the evil, not to encourage the good. A good man comes not from punishment, but is a result of education. See BODDE, *supra* note 36, at 21-22.

resort. Therefore, all types of litigation, including property and marriage, were subject to criminal procedures that included torture and corporal punishment.⁵⁶

As a result, “law” was considered punitive and identical to criminal law; a “lawsuit” was concerned with crime and, thus, was disgraceful, and “litigation” was perceived as a humiliating process. People simply knew that when they violated the law, they would be punished. They did not think law could protect their “civil interests.”⁵⁷ These perceptions may further explain the general hostile attitude towards litigation in ancient Chinese society. Additionally, the underdevelopment of private law reinforced the tendency to resolve conflicts through “unofficial channels.” The deeply rooted distrust of the legal system in ancient China has led people to seek justice outside the formal procedure. As with the harmony principle, this cultural legacy can still be found in today’s Chinese society.

A third important characteristic of the Confucian attitude toward dispute resolution is Confucianism’s emphasis on kinship and family. The family, not the individual, constituted the unit of the social and political community.⁵⁸ Strict legal obligations were attached to kinship/family relationships. Law, on the other hand, protected neither the political rights nor the economic position of the individual. This is in sharp contrast to Roman law, the foundation of modern Western law that regulated the private and economic rights and duties of the individual.

In China, the family supported the individual; at the same time, the fate of the family was determined by the behavior of each individual family member.⁵⁹ The individual’s obligations to his family

⁵⁶ Ancient China used criminal punishments for civil offenses. Both the ruling class and the ruled viewed the law viewed as a cruel instrument of suppression. Because ancient China was an agricultural society, the concept of private law that reflects the patterns of market exchange among equal persons never appeared in the traditional legal system. *See id.* at 40-41. *See also* WANG, *supra* note 38, at 6. For example, contract law was ignored throughout Chinese legal history until recently.

⁵⁷ Law was not considered an independent specialty but rather as a function of administration in general. Because law served the interest of the state and society in maintaining the Confucian hierarchy of relationships and social order, a popular concept throughout Chinese history was that justice could not be found in the law. *See* CHEN, *supra* note 37, at 12.

⁵⁸ For example, “[i]t has been said that two Chinese make a family, three Chinese make a bureaucracy. Family unity and governmental bureaucracy are, indeed, two important features of the history of [Chinese civilization].” REN, *supra* note 40, at 24.

⁵⁹ For example, the obligation to support aged or ill parents was a consideration in the decision to grant immunity or suspend a sentence in both capital and non-capital cases. An offender’s execution could be suspended until after his parents’ deaths if he was their only son. More importantly, the family tie had also been introduced into the panel system by a collective punishment in the form of the death penalty or the “corruption of blood.” The corruption of blood could be extended to an

and the family's obligations to the individual were dependent on each other.⁶⁰ These mutual obligations between the individual and the family served as a social control agent. Village elders, neighborhood organizations, or "local peacemakers" traditionally mediated disputes between individuals or families. Chinese non-litigiousness may also be attributable to this legacy and would further explain why the Chinese social order is relationship-driven.⁶¹ Even today, most Chinese people still prefer settling a dispute through a flexible, informal, less confrontational process, such as consultation or mediation, by which parties can maintain an amicable "relationship."

The foregoing examinations constitute an overview of Chinese legal culture⁶² and show that settling disputes through a legalistic, adjudicatory system never became rooted in Chinese thinking. The term "rule of law," therefore, is a "foreign concept" to Chinese society/thinking and the Chinese are still in the process of learning this new vocabulary.

B. *Confucians' confusion: A case study of Taiwan*

Large scale Chinese immigration to Taiwan began in the seventeenth century,⁶³ and the Chinese immigrants assimilated the native Taiwanese, despite attempts to resist. Since being introduced to

offender's entire family. This type of collective punishment clearly reflected the family value-oriented criminal system. *See id.* at 25-27.

⁶⁰ Confucius said: "During your parents' lifetime, do not journey afar." *See Analects, supra* note 45.

⁶¹ China has always been a most family-oriented society throughout its history. *See CHEN, supra* note 37, at 249-252. Even in the PRC, Mao Tse-tung's efforts to foster rejection of the kinship system had only limited success. The Communist party and state perpetrated the kinship framework for their own purposes. *Quanxi* (personal relations) plays an important role in today's Chinese societies. Not only has the emphasis on kinship collective not been challenged in modern Chinese countries, but also it has also even been reinforced. For a detailed discussion on *quanxi*, see Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of small Businesses in Taiwan*, in CONTRACT, QUANXI, AND DISPUTE RESOLUTION IN CHINA 223-262 (Tahirih V. Lee et al., eds., 1997) [hereinafter LEE].

⁶² *Cf. Potter, supra* note 11, at 135, 140-152. Professor Potter uses a narrative approach to call attention to cultural dimension of trade dispute resolution in China. In the article, he categorizes disputes into government to government disputes, private to government disputes, and private to private disputes. *See id.*

⁶³ *See generally The History of Taiwan*, (visited Dec. 12, 1999) <<http://www.taiwandc.org/history.htm>>. Portuguese navigators came upon the island of Taiwan in the seventeenth century. They were struck by the beauty of its green mountains rising out of the waters of the Pacific and named the island "Formosa," meaning "beautiful island." Under the name Formosa, Taiwan was introduced to the Western world. The Portuguese's interest in Taiwan was only moderate, and they soon left. The next Europeans to occupy Taiwan were the Dutch. During the Dutch administration in the seventeenth century, large scale Chinese immigration to Taiwan began. The mass Chinese migration to Taiwan changed the character of the island and was

Taiwan, Chinese traditions, including attitudes toward law and disputes, have become deeply rooted in Taiwanese society. During the Japanese occupation before and during World War II, Japan carried out a variety of legal reforms.⁶⁴ Japan, however, a country with a cultural heritage similar to China's, did not essentially transform Taiwan's traditional values.⁶⁵ In fact, since fleeing to Taiwan in 1949 after the defeat by the Communists, the Nationalists ("KMT") have encouraged Confucian thinking.⁶⁶

Rapid economic development after World War II transformed Taiwan socially. Economic development accelerated the pace of industrialization and urbanization, both of which in turn reshaped the traditional social and economic life. Although people are profoundly affected by the traditional cultures they have inherited, they are also affected by modern technologies, popular culture,⁶⁷ and the lifestyles of others.⁶⁸ Taiwan, being influenced by business trends, has absorbed much from the West.⁶⁹

followed by serious conflicts between Dutch and Chinese. The Ching dynasty of China made Taiwan its twenty-second province. *See id.*

⁶⁴ *See id.* China ceded Taiwan to Japan in 1895 under the Treaty of Shimonoseki. During its fifty-year rule of Taiwan, Japan carried out several legal reforms on the island. Japanese forces surrendered the island of Taiwan to the Allied Forces on October 25, 1945. *See id.* *See also* Lung-chu Chen, *Taiwan, China, and United Nations*, in *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER LEGAL AND POLITICAL CONSIDERATIONS* 189, 191-192 (Jean-Marie Henckaerts et al. eds., 1997).

⁶⁵ During the fifty-year occupation, the Japanese empire implemented several "laws" on the island. The fifty years of Japanese rule, however, did not substantially change Taiwan's legal culture due to the cultural similarity between Taiwan and Japan. *See* CHIU, *supra* note 39, at 35.

⁶⁶ Since then, the Nationalists have claimed that the Republic of China (Taiwan) is the sole legitimate government of China. Declaring that it "succeeded" to the Chinese tradition, the Chiang Kai-shek administration promoted Confucianism. *See generally* *The History of Taiwan*, *supra* note 63.

⁶⁷ Unlike in the PRC, Western popular culture has been "imported" into Taiwan almost without any political barriers for decades. The PRC, on the other hand, still maintains a strict censorship system. For popular motion pictures, the PRC has a quota that allows only ten "quality" western films to enter the country every year. The government blocks many Internet websites. The lack of access to modern communications and popular culture retards social transformation. *See* HOLTON, *supra* note 18, at 166. *Cf. infra* note 96.

⁶⁸ FRANK B. GIBNEY, *CREATING A PACIFIC COMMUNITY* 20, 25 (1993). Mr. Gibney argues that "people are profoundly influenced by the cultures, religions and traditions that they have inherited - and this is true nowhere more than in East Asia." *Id.* He says, however, that "people are also influenced by inventions, modern communications, popular culture and the lifestyles of others. All of these, thanks to modern technology, can now be exported and imported at lightning speed." *Id.*

⁶⁹ Compared to the PRC's legal system, Taiwan's, a mixture of Chinese and western society, is more formalized, institutionalized, and relatively transparent. It would be inaccurate, however, to infer that Taiwan is a society where Confucian thought is no longer valued. To illustrate, businesspersons have to take Chinese traditional values into consideration when marketing their products in Taiwan. An interesting case is the Pepsi billboard campaign. Pepsi cancelled its slogan "Come live with the Pepsi Generation" in Taiwan, because the slogan translated into Chinese turned out to be "Pepsi will bring your

Some distinctive features in Taiwan during its economic globalization and trade liberalization raises the following questions: whether the Western/Asian legal culture dichotomy remains in modern Chinese society, and to what extent international trade can transform the Confucian legacy.

Generally, networks of interpersonal relationships, based on the traditional kinship emphasis, have played a significant role in Taiwan's economic development and contributed much to Taiwan's "economic miracle."⁷⁰ Specifically, Taiwan's development experience with the "informal"⁷¹ financing techniques used by small or family-run businesses has been used as an example of the Chinese traditional personal relationship. Among the range of instruments the KMT used to guide business development, control of the banking and financial system was the most important. "The KMT gained leverage over credit, allowing it to direct entrepreneurial activity toward desired or targeted sectors[.]"⁷² Small and medium enterprises (SMEs),⁷³ on the other hand, generally had difficulties obtaining long-term credit to finance capital improvements. Therefore, SMEs had to finance themselves⁷⁴ through non-regulated,⁷⁵ informal mechanisms.⁷⁶ Family and friends provided much of the financing of SMEs in the form of capital contributions.⁷⁷

ancestors back from the dead," which violates Taiwanese culture. The result of the poor translation was very offensive to Chinese tradition of ancestor worship. See EDWARD G. HINKELMAN, TAIWAN BUSINESS 130-132 (1994).

⁷⁰ See Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of small Businesses in Taiwan*, in LEE, *supra* note 61, at 223, 235-338.

⁷¹ "Informal activities" are "the activities that should be registered or licensed by the authorities but are not, or that give rise to a tax liability but no taxes are paid." *Id.* at 241.

⁷² JOSE EDGARDO CAMPOS ET AL., THE KEY TO THE ASIAN MIRACLE 111 (1996).

⁷³ SMEs have been the backbone of Taiwan's economy. See *Vice President Lauds Contributions Of Taiwan SMEs*, CENTRAL NEWS AGENCY (TAIWAN), Jan. 18, 2000, available in 2000 WL 2358872.

⁷⁴ Small business financing in Taiwan often occurs outside of formal law. See generally BRIAN WALLACE SEMKOW, TAIWAN'S FINANCIAL MARKETS AND INSTITUTIONS: THE LEGAL AND FINANCIAL ISSUES OF DEREGULATION AND INTERNATIONALIZATION (1992).

⁷⁵ The combination of very cautious commercial bank lending policies and an underdeveloped securities market has produced a large-scale underground financial sector in Taiwan catering to the needs of individuals and small businesses that cannot obtain financing from regulated sources. See Michael S. Bennett, *Unleashing a Tiger: Financial Deregulation in Taiwan*, 11 UCLA PAC. BASIN L.J. 1, 2 (1992). See also Michael S. Bennett, *Banking Deregulation in Indonesia*, 16 U. PA. J. INT'L BUS. L. 443, 471 (1995). In the past decade, however, Taiwan's financial deregulation and liberalization, including the entry of private banks, have improved access to financing for SMEs in Taiwan. Thus, for the SMEs, networks of interpersonal relationships have become just one of the financing sources among many alternatives.

The marginalization of law in Taiwan⁷⁸ reflects the role of traditional legal culture in a modern Chinese society. SMEs, organized around the concept of the traditional Chinese family, have been the backbone of Taiwan's economy.⁷⁹ As the bases for favor exchanges, personal connections play an influential role in Taiwan's business world.⁸⁰ Taiwan's small-scale capitalism,⁸¹ which is based on the traditional kinship emphasis, and the networks of connections maintained and extended among these SMEs, demonstrate the strength of traditional Confucian culture in this society, which has been extensively exposed to commercial activities with the West.

To what extent international trade can transform the Confucian legacy can be examined from another perspective: the evolution of intellectual property ("IP") protection in Taiwan.⁸² Despite the U.S. government's attempts to improve IP protection in Chinese societies such as Taiwan,⁸³ the United States accomplished little, because U.S. policy makers assumed that the U.S. concept of intellectual property rights was universally accepted. Accordingly, the United States tried to impose Western

⁷⁶ See Winn, *supra* note 70, at 241. According to Professor Winn's study, the informal financial practices of small business in Taiwan accounted for about 57% of all economic activity in Taiwan, whereas informal economic activity accounted for from 3% to 20% of all economic activity in the U.S. See *id.* See also Lincoln Kaye, *Pains of Adolescence*, FAR E. ECON. REV., Jan. 25, 1990, at 51.

⁷⁷ See Winn, *supra* note 70, at 241-244.

⁷⁸ See *id.* at 241.

⁷⁹ Many economists believe that Taiwan's flexible small business sector is the major reason the country has been able to ride out the recent Asian financial crisis. See *Taiwan in Praise of Paranoia, A Survey of Taiwan*, THE ECONOMIST, Nov. 7, 1998, at 9.

⁸⁰ The general manager of a hotel in Taipei stated: "Everything in Taiwan is done through relationships. They need tangible incentive to do something for you. Generating this incentive is critical to doing business in Taiwan." See GEOFFREY MURRAY, *DOING BUSINESS IN CHINA: THE LAST GREAT MARKET* 71 (1995).

⁸¹ Currently, there are more than one million SMEs on the island, which means one for every twenty-two Taiwanese. These SMEs are capitalized at thirty million Taiwan dollars, accounting for nearly 80% of all employment, half of all exports, and 98% of all businesses. See David Frazier, *The coming thaw*, ASIAN BUSINESS, Oct. 1 1999, at 48, available in 1999 WL 13425531.

⁸² See generally Wen-tang Su, *Copyright Law in Taiwan: A Study of Social Meaning and Legal Reform*, in UNIVERSITY OF WISCONSIN LAW LIBRARY THESIS COLLECTION (1996). See also Paul E. Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 200-201 (1994).

⁸³ For example, the international community has referred to Taiwan, which was on the priority foreign country list of Special 301 in 1992, on the priority watch list in 1993 and on the watch list in 1994 and 1995, as the "pirate kingdom." U.S. Trade Representative (visited Jan. 17, 2000) <www.USTR.gov>.

cultural values on Chinese societies.⁸⁴ U.S. approaches to IP protection in Chinese economies have been misguided.⁸⁵ A direct transplant⁸⁶ is neither possible nor desirable in this case. Although the United States can “plant” a “Taiwanese Copyright Law,” it cannot transform traditional Taiwanese social attitudes toward IP.⁸⁷ No formal or informal counterpart to copyright law exists in Chinese history.⁸⁸ As mentioned earlier, profit-seeking activities were discouraged in ancient China.⁸⁹ In addition to discriminating against profit seeking, Confucian culture has historically encouraged and praised the copying and imitation of human ingenuity.⁹⁰ Therefore, Western copyright theory, as codified in the Berne Convention, is on a collision course with Chinese cultural beliefs.

In recent years, Taiwan has become the fastest growing global participant in the information technology industry. The country is currently a major market for, and a producer of, computer-related

⁸⁴ See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENCE* 1995 (arguing that brute attempts to transplant alien private property and rule-of-law concepts from the U.S. into the cultural and legal environment of China are bound to fail).

⁸⁵ See *id.* at 95-111.

⁸⁶ For criticism of attempts to directly transplant law into other cultures, see David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U.L. REV. 37 (1990) (attributing the failure of attempts in the 1960s to transplant law from developed countries into Africa, Asia, and Latin America to a lack of awareness of those regions' cultures).

⁸⁷ See generally George C.C. Chen, *Copyright Protection of Computer Software in Taiwan and Its Enforcement by the Information Product Anti-Piracy Alliance*, 19 HASTINGS INT'L & COMP. L. REV. 645 (1996).

⁸⁸ See generally ALFORD, *supra* note 84. Alford explains that in Chinese history, from the beginning of the imperial era to modern times, a counterpart to copyright can not be found. IP interests were not recognized throughout its entire legal history. See *id.* Copying, on the other hand, can be a form of flattery in the field of fine art. Copying is not harmful at all in most cases in traditional China. See *id.*

The history of the PRC provides a good example here. During the Cultural Revolution in the 1960s, the Communist government instituted radical policies attacking property rights and material incentives. It was believed that “if a steel worker need not put his name on an ingot he had produced, why should a writer enjoy the privilege of putting his name on the article he produced?” All creative works were blocked during that period and completely unprotected by any law. See David B. Dreyfus, *Confucianism and Compact Discs: Alternative Dispute Resolution and Its Role in the Protection of United States Intellectual Property Rights in China*, 13 OHIO ST. J. ON DISP. RESOL. 947 (1998).

⁸⁹ See *supra* note 47 and accompanying text (stating that only an indecent man knows personal gain).

⁹⁰ Hamilton Atsumi Lau, *Role Reversal And The Piracy Of Chinese-Language Films In The United States: Does The Rights Holder Have A Realistic Opportunity To Obtain Relief Under The Federal Copyright Act?*, 38 COLUM. J. TRANSNAT'L L. 169, 188 (1999).

products.⁹¹ Only after its domestic industries began to feel the costs of piracy did the Taiwanese government begin to improve its IP protection.⁹² The enormous economic benefit generated by its technology industries motivated the Taiwanese government to struggle with different interest groups and fight the long-standing traditional cultural values of society.⁹³ Without cultural support, however, copyright protection is still relatively weak in Taiwan in comparison to other major information technology producing countries. According to the United States Trade Representative, Taiwanese exports in 1998 accounted for the second largest amount of counterfeit goods seized by U.S. customs officials.⁹⁴ Taiwanese's legal consciousness of IP rights, after all, is still underdeveloped.

The assumption that the spread of pop culture and consumer goods around Taiwan represents the triumph of Western civilization is only a myth. The predominant role of the United States in the export of television program production and film industry only means the homogenization of pop culture, not legal culture.⁹⁵ Nevertheless, the essence of Western civilization is the Magna Carta, not the Big Mac hamburger. "The fact that non-Westerners may bite into the latter has no implications for their accepting the former."⁹⁶ Certainly, commercial relations inescapably bring people of differing cultural and political backgrounds together.⁹⁷ International trade agreements and commercial exchanges are

⁹¹ Taiwanese government and industry have begun a significant investment in high technology research and many brands such as Acer have become recognized worldwide. Taiwan passed Germany and since 1996 has occupied third place among the world's leading producers of information technology products, behind the U.S. and Japan. *See Moving Up in the World of Information Technology*, E. ASIAN EXEC. RPTS., Mar. 15, 1996.

⁹² *See* Andy Y. Sun, *From Pirate King To Jungle King: Transformation Of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 76-77 (1998).

⁹³ Currently, the ROC Copyright Law, Trademark Law, Patent Law, and Trade Secret Law, supplemented with their "Implementation Rules" and "Regulations of Application," altogether constitute a comprehensive legal framework for IP rights protection. *See id.* *See also Legal Guide to doing Business in Taiwan*, in LEE AND LI 69-87 (1996). *See generally China Law Website* (visited Oct. 17, 1999) <<http://www.qis.net/chinalaw>>.

⁹⁴ *See U.S. Urges Taiwan to Enforce Copyright Protection*, THE ASSOCIATED PRESS, Apr. 14, 1998, available in 1998 WL 66650682.

⁹⁵ *See* HUNTINGTON, *supra* note 51, at 58-59.

⁹⁶ *Id.* at 58. Huntington argues that although the younger generation all over the world dresses in Levis jeans, drinks Coke, listens to rap, watches the X-Files, and embraces Mickey Mouse, it does not necessarily signify that the younger generation is embracing Western cultural values. Americans used to consume millions of Japanese cars, TV sets, and cameras, but they were not being "Japanized." *See id.* *Cf.* HOLTON, *supra* note 18, at 166.

⁹⁷ *See* HUNTINGTON, *supra* note 51, at 58.

part of the process of normalization of trade relations between Taiwan and other countries. The transformation of legal culture, however, is likely to be time-consuming and require long-term efforts.

C. *When Confucianists Meet Non-Confucianists: A Case Study of APEC*

The WTO, in protecting economic globalization, ignores regional cultural differences. Given that the new WTO dispute resolution system is a more rule-oriented system, the West, comfortable with the legalistic approach of settling international trade disputes, enjoys an advantage in the new WTO dispute settlement system.

Commentators, however, challenge the existence of this advantage and question the reality of the so-called “Asian legal culture.” Comparing Japan, Singapore, Thailand, and Hong Kong reveals dramatic differences among their contemporary legal systems and approaches to law. For example, Japan has adopted a civil law system while Singapore has a common law system. Is it therefore still possible to identify any common legal culture in East and Southeast Asia?⁹⁸ Is there really an “Asian approach to dispute settlement”? Or is it just a cultural stereotype? The vision of a “uniform legal culture” in Asia is possibly only a mirage, given that the term “Asia” is an “artificial construct.”⁹⁹ Nevertheless, this section identifies some aspects of legal culture and approach to law common to all the East Asian and Southeast Asian countries.

The question of whether there is an Asian style of dispute resolution is best answered by a discussion of the dispute settlement mechanism within the Asia-Pacific Economic Cooperation forum (“APEC”).¹⁰⁰ In international arenas, such as the WTO, Asian countries have no choice but to adjust

⁹⁸ Among East and Southeast Asian countries, Japan, Korea, Indonesia, Taiwan, the Philippines, and Thailand have civil law systems; India, Malaysia, Singapore, and Hong Kong have common law systems; and the PRC, Vietnam, Laos, and Cambodia maintain socialist legal systems. See MICHAEL PRYLES ET AL., DISPUTE RESOLUTION IN ASIA 7 (1997).

⁹⁹ *Id.* at 2.

¹⁰⁰ In 1989, Australia invited senior officials from twelve Asia-Pacific nations to meet to form a new organization called the Asia-Pacific Economic Cooperation forum (“APEC”). The twelve nations invited were Burundi, Indonesia, Japan, Malaysia, the Philippines, Singapore, South Korea, Thailand, Australia, Canada, New Zealand, and the United States. See Kenneth W. Abbott et al., *Economic Integration for the Asian Century: An Early Look at New Approaches*, 4 TRANSNAT’L L. & CONTEM. PROBS. 187, 208 (1994). APEC, which began as an informal dialogue group with limited participation, reflected the founding members’ uncertainties as to what they were creating. The process of shaping APEC began at a slow pace. Even its geographic scope and membership criteria remained indeterminate. See *An introduction about APEC* (visited Dec. 4, 1999) <<http://www.apecsec.org.sg>>.

to the Western legal culture. The numerical dominance and growing significance of Asian countries in APEC, however, alter the international dynamics in APEC. APEC provides Asian countries with opportunities to defend their own approaches and to resist the dominant Western legal culture imposed on them elsewhere.¹⁰¹

Of APEC members, China, Taiwan, Hong Kong, Japan, Korea, and Singapore are influenced strongly by Confucian tradition. Even without being directly influenced by Confucianism, other Asian members are close to the Confucian group.¹⁰² APEC's Asian members insist that APEC should be defined as a loose, consultative forum, not as a treaty-based organization, and that APEC should be characterized by a spirit of pragmatism.¹⁰³ Asian members do not like the idea of setting up any regional bureaucratic or judicial institutions with powers of regulation or enforcement over individual APEC governments.¹⁰⁴ They do not want to make any formal commitments, because they are pursuing a process based on "consensus" and "joint encouragement."¹⁰⁵

The paradigm of APEC is essentially a mechanism based on voluntary consensus and peer pressure. This kind of "soft" law,¹⁰⁶ consisting of a set of commonly agreed skeletal principles stated in

¹⁰¹ See Carl J. Green, *APEC and Trans-Pacific Dispute Management*, 26 L. & POL'Y INT'L BUS. 719, 720 (1995). See also Chan, *supra* note 31.

¹⁰² Currently, APEC members are Australia, Chile, Indonesia, Malaysia, PNG, Russia, Thailand, Brunei, China, Japan, Mexico, Peru, Singapore, United States, Canada, Hong Kong, South Korea, New Zealand, Philippines, Taiwan, and Vietnam. See *An introduction about APEC*, *supra* note 100.

¹⁰³ See generally CHIA SIOW YUE, *APEC CHALLENGE AND OPPORTUNITIES* 37-53 (1994).

¹⁰⁴ See *APEC Flounders in Leadership Vacuum*, S. CHINA MORNING POST, Nov. 12, 1995, available in LEXIS/NEXIS. There are five major traditional types of regional trading bloc: Preferential Trade Arrangement, Free Trade Area, Customs Union, Common Market, and Economic Union. See Joseph L. Brand, *The New World Order of Regional Trading Blocks*, 8 AM. U.J. INT'L L. POL'Y 163, 164 (1992).

¹⁰⁵ For more discussion on the reluctance of Asian members to see a rapid institutionalization of APEC. see CHARLES E. MORRISON ET AL., *APEC AT THE CROSSROADS* 80-84 (1995).

¹⁰⁶ The term "soft law" is unsettling to some commentators and has been criticized as a confusing normative category. Generally, "soft law" refers to a "law" that is either not yet or not only law. "While there is no generally accepted definition of soft law, its essential characteristic is that, unlike traditional hard law sources, soft law does not create formally binding obligations. Instead, it records only the agreed-upon principles and objectives, and "a considerable degree of discretion in interpretation and on how and when to conform to the requirements is left to the participants." A. Neil Craik, *Recalcitrant Reality And Chosen Ideals: The Public Function Of Dispute Settlement In International Environmental Law*, 10 GEO. INT'L ENVTL. L. REV. 551, 572 (1998). For more explanations of soft law, see Pierre Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 420-422 (1991) or Gunther F. Handl et al., *A Hard Look*

broad terms;¹⁰⁷ is the preferred Asian way. For Asians, vague language is often necessary to ensure consensus on sensitive issues. Ambiguity is almost an art form; it is viewed as a useful device in mitigating conflict and building common positions and confidence.¹⁰⁸ For Westerners, in contrast, ambiguity is a weakness—a reflection of weak resolve or a feeble mind.¹⁰⁹ Asians prefer flexibility, which they view as a virtue. Westerners, on the other hand, prefer concrete agreements and view ambiguity as creating loopholes. Westerners tend to focus on procedures and regard disputes and negotiations as natural, inevitable, and even productive or beneficial.¹¹⁰ Asians tend to avoid legalism and emphasize group “harmony” and consensus. To most Asians, disputes and negotiations disturb group harmony.¹¹¹

Although Western-style legal systems have greatly influenced East Asia, fundamental differences remain. First, avoiding formal and legalistic procedures “continues to be a dominant social norm” in Asia.¹¹² Indeed, APEC’s dispute settlement mechanism is a voluntary and consultative dispute mediation, rather than arbitration. There is no “win or lose” confrontation in such a dispute mediation system, and there is no threatening atmosphere for resolving disputes. Second, Western officials have found it difficult “to agree on principles first, and then let things evolve and grow gradually.”¹¹³ For example, the American approach is “to start with legally binding commitments covering a wide range of

at *Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371 (1988). For a detailed discussion on whether “soft law” is really law, see Jonathan Carlson, *Hunger, Agricultural Trade Liberalization, and Soft Law*, 70 IOWA L. REV. 1187 (1985).

¹⁰⁷ See Chan, *supra* note 31.

¹⁰⁸ See Green, *supra* note 101.

¹⁰⁹ See *id.* at 729. “We are deeply imbued with the concept that truth and justice are most likely to emerge from the open clash of different ideas.” *Id.* According to Green, “We see positive value in the frank expression of differences, just as they are suspicious of notions of harmony that might suppress those differences for the sake of a superficial consensus.” *Id.* “Since disputes are natural, they think it is important to channel them into appropriate forums and resolve them in ways that are transparent and predictable.” *Id.* The differences between the thoughts of Enlightenment and Confucian philosophy are also important factors.

¹¹⁰ See *id.* at 729.

¹¹¹ See *id.* at 731.

¹¹² *Id.* at 729.

¹¹³ AMITAV ACHARYA, MULTILATERALISM: IS THERE AN ASIA-PACIFIC WAY? 12-18 (1997).

issues.”¹¹⁴ The evolutionary, non-legalistic approach to economic cooperation undertaken within APEC contrasts the WTO processes.¹¹⁵

By identifying some shared cultural and legal traditions among Asian countries,¹¹⁶ this section challenges the allegation that there is no single Asian approach to law. One common legal tradition is Asians’ tendency to pursue a voluntary and consultative dispute resolution mechanism that is based on harmony, ambiguity, and flexibility. These features in Asian legal culture reflect their traditional values and are unlikely to completely change in the near future.¹¹⁷ Contrasting Confucian to non-Confucian societies reveals a Western/Asian legal culture dichotomy between legalistic and non-legalistic approaches.

III. THE WTO DISPUTE SETTLEMENT SYSTEM AND EAST ASIA

A. Too “Legalistic” for East Asian Countries?

As generally agreed, the Uruguay Round’s most significant innovation is the formalization of a more adjudicatory system. In essence, the system is established by international “constitutional law.”¹¹⁸ The Dispute Settlement Body (“DSB”), the apex of the WTO, oversees the dispute settlement system, receives complaints, and issues panel reports.¹¹⁹ A formally independent tribunal, the Standing

¹¹⁴ *Id.* at 12.

¹¹⁵ As Canada’s Trade Minister commented, “this [non-legalistic approach] is, to a degree, an Asian approach.” David Vienneau, *Auto Pact ‘Not On Trade Table’ Pacific Rim Deal Won’t Hit Autos, McLaren Says*, THE TORONTO STAR, Nov. 18, 1995, at C3.

¹¹⁶ A recent situation with ASEAN is also illustrative here. ASEAN has proved to be ineffective in dealing with Indonesia’s annual forest fires, which have caused region-wide pollution and have severely damaged Southeast Asia’s tourism industry. ASEAN, however, can only “urge” and “express its deep concern” about the pollution. ASEAN’s tradition of non-interference in one another’s domestic policies is its main feature, and it seems that this “hands-off policy” is not going to change in the near future. Barry Porter, *Neighbours Unlikely To End Code Of Silence*, S. CHINA MORNING POST, Jul. 22, 1999, at 12, available in 1999 WL 2193453.

¹¹⁷ See Green, *supra* note 101, at 730.

¹¹⁸ See generally ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 44-57 (1997).

¹¹⁹ See generally *id.* at 177-186.

Appellate Body, is charged with handling appeals from panels.¹²⁰ At the panel level, procedures are virtually court-like. The new rules automatically confer jurisdiction on panels upon receipt of a complaint and establish deadlines for the completion of each stage of the process.¹²¹ Additionally, the new rules no longer permit either party to veto any step of the process.¹²²

Some scholars state that the establishment of a quasi-judicial dispute settlement within the WTO signifies the victory of Legalism. Viewing the creation of the DSU as a complete victory for Legalism, however, is misleading and ignores the GATT's gradual transformation in the late 1970s into a more "judicial" instrument.¹²³ Even before the WTO Agreement came into force, the WTO dispute settlement system was already evolving towards a more judicial model.¹²⁴ As one scholar explains,

In seeking to call attention to the significant legal advances made by the new WTO procedure, writers have tended to overstate the difference between the new procedure and its GATT predecessor. . . [T]he tendency to describe the GATT procedure solely in terms of these early characteristics completely ignores a major change that occurred in the last fifteen years of GATT's existence.¹²⁵

The procedures under the WTO's DSU, thus, do not entirely depart from those under the GATT system. Assessing the impact of the "victory of the legalists during the Uruguay Round" on East Asia requires consideration of the GATT's development toward legalism prior to the Uruguay Round. Even the relatively less legalistic system of the GATT maintained some legalistic approaches through a

¹²⁰ See *id.* at 186-90.

¹²¹ See *id.* at 182-86.

¹²² See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 9 (1999).

¹²³ See *id.*

¹²⁴ See *id.* Moreover, other signs of GATT's transformation prior to the Uruguay Round were the longer and more carefully reasoned decisions generated by later GATT panels. As the number and complexity of complaints grew, in the 1948-69 period, the average length of published opinions was seven pages; in the 1970-79 period, the average length of opinions was fifteen pages; and after 1985, the average length reached forty-eight pages. See Sweet, *supra* note 5, at 118.

¹²⁵ See Hudec, *supra* note 122, at 4.

mixture of diplomacy¹²⁶ and law.¹²⁷ Although there are significant innovations in the WTO's DSU, the WTO also ratified and legitimized some of the practices under the GATT.¹²⁸ Accordingly, consideration of the GATT's evolution narrows the gap between the GATT and WTO dispute settlement systems.

A closer examination of the new DSU reveals that the DSU's dispute resolution methods are not "purely" legalistic.¹²⁹ The DSU makes available both power-oriented¹³⁰ as well as rule-oriented¹³¹

¹²⁶ "The 'diplomatic' means of dispute settlement are characterized by the flexibility of the procedures, the control over the dispute by the parties, their freedom to accept or reject a proposed settlement, the possibility of avoiding 'winner-loser-situations' with their repercussions on the prestige of the parties, the only limited influence of legal considerations, and the often larger influence of the current political processes in, and relative political weight of, each party." PETERSMANN, *supra* note 118, at 69. Diplomatic means of settling disputes include negotiation, good offices, and mediation. *See id.* at 68.

¹²⁷ *See id.* at 66-69. "The legal means of dispute settlement through arbitration and courts, which are also available in GATT and WTO practice, tend to be employed when the parties want to obtain rule-oriented, binding decisions in conformity with their mutually agreed long-term obligations and interests[.]" *Id.* at 69.

¹²⁸ *See* Hudec, *supra* note 122, at 11 (stating that "[m]uch of new procedure laid down in the [WTO'S DSU] is merely a repetition of operating practices already established less formally by the GATT procedure"); PETERSMANN, *supra* note 118, at 84.

¹²⁹ A study conducted by Professor Ernst-Ulrich Petersmann clarifies these inquiries. *See* PETERSMANN, *supra* note 118, at 183. Professor Petersmann's study is simplified as follows:

DSU: LEGALISTIC APPROACH VS. PRAGMATIC APPROACH

WTO dispute settlement system (1994 Understanding)			
Power-oriented approaches		Rule-oriented approaches	
Article 4	Consultations	Articles 6-16 Articles 18-19	Panel procedure
Articles 5, 24	Good office	Articles 17-19	Appellate review procedure
Articles 5, 24	Conciliation	Articles 16-17	Rulings by DSB on panel and appellate reports
Articles 5, 24	Mediation	Article 25	Arbitration
Articles 16, 17, 19	Recommendations by panels, Appellate Body and DSB		
Article 21	Surveillance of implementation of recommendations and rulings		
Article 22	Compensation and suspension of concessions		

approaches for dispute settlement under the WTO.¹³² Most significantly, “consultation[] remain[s] a mandatory first step in the dispute settlement process,” and good offices, conciliation, and mediation remain as options.¹³³ Indeed, the WTO dispute settlement method does not always involve a confrontational approach, and the mandatory consultation stage is designed to preempt difficult negotiations between parties. As of September 1, 1999, 179 disputes were brought to the WTO, and a significant number of them were resolved out of court.¹³⁴

The new dispute settlement system may appear “scary” to East Asian countries in terms of their legal culture. The foregoing theoretical review, however, indicates that the new system should not be too legalistic for East Asia, because the WTO’s DSU ratified and legitimized some of the practices under the GATT.¹³⁵ The new system still provides parties with several chances to avoid confrontational

¹³⁰ See *id.* at 66-69. Petersmann identifies two dispute resolution techniques: “rule-oriented” and “power-oriented” techniques.

In negotiations on the settlement of international trade disputes among countries, both “power-oriented” and “rule-oriented” techniques tend to be used in varying degrees and combinations. The different means and institutions available to states for the peaceful settlement of disputes are usually subdivided into the so-called “diplomatic” and “legal” means of settlement of “disputes” (i.e., a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion by one party is met with refusal, counter-claim or denial by another).

Id. at 67-68.

Petersman describes power-oriented approaches as “discussions, negotiations or dispute settlement in which one party asserts or uses the relative power at its disposal in order to influence the conduct of the other party.” *Id.* at 66.

¹³¹ See *id.* at 66-69. Petersmann describes rule-oriented approaches as “suggest[ing] negotiations among governments or individuals on the elaboration and observance of general rules of conduct which all participants voluntarily accept, because the rules reconcile their conflicting short-term interests with their common long-term interests in a mutually beneficial manner.” *Id.* at 66-67.

¹³² Throughout the whole GATT/WTO history, the participants in the drafting and administration of the GATT/WTO have never subscribed fully to legalism and pragmatism. Both the GATT and the WTO, in fact, have both juridical and pragmatic features. The difference is a matter of degree.

¹³³ PETERSMANN, *supra* note 118, at 182.

¹³⁴ As of September 1, 1999, there have been 179 consultation requests under the WTO. Among them, twenty-nine cases are settled or inactive, and 70 are still at the consultation stage; those pending consultations may lead to settlements between the parties. See *The WTO* (visited Oct. 12, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

¹³⁵ See *supra* note 128 and accompanying text.

fight. Particularly, consultations remain mandatory first steps in the process. The following empirical review supports the proposition that the new WTO's DSU is not too legalistic for East Asian countries.

B. *The Evolution Process in East Asia: statistical examination*

East Asian economies--Japan, NIEs, and new NIEs--have grown faster and more steadily than those in any other regions of the world. Because they account for a large share of trade both in terms of destination of exports and origin of imports, these economies, as a whole, play a significant role in the world economy.¹³⁶ According to the World Bank, GDP in East Asia grew by 9.5% per year in the 1991-97 period and is expected to grow by about 5-5.5% per year in the following years.¹³⁷ With increasing international trade with, and investment in, East Asia, "disputes" will occur more and more frequently. Accordingly, "law" should play a major part in the WTO dispute settlement regime, at least in comparison to that of the GATT-1947 or APEC. How often, however, do the East Asian economies utilize the WTO dispute settlement system?

Table 1 demonstrates the frequency of "voluntary" participation. The table includes only parties who initiated cases under the GATT/WTO. Table 1¹³⁸ reveals that, throughout the GATT's history,

¹³⁶ See *APEC Economies beyond the Asian Crisis: Trade and Investment*, (visited Oct. 5, 1999) <www.APEC.org>.

¹³⁷ The World Bank expects that growth in East Asia (excluding China) post-crisis to be substantially lower in 2001-07 than in 1991-97. See *Country Forecast Asia*, THE ECONOMIST INTELLIGENCE UNIT LIMITED, Sept. 3, 1999, available in 1999 WL 23931671.

For a related study by APEC, see *Growth Potential of the APEC Economies After the Asian Crisis* (visited Oct. 5, 1999) <www.APEC.org>.

ANNUAL REAL GDP GROWTH RATES

	NIEs in Asian-Pacific Region	ASEAN
Projection (1995-2015)	3.4%	5.5%
Actual (1970-1995)	8.4%	6.6%

¹³⁸ Table 1 focuses on complainants only, rather than on defendants. Moreover, it should be noted that neither the PRC nor Taiwan is a WTO member yet. From 1946 to 1948, China, represented by the Nationalist government, participated in all of the negotiations aimed at establishing the International Trade Organization and the GATT. In October 1947, China,

East Asian countries rarely invoked the GATT's dispute settlement procedure, initiating only a total of eleven cases. The United States, in contrast, utilized the GATT often, bringing eighty-eight cases under Article XXII and XXIII. Taken from first and secondary sources discussing the GATT's almost fifty years practice and WTO's nearly five years operation, the data in Table 1¹³⁹ presents a sharp contrast between the frequency of claims brought by the United States, which utilizes the GATT/WTO's dispute settlement mechanism the most, and the East Asian countries, which utilize the mechanism among the least.

together with twenty-two other governments, signed the Final Act of the General Agreement and became an original contracting party. During the first and second rounds of the multilateral tariff negotiations, China also negotiated tariff concessions with contracting parties and accepted protocols modifying GATT provisions and ratifying the General Agreement. In October 1949, the Communists overthrew the Nationalist government and became the PRC. After the Nationalist government fled to Taiwan, it was unable to continue to fulfill its tariff concessions, because most products were shipped from the mainland. Thus, on March 7, 1950, Taiwan notified the Secretary General to the United Nations of its decision to withdraw from GATT. The Czechoslovak delegation then held that its government would not recognize the legitimacy of Taiwan's withdrawal, because the negotiation was made by persons having no legal power to act on behalf of China. The GATT contracting parties made no official decision on this issue. In 1965, the issue was raised again when Taiwan applied for observer status in GATT. The Nationalist government in Taiwan was granted observer status, because it still held China's United Nations seat. In November 1971, when the United Nations decided to recognize the representatives of the PRC government as the only legitimate representative of China in the U.N., the GATT contracting parties recalled their decision on granting observer status to Taiwan to follow U.N. decisions on essentially political matters. See Sofa Wu, *Taiwan Set to Join GATT Before End of 1994*, CENTRAL NEWS AGENCY, Dec. 21, 1993, available in LEXIS/NEXIS, World Library, CENEWS File. See also Philip Liu, *Taiwan: Year-End Deadline for GATT Accession Deemed Impossible*, BUSINESS TAIWAN, Oct. 10, 1994, available in LEXIS/NEXIS, World Library, TXTLNE File; Susanna Chan, *Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round*, 2 IND. J. GLOBAL. LEGAL STUD. 275, 276-277 (1994).

¹³⁹ Calculating the precise number of disputes is difficult. Under the old GATT regime, there were some disputes that occurred but did not ultimately result in panel reports. Additionally, there were disagreements on what constitutes a complaint. Making a precise statistical statement is, therefore, inherently misleading. The most careful analysis perhaps is the list prepared by Professor Hudec. See Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1 (1993).

TABLE 1: STATISTICAL ANALYSIS ON FREQUENCY AS COMPLAINANTS: THE UNITED STATES VS. EAST ASIAN COUNTRIES*

COMPLAINANTS: THE INITIATING PARTY	UNDER GATT ARTICLE XXII AND XXIII ¹⁴⁰	UNDER WTO'S DSU			
		SETTLED CASES	PRE- PANEL STAGE	PANEL STAGE	POST- PANEL STAGE
(Selected Western Country)					
UNITED STATES ¹⁴¹	88	11	22	6	7
(Selected East And Southeast Asian Countries)					
JAPAN ¹⁴²	5	1	1	2	0
REPUBLIC OF KOREA ¹⁴³	0	1	1	0	1
HONG KONG ¹⁴⁴	3	1	1	0	0
THAILAND ¹⁴⁵	2	1	1	0	1
REPUBLIC OF THE PHILIPPINES ¹⁴⁶	1	0	1	0	1
INDONESIA ¹⁴⁷	0	0	1	0	0
MALAYSIA ¹⁴⁸	0	0	0	0	1
SINGAPORE ¹⁴⁹	0	1	0	0	0
TAIWAN	--	Not a member yet			
CHINA	--	Not a member yet			

*The above data are current as of September 1, 1999.

¹⁴⁰ See Brendan P. McGivern, *The WTO and Developing Asian Economies: Special Provisions for Dispute Resolution and Emerging Paradigms within APEC*, in BUCHANAN, *supra* note 11, at 95, 103.

¹⁴¹ United States has been the most frequent user of both GATT and the WTO. It brought eighty-eight cases under the GATT history and currently has twenty-two cases pending at the consultation stage, 6 cases with panels or the Appellate Body, and seven cases at the implementation stage. See *The WTO* (visited Oct. 12, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

¹⁴² See *id.* Since WTO establishment, Japan has brought cases against the United States and Indonesia.

¹⁴³ See *id.* Since WTO establishment, South Korea has brought cases against the United States.

¹⁴⁴ See *id.* Hong Kong brought one case against Turkey.

¹⁴⁵ See *id.* Thailand has brought cases against the U.S., Turkey, Hungary, and the European Union.

¹⁴⁶ See *id.* The Philippines has brought cases against Brazil and the United States.

¹⁴⁷ See *id.* Indonesia brought one case against Argentina.

¹⁴⁸ See *id.* Malaysia brought a case against the United States.

¹⁴⁹ See *id.* Singapore brought a case against Malaysia.

One development under the WTO is worth particular attention. An examination of the record in the past four and a half years suggests the beginning of a trend of greater East Asian involvement in the WTO dispute settlement process. Although the United States is still the most frequent user of the system, and the contrast is still relatively sharp, the statistics are encouraging. The very first dispute under the WTO's dispute settlement procedures was brought by Singapore against Malaysia regarding Malaysia's prohibition of imports of polyethylene and polypropylene.¹⁵⁰ In addition, some countries, such as Korea, Indonesia, Malaysia, and Singapore, which have never invoked the GATT's dispute settlement procedure, began to bring cases to the WTO. The WTO experience to date reveals progress in East Asia's ability and willingness to cope with the trend toward legalism.

Table 2, on the other hand, illustrates East Asia's reluctance to drag other economic powers into trade disputes. Table 2 compares the frequency of East Asian countries being complainants and being defendants.

¹⁵⁰ See *Malaysia - Prohibition of Imports of Polyethylene and Polypropylene*, (WT/DS1) available in WTO Document Dissemination Facility <<http://www.wto.org/ddf/>>. See also PETERSMANN, *supra* note 118, at 204-205. This historical case (WT/DS1) was settled on July 19, 1995, with Singapore's withdrawal of the panel request. Nevertheless, it is encouraging that the first "user" of the WTO dispute settlement system was an Asian country.

TABLE 2: STATISTICAL ANALYSIS OF FREQUENCY OF PARTICIPATION: AS COMPLAINANTS VS. AS DEFENDANTS*

COMPLAINANT (C) OR DEFENDANT (D)	UNDER WTO'S DSU							
	SETTLED CASE		PRE-PANEL STAGE		PANEL STAGE		POST-PANEL STAGE	
	C	D	C	D	C	D	C	D
JAPAN ¹⁵¹	1	3	1	3	2	0	0	3
REPUBLIC OF KOREA ¹⁵²	1	3	1	2	0	3	1	1
HONG KONG	1	0	1	0	0	0	0	0
THAILAND ¹⁵³	1	0	1	1	0	0	1	0
REPUBLIC OF THE PHILIPPINES	0	1	1	0	0	0	1	0
INDONESIA	0	0	1	0	0	0	0	1
MALAYSIA	0	1	0	0	0	0	1	0
SINGAPORE	1	0	0	0	0	0	0	0
TAIWAN	Not a member yet							
CHINA	Not a member yet							

*The above data are current as of September 1, 1999.

Of the 179 WTO cases filed since its establishment, East Asian economies have been accused, primarily by Western countries, of unfair liquor taxes, safeguard measures on dairy products, anti-dumping duties on steel, and other unfair trade practices. East Asian countries, however, invoke the WTO panel process at a relatively lower rate. The contrast between suing and being sued is clear. East Asian countries are still on the “receiving end” of trade negotiations.¹⁵⁴ In other words, they do not sue other members under the GATT/WTO System as often as they are sued.

¹⁵¹ Japan has settled four cases under the DSU procedures since the WTO was established. *See The WTO, supra* note 141. In those four cases, Japan was the complainant in one case but the defendant in the other three. As of September 1999, Japan has been involved in nine cases under the DSU procedures, pending at various stages. Japan was the complainant in three cases but was the defendant in the other six.

¹⁵² South Korea has settled four cases under the DSU since the WTO was established. In those four cases, South Korea was the complainant in one and the defendant in the other three. *See id.* As of September 1999, South Korea has been involved in eight cases, pending at various stages. South Korea was the complainant in two cases but was the defendant in the other six cases. *See id.*

¹⁵³ *See id.* The case of Thailand is worth particular attention. In the four cases Thailand was involved in, it was the plaintiff more than it was the defendant.

¹⁵⁴ *See* Juanjai Ajanant, *The WTO and Developing Asian Economies: Emerging Issues and Challenges*, in BUCHANAN, *supra* note 11, at 124, 130.

For too long under the multilateral trading systems, East Asian countries focused not on positive gain but on “damage limitation.”¹⁵⁵ Although East Asian countries are no longer mere observers or respondents in the new regime, their incompatible legal culture, particularly their non-litigious tradition, limits their full participation in the WTO’s judicialized system.

The non-litigiousness of East Asian legal culture has endured for thousands of years. People accept change only when they are forced by necessity, and they only recognize “necessity” when a crisis is upon them. So, should East Asia now relinquish its “grand” tradition to Western legal culture?

IV. CONCLUDING REMARK: COPING WITH THE TREND TOWARD LEGALISM

Eventually, globalization means more demands for domestic law reforms, more changes in domestic legal culture, and more adjustment to international trends. In fact, the WTO rules were fostered by the logic of globalization that comprises also the sphere of cultural values. “Globalization,” from the East Asian perspective, can be defined as the dominance of Western economic and cultural interests over the rest of the world. This dominance means the perpetuation of inequality between regions.¹⁵⁶ For East Asian countries, the WTO appears to be a place where they cannot shy away from the negotiation table and cannot embrace the non-confrontational approach as they do in APEC.

Although WTO’s rule-based framework conflicts with the less developed state of the rule of law in most of Asia, it would be wrong to draw too strong a contrast between Western and East Asian general legal approaches. The assumption about Americans being excessively litigious is also questionable.¹⁵⁷ Studies show that even in the United States, a significant number of economic relationships are managed entirely outside the law.¹⁵⁸ In comparison, however, “law” is really a recent

¹⁵⁵ See Chulsu Kim, *East Asia and the WTO as Seen from the WTO*, in THE EMERGING WTO SYSTEM AND PERSPECTIVES FROM EAST ASIA 255, 259 (Alan Deardroff et al. eds., 1997).

¹⁵⁶ See HOLTON, *supra* note 18, at 2.

¹⁵⁷ See Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: “Mao and Mediation” Revisited*, 11 COLUM. J. ASIAN L. 229, 375 (1997); see also *supra* notes 25-27 and accompanying text.

¹⁵⁸ See *id.*

addition to the configuration in Asia for social order. Consciousness of individual rights is still emerging and the “rule of law” concept is still evolving in East Asia.

To clarify, it cannot be ignored that different countries are at various stages in terms of their “rule of law” evolution. To some observers, the process in China, for example, has been slow and its development is rather patchy. The legal system in today’s China -- a system with a high degree of discretion on the part of government officials, political manipulation, and “back door” deals--is still far from a “legalistic” scheme. Bureaucratic abuse and corruption, partially derived from the kinship emphasis, are pressing problems in China.¹⁵⁹ Thus, one may conclude that countries where the rule of law is still at a similar evolutionary stage as in China may have a long way to go to develop a WTO-compatible legal system. This may be the case in some Asian new NIEs. If these countries would like to be competent members of the WTO and make the best use of its dispute settlement system, they must accelerate their efforts to introduce the rule of law, at least into their economic affairs.¹⁶⁰ Some countries, such as Japan, South Korea and Taiwan, however, have experienced a tremendous increase in certain uses of the legal process.¹⁶¹ Although still not sizeable, the number of lawyers is increasing in these countries.¹⁶² In these more economically advanced East Asian nations, law is becoming more visible in shaping the social order and people now tend to value legal rules and to fashion formal arrangements.

¹⁵⁹ The Chinese economy is still dominated by bureaucratic control. Access to many goods and services is controlled through bureaucratic procedures. Almost all business activities require government approval or licenses. The overreaching Chinese bureaucratic is a pressing problem for foreign investors in China. For more information on the bureaucratic heavy hand and abuses in the PRC, see *id.* See generally David Weller, *The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action*, 98 COLUM. L. REV. 1238 (1998).

¹⁶⁰ See Lubman, *supra* note 157, at 386.

¹⁶¹ See LAWRENCE FRIEDMAN ET AL., *LEGAL CULTURE AND LEGAL PROFESSION* 59 (1996). In these countries, passing the bar examination was extremely difficult in the past. About 2% of those who took the bar examination have been admitted. Between 1950 and 1991 in Taiwan, less than 5% of candidates passed the bar exam. In 1986, there were fewer than 1500 attorneys in South Korea, which had a population of more than 41 million at that time. Compared with the past, these East Asian countries are no longer a “lawyerless wonderlands.” There has been a noticeable increase of lawyers in those countries. See CHIU, *supra* note 39, at 21, 35; Tae-kyu Park, *Confucian Values and Contemporary Economic Development in Korea*, in *CULTURE AND ECONOMY: THE SHAPING OF CAPITALISM IN EASTERN ASIA* 119, 125 (Timothy Brook et al. eds., 1997). See generally Takeyoshi Kawashima, *Japanese Way of Legal Thinking*, in *COMPARATIVE LEGAL CULTURES* 127 (Csaba Varga et al. eds., 1992).

¹⁶² See CHIU, *supra* note 39, at 35. See also LESLIE PALMIER ET AL., *STATE AND LAW IN EASTERN ASIA* 69-86 (1996).

For such countries, the issue is much different from what it is for countries that are at a lower stage in the evolution of the rule of law. For “advanced” Asian countries, it is “too late” for them to demand their “cultural recognition” in the WTO or to claim “cultural consideration” in the DSU. Also, it is no longer a reasonable strategy to exploit “Asian value and approach” as only window-dressing. Adapting their legal culture, including trade policies that burden the transformation process of the legal culture, to be WTO-compatible, is the goal. That is, they must determine how to improve their participation in the WTO,¹⁶³ enhance their status in the WTO adjudicatory body, and “sue” more. To achieve these goals, Asian nations should now “embrace” the legalistic approach.

Indeed, there has been a dramatic increase in the number of disputes brought into the WTO dispute settlement system. Although the cases are largely being brought by the major powers, particularly the United States and the European Union, against each other, there is noticeably greater participation by developing countries, both against other developing countries and against developed countries.¹⁶⁴ The diversity of participants is a healthy sign. There has been a significant increase in the participation of East Asian countries as claimants when confronting economically powerful countries. Given the greater strength of the WTO’s DSU and the possible benefits of actively participating as a complainant, East Asian countries should significantly increase their utilization the dispute settlement mechanism as complainants to the level of their involvement as defendants.

In the WTO era, the legal culture has transcended national/regional boundaries bringing with it predominantly Western legal ideals. Therefore, East Asian countries can no longer shy away from the negotiating table, because their prosperity depends on their active performance in the WTO. Asians have to learn that bringing their trading partners to court does not necessarily undermine their “friendly relationships” and that a “relationship” can be continued even when two parties are involved in a lawsuit in the WTO. Relevant legal professionals and diplomats need to prepare themselves for

¹⁶³ Although great strides have been made in opening East Asian markets in recent decades, the existence of pockets of protectionism in these countries cannot be denied. Substantial trade liberalization efforts should be continued to comply fully with the WTO rules.

¹⁶⁴ Developed countries have brought the majority of complaints against other developed countries, with the next largest category being against developing nations. Developing nations, however, have been increasingly initiating complaints. See *The Dispute Resolution Mechanism* (visited Oct. 29, 1999) <<http://www.internationalecon.com>>.

confrontations.¹⁶⁵ The economic ramifications and costs of such transformation, of course, are considerable though. As more and increasingly complex disputes arise, East Asian countries will have to devote more financial and human resources to dispute settlement. Currently, those countries have few, if any, such resources.¹⁶⁶ Due to their lack of resources, skills, and experience with the judicialized dispute settlement approach, the demand on the Asian NIEs in the WTO is challenging. If they want to utilize the WTO dispute settlement system effectively, the governments have to increase sufficiently the number of experts who have specialties related to the WTO Agreements and dispute settlement procedures.¹⁶⁷

In addition, there should be more WTO panelists from this region. Currently, East Asian WTO panelists constitute less than one-sixth of the total panelists in the WTO'S DSU panel roster. Legal professionals from East Asia, however, are in a very advantageous position to be listed and appointed as panelists. Currently, there are almost seventy cases at the consultation stage under the WTO. If most of these cases actually lead to establishment of panels, the resources of the WTO system will be burdened greatly. At the panel stage, selecting panelists who are acceptable to all the parties to the dispute becomes increasingly difficult. Moreover, under the DSU, generally, nationals of the parties to the dispute cannot serve on a panel unless the parties agree otherwise. That the United States and the European Union are major users of the dispute settlement system significantly limits the sources for potential panelists. Furthermore, in a dispute between a developing and a developed country, the panel must include at least one panelist from a developing country if the developing country disputant so requests. Based on these factors, relevant experts from Asian countries have a good chance of being prospective panelists.¹⁶⁸

¹⁶⁵ See Ajanant, , *supra* note 154, at 124, 132.

¹⁶⁶ See C. Christopher Parlin, *WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?*, 32 INT'L L. 863, 867 (1998).

¹⁶⁷ See *id.* at 869.

¹⁶⁸ The WTO panelist roster is unbalanced in terms of both gender and geography. In terms of gender, the number of male panelists is more than ten times that of female panelists. In terms of geography, East Asian panelists are less than one-sixth of the total panelists. See *Unbalanced WTO Dispute System* (visited Dec. 12, 1999) <<http://www.citizen.org/orgs/pctrade/gattwto/gender.htm>>.

The WTO, as a reflection of economic globalization, is a great, exciting experiment for East Asian countries. If economic globalization is reshaping the geography of legal culture and national sovereignty, East Asia's strengthened presence and extended stake in the WTO will reconfigure international economic regulations.