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Comparative Legal Cultural Analyses of International Economic Law: Insights, Lessons and Approaches

By

Colin Picker*

ABSTRACT

The effective development and operation of the law faces many obstacles. Among the more intractable but hidden barriers are legal cultural disconnects and discontinuities. These occur when opposing legal cultural characteristics from different legal cultures are forced to interact as part of the implementation of the law across two different legal cultures. That conflictual interaction can impede or block the successful implementation and development of the law. While present in domestic legal systems, those conflicts are more likely and the conflicts may be deeper between the many different legal cultures involved in the international legal order. This article aggregates and analyses the results from a series of related case studies applying a comparative legal cultural analysis to various aspects of international economic law. When brought together, it is clear that the methodology can be usefully applied to the international legal order, and specifically to international economic law. Furthermore, the various findings provide deep insights into the inner workings of the field as a whole, as well as of the individual areas examined. In addition, the case studies' successful employment of comparative legal cultural analysis revealed hitherto hidden insights into legal culture as well as into the methodology itself.

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I. Introduction

Numerous and different legal cultures permeate the legal environment, existing as different communities' collective conscious and subconscious responses to the law.²¹⁵ Legal cultural conflicts, disconnects and discontinuities are an inevitable consequence of the development and operation of the international legal order that forces different and sometimes competing legal cultures to interact. These legal cultures may be associated with international or domestic legal systems, or as is more likely, with smaller constituent parts of those larger systems. An example of such a conflict is when the legal culture in the financial sector of a country interacts with what may be the very different legal culture of international financial law.²¹⁶ Such conflicts may prove to be serious obstacles to the smooth operation and development of the law. After all, legal cultures are not easily displaced, for they are deeply rooted within their communities reflecting the common history, traditions, outlook and approaches of those communities. Their 'stickiness' is further accentuated by the fact that they exist not because of regulation or substantive law, but as a result of the collective responses and actions of the participants in those legal communities. Thus, failure

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²¹⁵ While an elusive concept, see Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies and the Situation of Legal Studies*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM 12 (Austin Sarat & Jonathan Simon, eds.) (2003), There are no shortages of definitions of legal culture. For example: Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291, 292 (2003) ('By "legal culture," we mean the patterns of order that shape people, institutions, and the society in a jurisdiction.');

Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in COMPARING LEGAL CULTURES 34 (David Nelken ed., 1997) (Legal culture 'refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds.');

John H. Merryman, David S. Clark, & John O. Haley, COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA 51 (1994) ('By "legal culture" is meant those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society.').

²¹⁶ Basel Committee on Banking Supervision, Basel III: A global regulatory framework for more resilient banks and banking systems (December 2010, Revised June 2011) *accessible at* <http://www.bis.org/publ/bcbs189.pdf>.

to identify and accommodate the legal cultural conflicts that arise in the development and implementation of international law can at best impede the success of the international initiative and at worst destroy it.

The identification of legal cultural conflicts is at its heart a comparative law exercise, involving other comparative law analyses, such as legal functionalism²¹⁷ and contextualism²¹⁸, but with the analyses taking place within the international legal framework. That methodological approach, comparative legal cultural analysis, has recently been applied to a series of case studies within the area of international economic law ('IEL'). Those case studies were intended to show the suitability of the methodology to IEL, but in the process produced tangible insights on each of the discrete areas of IEL that were examined. This article, for the first time aggregates and examines those different case studies and their findings. By so doing, it expands our understanding of the present character and potential future development of IEL, as well as the methodology and the underlying concept of legal culture.

This article in Parts II and III will first lay out the lessons and insights gleaned from the different analyses with respect to the methodology and legal culture, permitting the reader to better understand the non-traditional methodology while employing examples from the analyses of IEL. Building on the many examples concerning IEL provided in the previous sections, Part IV will present the collective findings of the methodology as it was applied to discrete parts of IEL. Part V will then consider devices to ameliorate some of the legal cultural disconnects and conflicts that the methodology has identified and which may exist in the development and implementation of IEL.

II. Insights on Comparative Legal Culture as a Methodology

A comparative legal cultural analysis is a difficult and unusual methodology. Indeed, much

²¹⁷ See generally, Ralf Michaels, *The Functionalist Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006)

²¹⁸ See Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800, 827 (2000).

has been written about the obstacles to the widespread or accessible use of the methodology. Yet much of the discussions about legal cultural analyses are theoretical.²¹⁹ As with so many other aspects of life, understanding can only be achieved when one ‘stops talking and begins doing’. In this case that means that a better understanding of the methodology can only be achieved when one stops theorizing and actually uses the methodology in real case-studies of the sort recently undertaken by the author and which form the data pool for this article.

The case studies were analyses of specific fields within international economic law, international law, and of a few discrete legal systems and their interactions with the international legal order. They focused on the substantive and procedural aspects of the fields, rather than on explicit and concrete applications of the fields to real problems, as is sometimes the case with case studies. The case studies included broad analyses of the comparative and legal cultural characteristics of:

- a. Public international law as whole²²⁰;
- b. International Organizations as a whole;²²¹
- c. The WTO²²²;
- d. International investment law²²³; and

²¹⁹ See Colin B. Picker, *Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach*, 1 CHINESE J. COMP. L. 21-48 (2013).

²²⁰ Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1083 (2008) (hereinafter ‘Picker (International Law)’).

²²¹ Colin B. Picker, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW AND INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS (PUBL. OF SWISS INSTIT. COMP. L) (2014) (Lukas Heckendorn & Colin Picker eds.) (2014) (hereinafter ‘Picker (Methodology)’).

²²² Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine, Seán Patrick Donlan & Martin Sychold, eds.) (PUBL. OF SWISS INSTIT. COMP. L) (2010) (hereinafter ‘Picker (WTO)’).

²²³ Colin B. Picker, *International Investment Law: Some Legal Cultural Insights* in REGIONALISM IN INTERNATIONAL INVESTMENT LAW (Leon E. Trakman & Nicola W. Ranieri, eds.) (Oxford Univ. Press) (2013) (hereinafter ‘Picker (Investment)’).

- e. The field of International Development Law²²⁴;

In addition to the broad analyses, there were more focused analyses of:

- a. The IEL relationship between the WTO and China²²⁵;
- b. The WTO's governance²²⁶;
- c. Vietnam and its emerging IEL legal capacity²²⁷;
- d. The narrow area of poverty-reduction that spans the entire area of IEL²²⁸;
- e. The discrete proposed IEL policy, microtrade²²⁹; and
- f. American legal culture and its interaction with the international legal order²³⁰.

Thus, the comparative legal cultural analyses in the case studies covered a variety of different legal systems (domestic and international) as well as different fields and institutions within the international economic legal order -, permitting the methodology to be tested across a disparate landscape. Those analyses led to, a number of important insights. As an initial matter, the methodology itself was tested, during which the following issues were uncovered:

²²⁴ Colin B. Picker, *International Trade and Development Law: A Legal Cultural Critique*, 2(4) LAW & DEVELOPMENT REVIEW 2 (2011) (hereinafter 'Picker (Development)').

²²⁵ Colin B. Picker, *China, Global Governance & Legal Culture* in CHINA AND GLOBAL ECONOMIC GOVERNANCE: IDEAS AND CONCEPTS (ISS Research Series No.45, Tokyo: Institute of Social Science, University of Tokyo.) (Junji Nakagaw, ed.) (2011) (hereinafter 'Picker (China)').

²²⁶ Colin B. Picker, *WTO Governance: A Legal Cultural Critique* in GOVERNANCE IN CONTEMPORARY JAPAN (PUBL. OF UNIV. TOKYO INSTIT. SOC. SCI.) (Kenji Hirashima, ed.) (2011) (hereinafter 'Picker (Governance)').

²²⁷ Colin B. Picker & Lisa Toohey, *Legal Culture and Trade Disputes: Vietnam's Increasing Capacity to Engage with the WTO*, 2012 JURISPRUDENCE JOURNAL 105 (2012).

²²⁸ Colin B. Picker, *Anti-Poverty v. The International Economic Legal Order? A Legal Cultural Critique* in POVERTY & THE INTERNATIONAL ECONOMIC LAW SYSTEM (Krista Shefer, ed. 2013) (hereinafter 'Picker (Poverty)').

²²⁹ Colin B. Picker, *A Legal Cultural Analysis of Microtrade*, 5(1) LAW & DEVELOPMENT REVIEW 101-128 (2012) (hereinafter 'Picker (Microtrade)').

²³⁰ Colin B. Picker, *Comparative Law Methodology & American Legal Culture: Obstacles And Opportunities*, 16 ROGER WILLIAMS UNIV L. REV. 86 (2011) (hereinafter 'Picker (RWU)').

- a. **Maturity.** The methodology may work best with more mature fields of study. Similarly, relatively new or less sophisticated or developed fields may be more difficult for the methodology. In addition, the lack of a institutional or centralized structure within the field under study makes the analyses more difficult and less focused. For example, the comparative legal cultural analysis of international investment law was correspondingly more difficult than in those case studies concerned with the WTO or international trade law.²³¹
- b. **Role of Domestic Law.** As was noted in the analysis of international development law, when there are many different domestic legal systems involved, each with their own different legal cultures, it can be harder to identify a consistent legal cultural relationship between the international field/ institution and the domestic participants.²³²
- c. **Western Legal Cultures.** The methodology specifically brings to fore the legal culture conflicts that arise when the domestic system involved are non- western or ones with significant non-western components. For example, those conflicts arise in many of the IEL anti-poverty initiatives as they are frequently implemented within states with significant non-western legal cultural characteristics.²³³
- d. **Traditional & Historical Legal Cultures.** The comparative legal cultural analysis will be more complete and accurate when it includes consideration of any relevant traditional and historical legal culture. This is particularly necessary with legal systems which have survived intact or with significant continuity over the centuries, as was shown in the comparative legal cultural analysis of China and the WTO.²³⁴
- e. **Aggregation.** Comparative legal cultural analyses can be complex, and may themselves be the

²³¹ See, e.g., Picker (Investment), *supra* note 9. The citations in this section and throughout will typically just cite one case study as an illustration of the point, despite the fact that many of the other case studies will likely have considered the issue as well.

²³² See, e.g., Picker (Development), *supra* note 10 at 64-65.

²³³ See, e.g., Picker (Poverty), *supra* note 14 at 28-30.

²³⁴ See, e.g., Picker (China), *supra* note 11 at 77-82.

aggregation of many different sub-legal cultures and legal cultural characteristics. The analysis of microtrade was a perfect example that showed that the legal culture sought or examined in that case study was actually the aggregated legal culture of the many different participants—transnationally, internationally and domestically.

- f. **Wide Applicability.** The example of China and the WTO shows the ability of the methodology to stretch beyond the traditional common law/ civil law analysis. The analysis can even include such legal cultural characteristics as virtue (a component of Confucianism), not often considered within legal analyses.
- g. **Complementarity.**²³⁵ The methodology can identify conflicting as well as complimentary legal cultural characteristics. For example, some non-western legal cultural characteristics may support anti-poverty policies, such as communal property rights. Though communal property rights may themselves clash with the individualism emanating from the liberal economic theory underlying IEL, that is also typically part of the belief structure of western IEL participants.²³⁶
- h. **Improved Communications.** Identification and amelioration of conflicts among legal cultures, one of the primary goals of the methodology, can be considered to be a way of improving communication between communities, domestically and internationally.²³⁷ Though, there needs to be care that the effectiveness of the communication is itself not undermined by any pre-existing power asymmetries. Thus, once communication on the issue is established it is important that the communication is not, as is too often the case, driven by the economically more powerful party, be it an IEL organization or a powerful economy. As noted in the

²³⁵ Complementarity means, among other things, ‘a relationship or situation in which two or more different things improve or emphasize each other’s qualities’, Oxford Dictionaries (*available* at <http://oxforddictionaries.com/definition/english/complementarity>).

²³⁶ See, e.g., Picker (Poverty), *supra* note 14 at 31.

²³⁷ See, e.g., Picker (Methodology), *supra* note 7 at Part VI; see also, Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 91 (2001).

analysis of international investment relationships, the weaker party, and their legal culture, is too often ignored or displaced entirely.²³⁸

- i. **Bridging Difference.** Comparative legal cultural analysis can also serve to bridge different and contested understandings of international fields. For example, the ability of a comparative legal cultural analysis to bypass the contentious issue of whether development should be narrowly or broadly defined.²³⁹
- j. **Observer Effect.** The research into the article suggested that the methodology may be subject to the observer effect.²⁴⁰ Repeatedly, after introducing this work to officials at international organizations,²⁴¹ they typically noted that it would henceforth be hard for them to not consider legal culture seriously in their future work.²⁴² In other words, it may be that a legal cultural discussion/ examination may itself lead to changes in the very legal culture being examined.
- k. **Cultural Fallacies.** When working with the methodology, care must be taken with respect to false or ephemeral cultural characteristics. These can range from erroneous local beliefs about litigiousness or, as was a question in the research on the WTO, the extent of the adversarial or consensual approaches within the WTO.²⁴³ In addition to providing questionable data, there are also legal culture questions concerning the origin and the real impact of such fallacious views.
- l. **Contention, Emotion and Passion.** The more contentious a field, whether among academics,

²³⁸ See, e.g., Picker (Investment), *supra* note 9 at 52.

²³⁹ See, e.g., Picker (Development), *supra* note 10 at 44-45.

²⁴⁰ The term 'observer effect' can refer to the fact that the act of observing something may change it. See, e.g., Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 388 (2012).

²⁴¹ See Picker (WTO), *supra* note 8 at 121.

²⁴² Indeed, after presenting the idea at a conference at the Swiss Institute of Comparative Law, that institute organized a conference the following year to explore the role of legal traditions and cultures within international organizations. See *Comparative Law and International Organisations: Cooperation, Competition and Connections* (Swiss Instit. Comp Law, 9-10 September 2010).

²⁴³ See Picker (WTO), *supra* note 8 at 128; see also Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOKLYN J. INT'L L. 67 (2004).

practitioners, officials (international and domestic) and the public, the more passion and emotion will be aroused and human-centered comparative legal cultural analysis will be relevant.²⁴⁴ Thus, for example, the field of investment involving the sometimes conflicting goals of states and foreign investors is one that is surrounded by a great deal of emotion, and hence is a field very closely connected to legal culture.²⁴⁵

- m. **The Inexpert Researcher.** In the process of carrying out the case-studies, numerous issues were confronted that were outside the direct expertise of the researcher. Yet, as is exhibited in the analysis of China's legal culture, important insights were still found despite a relative lack of knowledge of Chinese law. Thus, suggesting that the methodology is powerful enough even for non-experts who can engage in a 'see the forest, not the trees' approach.²⁴⁶

The above are just a few examples of the insights related to comparative legal cultural analyses. But, perhaps the most significant outcome relates to the fact that by showing that the methodology can be usefully applied to parts of IEL, it is fair to assume that the methodology can be applied in other IEL contexts, as well as within the larger public international legal order. In addition, by extending the methodology, the methodology itself is given a new lease of life, being shown to be even more versatile than previously thought.

III. Insights on Legal Culture

Interestingly, while the case studies were designed to employ comparative legal cultural

²⁴⁴ For the role of emotion and passion in international trade, *see generally* Colin B. Picker, *Trade & Security: Empiricism, Change, Emotion & Relevancy*, in *TRADE AS THE GUARANTOR OF PEACE, LIBERTY, AND SECURITY? CRITICAL, HISTORICAL, AND EMPIRICAL PERSPECTIVES* (American Society of International Law Press, *STUDIES IN TRANSNATIONAL LEGAL POLICY: A SERIES OF BOOKS*) (2006) (Padideh Alai, Tomer Broude, & Colin B. Picker, eds.).

²⁴⁵ *See, e.g.*, Picker (Investment), *supra* note 9 at 34, 50-51. It is thus no surprise that to the extent there is any substantive work on an IEL field and legal culture it is on investment. Picker (Investment), *supra* note 9 at 28-29 (discussing and citing some of the many 'guidebooks' for working in international investment law in different legal cultural environments).

²⁴⁶ *See, e.g.*, Picker (China), *supra* note 11 at 71. Furthermore, this is likely to be the case, for it will be the rare researcher that has facility across all the different legal cultures that arise when considering the legal cultural issues of international legal systems.

analyses to further develop an understanding of IEL and of the comparative legal cultural methodology, the effort has also led to a greater understanding of the underlying concept of legal culture. As noted in many other works, the concept of legal culture is considered by many to be too vague to be easily usable.²⁴⁷ But, as is shown in the IEL examples below, the case-studies have helped to put flesh onto that usually elusive concept. Two main areas were especially illuminated: the factors that contribute to the formation and development of a legal culture and the existence of legal subcultures. Both are explored below through IEL examples drawn from the case-studies.

A. The Development of Legal Cultures

A number of issues related to the development of legal culture were identified in the article. They include:

- a. **Incidents.** The role of ‘incidents’ in the development of legal culture, for both domestic and international legal systems and communities is significant. For example, the impact of the post-Tiananmen Square protests on the development of modern Chinese legal culture.²⁴⁸ Or, in the international sphere, the as yet unknown consequence of the impact of the Seattle WTO Ministerial debacle on the long term development of the WTO’s legal culture.²⁴⁹ An incident study could also be used as a different type of ‘case-study’ in helping to identify consistent legal cultural responses and conflicts within or across legal systems.²⁵⁰
- b. **Legal Cultural Duality.** The examination of China’s legal culture shows that legal culture is not monolithic within a state—the opposing duality of Confucianism and Legalism existing

²⁴⁷ See note 5 *supra*.

²⁴⁸ See Picker (China), *supra* note 11 at 86.

²⁴⁹ *Id.*

²⁵⁰ ‘Incident studies’ are another methodological approach for discerning trends and developments within international law. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1 (1984); INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W.M. Reisman & A.R. Willard (eds.), 1988); Colin B. Picker, *Fishing for Answers In Canada’s Inside Passage: Exploring the Use of the Transit Fee as a Countermeasure*, 21 YALE J. INT’L L. 349 (1996) (an example of an incident study explored under Professor Reisman’s supervision).

side by side within today's modern Chinese legal culture shows the complexity of a state's legal culture, in which conflicting legal cultural approaches often coexist and then interact, harmoniously or in a conflicting manner, with IEL.

- c. **Colonization.** As noted in many of the case studies, discussions of the development of legal cultures in non-western states cannot take place without considering the role of colonization and even neo-colonization.²⁵¹ Furthermore, as specifically noted in the analysis of microtrade, colonization may have had a different impact and role on the different communities of the former colony—perhaps with the greatest impact on urban areas, on the elites and on favored ethnic groups.²⁵²
- d. **Dispute Settlement System.** A functioning or extant dispute settlement system, such as that discussed in the case studies concerning the WTO, can have a significant impact on the development of a legal culture. That impact can take place at a substantive level through the introduction of such legal culture characteristics as pragmatism and can also can impact the legal cultures' development through the leadership role that the judges can have on the system's legal culture, as the judges' decisions through *de jure* or *de facto* precedent develop the field.²⁵³
- e. **Legal Literacy/ Education.** Legal literacy and education can play a significant role in the development of legal cultures.²⁵⁴ Legal illiteracy may lead to a legal culture with a greater belief and utilization of informal mechanisms, or with a greater divide between legal professionals and the public. It may also lead to conflict based on erroneous understandings, as may have been the case with some of the anti-globalization protesters, believing that, for example, the WTO was anti-environmental, despite the Shrimp-Turtle case's pro-

²⁵¹ See also, Picker (Development), *supra* note 10 at 62.

²⁵² See, e.g., Picker (Microtrade), *supra* note 15 at 109-10.

²⁵³ See, e.g., Picker (Governance), *supra* note 12 at 107-111, 118-20.

²⁵⁴ See, e.g., Picker (Microtrade), *supra* note 15 at 114.

environment content.²⁵⁵

- f. **'Smallness'.** As dealt with at some length in the consideration of legal culture and microtrade, the size of a relevant community, be it a political entity, such as city or state, or a tribe or other social group, may have a specific impact on the development of the legal culture of that entity.²⁵⁶ Correspondingly, there may be specific legal cultural consequences with large forms of those communities. For example, consider the different legal cultural characteristics that may exist within the otherwise potentially close legal cultures of Taiwan compared to Hongkong, or Australia compared to New Zealand, that are directly related to the difference in size between the two states (though, of course, many other factors will also drive the differences in their legal cultures).
- g. **Informal Law.** Many legal systems have a substantial component of law that is 'informal', such as that reflected in the discussion of Guanxi in the China and WTO case study. That informal law can have a significant impact on the legal culture of the entire legal system, but even more so for the specific communities which use it and for related fields of law.²⁵⁷
- h. **Mixed Legal Cultures.** Like other aspects of legal systems, legal cultures are often the product of different legal cultures, such as foreign invaders blending together.²⁵⁸ Though it is worth noting that those parts of a legal system more connected to the underlying values/traditions, such as family or inheritance law, may be less influenced by foreign legal cultures.²⁵⁹
- i. **Language.** The role of language looms large in the development of a legal culture.²⁶⁰ The use

²⁵⁵ See United States—Import Prohibition of Certain Shrimp and Shrimp Products (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report) at paras 129, 154 and 185; see also Steve Charnovitz, *A New WTO Paradigm for Trade and the Environment*, 11 S.Y.B.I.L. 15, 18-19 (2007).

²⁵⁶ See, e.g., Picker (Microtrade), *supra* note 15 at 192.

²⁵⁷ See, e.g., Picker (China), *supra* note 11 at 86-87.

²⁵⁸ See, e.g., Picker (Methodology), *supra* note 7 at Part VII.

²⁵⁹ Picker (International Law), *supra* note 6 at 1124.

²⁶⁰ See, e.g., Picker (Methodology), *supra* note 7 at Part VI.

of English may bring with it the influence of the Anglo-American legal culture, while the use of French may permit more EU and civil law legal cultural influences.

- j. **Institutional structure.** As noted in the case studies discussing international development law and international investment law, the lack of an institutional structure in a legal field or system is likely to result in a less clear and developed legal culture.²⁶¹
- k. **Law Firm/ School Influences.** The role of the large Anglo-American law firms and law schools in the development of the legal culture of many of these fields and systems may be significant.²⁶² This issue has been explicitly discussed in the article on investment²⁶³ and in the WTO context²⁶⁴, where law firms are particularly critical.
- l. **Values.** Normative considerations may play a large role in the development of a legal culture, as the legal culture may be divorced or more separated from the typically positivistic legal systems within which it exists.²⁶⁵ As discussed in relation with international development law, this may particularly be the case in those legal systems with a western legal system that was imposed by colonizers but where non-western legal cultural approaches continue to exist among the general population.²⁶⁶
- m. **Corruption.** The relationship between corruption and legal culture, with the causation running in both directions, can be critical to the development of the legal culture.²⁶⁷ As discussed at length in the analysis of microtrade, among its many impacts, corruption can undermine a rule of law character within the legal culture.

B. Legal Subcultures

²⁶¹ See, e.g., Picker (Investment), *supra* note 9 at 35-36.

²⁶² See, e.g., Picker (Investment), *supra* note 9 at 45.

²⁶³ *Id.*

²⁶⁴ See Picker (WTO), *supra* note 8 at 134.

²⁶⁵ See, e.g., Picker (Development), *supra* note 10 at 66.

²⁶⁶ *Id.*

²⁶⁷ See, e.g., Picker (Microtrade), *supra* note 15 at 112.

As noted above, the legal culture of a legal system, whether domestic or international, is not monolithic, but will include within it discrete legal subcultures, many of which must be taken into account when considering the legal cultural relationships of that system with other legal cultures, be they international, foreign or domestic. The many discrete legal subcultures identified and considered in the case-studies, and that should therefore be considered when engaging in the methodology, include:

- a. **Field or Substantive Law Subcultures.** Within a legal system there may be a set of legal cultural characteristics associated with a particular field that are not applicable to other fields within the same legal system. For example, contract/ commercial law and family law, while sharing many common legal cultural characteristics, may differ in a few significant legal cultural respects. Within IEL, the differences are starker. While investment, finance and trade all share many characteristics, nonetheless all clearly differ with respect to some legal cultural characteristics. For example, while the legal culture of a WTO-centered international trade law may reflect greater confidence and self assuredness, that of the more anarchic international investment law may reflect much less confidence and certainty.²⁶⁸
- b. **Gender Subcultures.** Legal systems may include within them legal cultural characteristics that are associated with men or women, or that apply differently to men or women. As specifically noted in the analysis of microtrade, those legal culture characteristics may play a role in the position of women in society and in the law—both with respect to formal and informal law, regional law, community law, and so on.²⁶⁹ In that case study, given the likely significant role of women in microtrade, these gender legal cultural issues may be critical to the success of that initiative.
- c. **Class Subcultures.** There may be different legal cultures or legal cultural characteristics for

²⁶⁸ See, e.g., Picker (Investment), *supra* note 9 at 51.

²⁶⁹ See, e.g., Picker (Microtrade), *supra* note 15 at 121.

the different socio-economic divisions within a society. For example,²⁷⁰ the elites and the ordinary people may have different legal cultures.²⁷¹

- d. **Geographic Subcultures.** The different communities associated with different geographies within a legal system may have different legal cultures or legal cultural characteristics.²⁷² Thus, there may be differences between rural and urban developments, agricultural and industrial communities, mountainous or plains legal cultures, desert and rain forest peoples, and so on. This is an issue rarely discussed in legal literature, and in particular in IEL, but one that comes to the fore very quickly when one engages in a comparative legal cultural analysis. For example, a desert nomad culture may have radically different notions of geographic boundaries, natural resource allocations and so on.²⁷³
- e. **Professional or Trade Subcultures.** For those professions or trades that are sufficiently cohesive or organized, such as those organized around guilds, one should expect to find specific associated legal cultural characteristics.²⁷⁴
- f. **Ethnic, Religious and other Discrete Minority Subcultures.** While being one of those aspects of legal culture that does get some attention, it is worth noting that to the extent there are minority communities within a legal system it is likely that they will have their own legal cultural characteristics. As noted in the case studies, one of the more common ethnic legal cultural issues would be the utilization of the communities' informal legal mechanisms, such as community dispute resolution and community contract/ guarantor regimes.²⁷⁵

²⁷⁰ See, e.g., Picker (Poverty), *supra* note 14 at 31.

²⁷¹ See, e.g., Picker (Microtrade), *supra* note 15 at 114.

²⁷² See, e.g., Picker (Microtrade), *supra* note 15 at 109.

²⁷³ An acceptance of the fact that some nomads' may have different approaches to such things as boundaries was noted in the International Court of Justice's Advisory Opinion in the Western Sahara case. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para 81 (Oct. 16); see, also, John C. Duncan, Jr. *Following a Sigmoid Progression: Some Jurisprudential and Pragmatic Considerations Regarding Territorial Acquisition Among Nation-States*, 35 B.C. INT'L & COMP. L. REV. 1, 19 (2012).

²⁷⁴ See, e.g., Picker (Microtrade), *supra* note 15 at 117.

²⁷⁵ See, e.g., Picker (Development), *supra* note 10 at 68.

- g. **Age and Generational Subcultures.** A natural extension of the legal subcultures above, and a future legitimate line of inquiry, is whether there are specific legal cultural characteristics associated with the elderly or the young, or even of people of different generations regardless of their progression through life. For example, consideration of whether those who became adults in the 1960s have a different legal cultural attitude to those that became adults in the 1980s or 2000s.²⁷⁶

While far from an exhaustive list, the above discussion suggests that there are a significant number of very different legal subcultures, generally co-existing peacefully within the larger legal systems' legal cultures. Co-existence may suggest the presence of strong legal cultural pluralism.²⁷⁷ Furthermore, as the above non-exhaustive list shows, the role of legal subcultures, often less visible than the overarching legal cultures within which they exist, is clearly as complex as is the case for larger legal cultures. Despite those difficulties, the many internal legal subcultures must be identified and examined. They must then be taken into account, both to understand their discrete interactions with other legal cultures and for their contribution, along with the other factors noted above, to the

²⁷⁶ For example, it has been argued that Gorbachev's different approach to the rule of law from his immediate predecessors in the Kremlin was due in significant part to a generational difference. Might then Putin reflect yet a different generation with correspondingly different legal cultural attitudes.

²⁷⁷ Legal pluralism is an important legal cultural characteristic, and is one of the defining characteristics of western legal systems. See Harold J. Berman, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 10 (1983). That potential legal cultural pluralism raises many questions such as:

What is the extent of legal cultural pluralism?

Given the axiomatic nature of legal pluralism within the western legal tradition, should we expect legal cultural pluralism within the western systems and legal cultures?

Given that many non-western legal systems reflect strong pluralistic elements (see H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* 305-07 (4th edn., 2010) and also include legal subcultures, might there also be widespread legal cultural pluralism in those systems?

Given that there are also legal systems that may be in some respects less pluralistic, such as some religious legal systems, yet that also will include legal subcultures, might there be broader pluralism at the legal cultural level in those systems than is the case in the overarching legal system itself?

Given the existence of legal cultures associated with international law, might they also be pluralistic or does the supremacy of international law suggest less pluralism than in domestic legal cultures?

Was legal cultural pluralism visible in the case-studies or do we in fact see the opposite (this issue is noted again in the next section with respect to specific findings on this issue.).

These questions will be considered by me in my future research on legal culture.

development of the aggregate legal culture of the larger legal system.

IV. Insights on the International Economic Legal Order

The central goals of the case studies involved two related determinations—whether comparative and comparative legal cultural analyses could be applied in the international context and if those applications would be valuable. The case studies show the value of the analyses. Despite the fact that each of the case studies considered a different part of IEL, for a different audience and context, the methodology in each case proved its worth in revealing insights about those fields and issues, and by extension about international law and IEL in general. As the examples below show, each of the case studies identified specific concrete insights, as well as general insights and suggestions of insights that would be revealed were the methodology to be applied in greater detail to that field. While the case studies suggested many such insights, space constraints limit this article to the few examples below, highlighting the very different types of insights that can be derived from the methodology:

- a. **Implementation of IEL.** Legal culture plays a substantial role in the effectiveness and reception of international law within states. For example, China's legal cultural attitude to private law may be playing a role in China's domestic implementation of IEL. As discussed in the case study on China and the WTO, the dominance of Guanxi over private law combined with private law's relative immaturity may be undermining the reception of IEL principles that have private law impact—from investment law guarantees to procedural fairness demands in unfair trade practice areas.²⁷⁸
- b. **IEL Organizations.** An international organization's legal culture is critical in the development of its character and operation. The case studies identified specific factors that play a role in the development of that legal culture, including:

1. The aggregate composition of the legal cultures of the international organization

²⁷⁸ See, e.g., Picker (China), *supra* note 11 at 80-81.

officials.

2. The legal educational background of the law trained international organization participants.

3. The legal cultures of the primary state participants in the international organization.

4. The physical location of the international organization's headquarters, and the associated legal culture of the jurisdiction within which the headquarters sits.

5. The legal cultures of the primary scholars of the international organization and its associated field.

6. The legal cultural backgrounds of the judges/ arbitrators/ panelists that serve in the international organization's dispute settlement bodies or processes.²⁷⁹

- c. **Legal Pluralism Issues.** A legal cultural insight identified within the international legal order is a potential lack of legal pluralism with respect to the other parts of international law.²⁸⁰ Thus, for example, trade, and IEL in general, can be thought of as not keen to 'work' with other disciplines. Despite efforts to include other parts of international law, such as human rights and the environment, the field's legal culture is often unwelcoming to these ostensibly non-economic issues, which are supposedly outside the bounds of IEL.²⁸¹
- d. **Fragmentation Issues.** The analyses exposed the legal cultural unevenness of IEL, likely reflecting and contributing to its fragmentation.²⁸² For example, while the legal culture of

²⁷⁹ See, e.g., Picker (WTO), *supra* note 8 at 134-35.

²⁸⁰ See, e.g., Picker (Investment), *supra* note 9 at 52.

²⁸¹ Of course, the issues are debated, and there are many participants in the field that argue for their inclusion, both from substantive and normative positions, and there are the beginnings of a weak introduction of these issues into trade. But, aside from the world of authorized exceptions, such as are found in the GATT's Article XX, we see little effective involvement of these issues at the multilateral level. Even with respect to regional trade agreements, some of which now claim to include labour and environment, they do so in a rather ineffective manner.

²⁸² See, e.g., Picker (Methodology), *supra* note 7 at Part IVB. See also, Eugenia McGill, *Poverty And Social*

international trade law reflects public law, centralization, judicialization attributes and is largely non-controversial,²⁸³ international investment law's legal culture can be viewed as more private, contentious, anarchic, and less openly judicialized.²⁸⁴

- e. **Specialization.** One of the most important insights revealed is that those that work and study these fields and institutions have become too specialized, even as the field has fragmented—a mutually reinforcing pattern.²⁸⁵ Thus, it may even be the case that a specialist in GATS may not have sufficient expertise on GATT, let alone on investment or finance, or even public international law and comparative law. Yet, as shown by this article and the associated case studies, bringing in outside and challenging perspectives can help our understandings and development of these different but related fields.
- f. **Hard & Soft Law.** Legal culture is not only relevant to 'hard' international law, but also to the many parts of international law considered to be 'soft'.²⁸⁶ It is also likely that legal culture is relevant in the often subjective assessment of whether a part of international law is hard or soft. That subjective attitude is critical in predicting whether the law will be operational or effective. Relatedly, there may be additional legal cultural disconnects within a field to the extent different legal cultures have opposing views on whether a part of international law is hard or soft. Thus, as discussed in the case study on poverty and IEL, whether an anti-poverty initiative will be implemented may vary according to whether the relevant parties view it as hard or soft.²⁸⁷
- g. **Domestic Law Comparisons.** Throughout the many case studies, many legal culture aspects of IEL are illuminated through comparisons with domestic legal systems and their legal

Analysis Of Trade Agreements: A More Coherent Approach? 27 B.C. INT'L & COMP. L. REV. 371, 385-86 (2004) (discussing policy coherence in IEL).

²⁸³ See generally Picker (Development), Picker (China), Picker (Governance) and Picker (WTO), *supra* note 8.

²⁸⁴ See generally, Picker (Investment), *supra* note 9.

²⁸⁵ See, e.g., Picker (Methodology), *supra* note 7 at Part III.

²⁸⁶ See, e.g., Picker (Poverty), *supra* note 14 at 20-22.

²⁸⁷ *Id.*

cultures. For example, the case-study of legal culture and the WTO's governance suggested the following potentially fruitful approaches:

1. Comparing the WTO's legal cultural relationships with its members and with the many regional trade agreements to the legal cultural issues that arise in the context of domestic approaches to federalism and subsidiarity.²⁸⁸
2. Viewing the legal culture of the WTO's Appellate Body driven development of WTO law within the context of a constitutional imbalances not present in most legal systems—where there are typically functioning counterbalancing legislative and executive branches, with associated impacts on the legal culture of the system.²⁸⁹
3. Considering that the legal cultural role of states in driving litigation at international organizations and in international law fields is akin to the legal cultural issues associated with 'private attorneys general' in domestic legal systems, where normally it is the executive branch that brings public law cases to trial.²⁹⁰

In addition to providing new insights about the international legal order, the case studies repeatedly show that the legal cultural methodology is capable of providing fresh insights even to those few parts of IEL that have been the subject of previous comparative examinations. For example, the case studies provided multiple instances of novel legal cultural and comparative considerations of the oft-examined issue of the role of precedent and case law in the international economic legal order.²⁹¹

Finally, through the application of comparative and comparative legal cultural

²⁸⁸ See Picker (Governance), *supra* note 12 at 120-21.

²⁸⁹ This brings to mind the early development of the English legal system, with weak legislature and an executive focused on other issues See Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON WESTERN LAW 307-310 (3rd edn., 2007)

²⁹⁰ See, e.g., Picker (Governance), *supra* note 12 at 119-20.

²⁹¹ *Id.* See also, Picker (Investment), *supra* note 9 at 56-57; see also, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker, Isabella D. Bunn, & Douglas W. Arner eds., 2008); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999).

analyses in the case-studies, IEL was demystified, brought down to earth, and placed within the world of ‘normal’ law.²⁹² As such, the once sacrosanct aspects of the international economic legal order can then be examined anew and challenged in ways never before done.

V. Responses to IEL Legal Cultural Disconnects

As Joel Trachtman notes, ‘[g]ood research illuminates the consequences of policy choices and therefore allows people to make better policy choices.’²⁹³ But, too often academics do not take that next step of actually considering or suggesting the ‘better policy choices’, stopping instead at identification of the problems and obstacles of existing policy choices. Too rarely are solutions suggested. It is indeed easier to tear down a house than to build one. Lest this article and the case studies be accused of such an approach, adding to those provided in the case studies this section will suggest some lessons—some additional potential mechanisms to ameliorate some of the legal cultural obstacles identified by the comparative legal cultural analyses.

As an initial matter, because comparative legal cultural analyses are a part of comparative law it would be remiss not to consider looking at how other legal systems have handled such issues when seeking solutions to legal cultural conflicts. This applies equally to international legal systems that borrow solutions from domestic systems as well as domestic systems that often borrow solutions from other domestic systems. For example, as noted in the case studies and above, the legal cultural isolationism or legal chauvinism that are present in some international fields, especially some IEL fields, can perhaps be tackled in the same manner as equivalent issues in domestic systems. One of the best examples of a legal system that is often considered, rightly or not to be isolationist and chauvinistic, is the United States.²⁹⁴ Proposed approaches to America’s supposed isolationism and chauvinism, even

²⁹² See, e.g., Picker (Methodology), *supra* note 7 at Part IVA (application of ‘ordinary’ comparative law techniques to international organizations).

²⁹³ Joel P. Trachtman, *International Economic Law Research: A Taxonomy* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE 51 (Colin B. Picker, Isabella D. Bunn & Douglas Arner, eds, 2008)

²⁹⁴ See generally, Picker (RWU), *supra* note 16.

though of a different form, may therefore be relevant for this issue within IEL. One proposed approach in the American context is quite simply for American legal actors (legislators, judges, academics, practitioners and law students) to learn more about and experience other legal systems.²⁹⁵ A comparable approach in the IEL context could be efforts to promote greater interdisciplinarity. For example, WTO officials or likely DSB panelists could be encouraged to spend some time with officials at the International Labor Organization or with the ICSID. This does not mean adoption of the ‘foreign’ principles in a later WTO case that involves labor or investment issues, but it may make for a more nuanced interaction with those principles.

Of course, to the extent that these international legal systems borrow from domestic legal systems or domestic legal systems borrow from or implement aspects of international legal systems while seeking to mitigate legal cultural conflict, the wider legal culture must be taken into account to ensure a smooth and effective fit.²⁹⁶ After all, such borrowing and transplantation will not work well if the relevant domestic system has a legal culture in opposition to that of the international organization or field. This is especially the case for domestically implemented international law that may be at odds with the local legal culture. When such borrowing takes place, the legal cultures in the domestic system and the international institution must be taken into account. ‘Taken into account’ does not mean that the underlying cultures must be changed, or that one must conform to the other—even assuming that culture can be changed in those ways.²⁹⁷ Rather, other less culturally destructive options should be pursued, such as are suggested below.

As noted earlier, one of the best ways to figure things out is ‘by doing’ and thus the remainder of this section will explore solutions through consideration of some of the legal

²⁹⁵ *Id.* at 94-96.

²⁹⁶ See Picker (Legal Culture), *supra* note 6 at Part V concerning Pierre Legrande’s cultural critique of transplantation.

²⁹⁷ See Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 543 (2009) (providing history of ‘neoculturalists’, historically and recently, and their attempts to change culture in efforts to promote development and rule of law.).

cultural conflicts identified in the case studies. But, because so many legal cultural conflicts, disconnects and discontinuities were identified throughout the case studies, this section will, for illustrative purposes only, focus on just one of the case studies and its identified legal cultural conflicts, proposing potential solutions to ameliorate those conflicts.²⁹⁸ In that case study, a comparative legal cultural analysis of microtrade,²⁹⁹ the legal cultural conflicts that were identified were associated with:

- a. legal illiteracy;
- b. gender;
- c. a nascent international organization;
- d. rural and agricultural communities;
- e. artisan communities;
- f. corruption; and
- g. 'small' communities.

Of course, many of those issues were also sources of legal cultural conflict in some of the other case-studies,³⁰⁰ and so the solutions suggested below may equally be applicable in those and other areas of IEL.

Because legal cultural issues are 'sticky' i.e. less easily modified by formal law,

²⁹⁸ See Colin B. Picker, *Chapter 6, Microtrade and Legal Cultural Considerations* in MICROTRADE: A NEW SYSTEM OF INTERNATIONAL TRADE WITH VOLUNTEERISM TOWARDS POVERTY ELIMINATION (Yong-Shik Lee, ed.).

²⁹⁹ 'Microtrade is essentially a mechanism to support development in the least developed states ("LDCs") through the creation of a mechanism, structure, and organization that will facilitate small scale international trade from the LDCs into more developed markets. Microtrade seeks to make this work through leveraging the lower labor costs in the LDCs, demand in more developed markets, and through collaborative and voluntary efforts to minimize the costs of shipping and other barriers to such small scale trading ventures.' Picker (Microtrade), *supra* note 15 at 101; *see also* Yong Shik-Lee, *Theoretical Basis and Regulatory framework for Microtrade: Combining Volunteerism with International Trade Towards Volunteerism*, 2(1) LAW AND DEVELOPMENT REVIEW, 367-399, at 368 (2009).

³⁰⁰ See, e.g., Picker (Poverty), *supra* note 14 at 31-34.

whether judicial, parliamentary or executive made law, they are tougher to change than case law, statutes, or regulations. Nonetheless, legal cultural conflicts can be ameliorated in two essential ways—systemically and topically. The first and perhaps the most effective way is by tackling the systemic issues which have led to the legal culture characteristics at issue. Thus, for example, legal illiteracy was identified as a legal cultural issue that will impact on microtrade transactions.³⁰¹ Legal illiteracy may be caused by failings in the education system or by poverty that requires children to begin earning income instead of staying in school, or through cultural factors that may not consider education suitable or worthwhile for parts of society. Those systemic issues can be tackled, but not in the short term, not just by IEL policies, and not easily in the discrete cases that will arise with respect to specific microtrade transactions or, indeed, other international economic policies. Conversely, while the above example of legal illiteracy is not one that appears to have a positive side to it, there are some legal cultural characteristics that, while harmful to microtrade policies may contribute to the development or welfare of the country in other ways. Thus, before the eradication or diminution of those legal culture characteristics is undertaken, there must be careful consideration of the benefits versus the harms of such legal culture characteristics. For example, while a country may benefit from the maintenance of traditional agrarian cultures that add to the cultural diversity of the country and maintain close links with a cherished past, such traditional cultures may lead to legal culture characteristics that are not supportive of modern global transactions, such as those at the heart of microtrade and other IEL policies.

While the systemic issues cannot easily be tackled, there are some concrete and localized mechanisms, ‘topical’ approaches, that could be considered in order to ameliorate the harm caused by specific legal culture characteristics. Thus, while legal literacy has a generalized impact on the overall context within which microtrade must operate, such as the marginalization of those with legal illiteracy or the overall ‘dumbing down’ of the legal culture, there are some specific and localized consequences of legal literacy that can be

³⁰¹ See, e.g., Picker (Microtrade), *supra* note 15 at 114.

ameliorated. For example, while legal illiteracy undermines effective assistance and monitoring of legal counsel, those harms can be tackled through training designated and dedicated counsel in the issues associated with legal illiteracy. This can help by changing the legal culture of the lawyers as opposed to the culture of their clients. But, the legal illiteracy culture of the developing country microtrade participants can also be tackled in discrete, transaction specific ways. For example, requiring and providing basic training for microtrade participants in those legal issues relevant for their microtrade transactions can permit participants to better monitor their counsel, as well as to better understand the transactions, and can slowly erode the legal culture of illiteracy. At the national level, there are some discrete policies that could also help with the problems caused by legal illiteracy in the context of such transactions, such as providing dedicated legal aid for microtrade participants and simplification of the law for the low level transactions involved (just as small claims courts employ simplified procedures).³⁰²

Many of the potential solutions discussed above could also help ameliorate the conflicts caused by some of the other legal culture characteristics. For example, many of the legal culture concerns raised by the ‘smallness’ of microtrade transactions,³⁰³ could be handled in similar ways to the above. Thus, the fact that the legal culture surrounding smaller transactions tends to result in a diminished participation of counsel could be assisted through the legal aid suggestion above. Of course, each of the legal culture characteristics has its own unique issues. Thus, the fact that the issue of smallness is associated with a different legal cultural approach to risk analyses³⁰⁴ suggests that a different approach is required. For example, in that case it could be that provision of insurance, guarantors, pooled risk and other devices could be incorporated into the microtrade project to counter any risk aversion.

³⁰² Though, there are no solutions that do not themselves potentially create new problems. Thus, greater governmental oversight may lead to increased costs and bureaucratization, while capture of microtrade by a closed group of lawyers may create a whole series of other problems.

³⁰³ See, e.g., Picker (Microtrade), *supra* note 15 at 116-17.

³⁰⁴ *Id.*

Also, the impact of artisan and craftsman legal culture in the microtrade context³⁰⁵ will undoubtedly require its own unique solutions. However, without an understanding of the legal culture associated with artisans and craftsmen, we cannot make any progress on developing such solutions. Hence, as an initial matter their legal culture must first be studied and understood.

Another source of legal cultural conflict that may arise in the microtrade context relates to the disconnect between legal cultures that are heavily influenced by informal sources of law and those where formal law plays a greater role.³⁰⁶ While not absolute, legal cultures associated with informal law are more often associated with developing and non-western states, and hence are of direct relevance to microtrade—a development policy initiative with particular relevance in non-western systems. One possible solution within the specific context of an actual microtrade project may be to employ intermediaries, such as the proposed microtrade organization,³⁰⁷ that can mediate between the formal and the informal approaches of the different participants. Indeed, the need for the microtrade organization to play that role may be one of the major reasons for such an organization.

Of course, the role of the microtrade organization in mediating such conflicts and in all other matters will depend to some extent on its own legal culture and its fit with the other participants and related fields. While it is not possible to predict at this stage of the development of the microtrade idea, the legal culture of a future microtrade organization can be anticipated to some extent. Procedures can then be implemented to mitigate any negative consequences or disconnects with the other microtrade participants and fields. For example, the legal culture background of the individuals involved or of those states that are most active in setting up and supporting the new organization will be critical in setting the tone of the legal culture of the new organization. Similarly, at a substantive level, by carefully considering the source of the substantive mechanisms and procedures imported into the new

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *See, e.g.,* Picker (Microtrade), *supra* note 15 at 122.

organization's methods and substantive law, it may be possible to identify imported legal culture characteristics. Also, as discussed in previous analyses of the legal culture of international organizations, the languages employed within the organization can become strong indicators of the eventual legal culture of the organization.³⁰⁸

By overtly manipulating these and other issues in the early days of the organization it may be possible to guide the development of the legal culture of the organization in ways that may better suit microtrade. Thus, if it is felt that the organization should be pragmatic and develop in an organic manner, it may be that a more Common Law approach would work better which would then more likely be supported through use of English, employment of officials with Common Law background (by origin or training), locating the organization's headquarters in a Common Law country, and so on. Similarly, identification of Civilian/ Continental characteristics as more suited to the organization might suggest that the new organization use French (or German, Mandarin, etc), predominantly employ Civil Law trained officials, locate the headquarters of the organization in a Civil Law jurisdiction and so on. Likewise, if it is felt that the legal culture should reflect more non-western characteristics then as the organization is being created, it can be set up to enhance the likelihood of those characteristics permeating the organization through similar and other approaches.

The final example of potential solutions or approaches to the legal cultural disconnects that might arise in the microtrade context is that associated with gender. It is quite possible that in many developing countries it will be women who take the initiative in benefiting from microtrade,³⁰⁹ even as their societies may not permit them to be involved in business to the extent that may be necessary for microtrade to operate to its optimum. Gender roles within societies very often reflect deeply held and sensitive beliefs, frequently emanating from religious precepts or deep seated traditions about the roles of the different genders—in the family, the workplace and in society more generally. Due to the very passionate and

³⁰⁸ See, e.g., Picker (Methodology), *supra* note 7 at Part VI.

³⁰⁹ See, e.g., Picker (Microtrade), *supra* note 15 at 121.

emotional attachments associated with these sorts of issues, it would seem that no progress could be made on this issue without the direct and active involvement of those within those communities, and with policies carefully tailored to meet the specific circumstances. Thus, solutions will likely have to involve religious institutions and community leaders, specific microtrade initiatives that are gender specific, modification of existing opportunities for women, and so on.

As these few examples of solutions indicate, it is not an easy task to counter the conflicts caused by the interaction of different legal cultures. But because those conflicts have the potential to seriously undermine or impede IEL policies or projects, it is imperative that solutions be considered and attempted. Yet, as noted throughout the article and case studies, the most important step may be the initial identification of the relevant legal cultural disconnects—raising awareness of the issues among those involved in the creation and implementation of international economic policies. For without being aware of the problem, there is no chance that the problems can be resolved. However, such efforts may be assisted in the future through the development of a legal cultural impact analysis for new or ongoing IEL policies. A legal cultural impact analyses could operate in a manner similar to other compliance review mechanisms, such as environmental impact analyses or legislative reviews for constitutionality.

VI. Conclusion

In addition to providing a rich set of insights about international economic law, when taken as a whole, the analyses in the many case studies support the validity of the methodology as applied to the international economic legal order. But, as noted throughout those case studies, it is not an analysis that leads to certainty in its conclusions. Other comparatists, such as Vivien Curran have noted this issue with respect to legal cultural analyses, recognizing ‘the problem of the lack of scientific verifiability to conclusions about foreign

legal cultures.’³¹⁰ But, she rightfully notes that ‘one needs to distinguish between verification and validity, and to recognize that unverifiability does not imply invalidity, but only uncertainty about validity.’³¹¹

Thus, researchers should consider this methodology when analyzing different aspects of IEL, and indeed other parts of public international law, either in tandem with other more traditional methodologies or on its own. Of course, that does not mean that the proposed methodology is always appropriate, or the best initial approach. Nor is it meant to be exclusive, but rather complimentary to other approaches. As Tomer Broude notes, ‘each of the valid, alternative, methodological streams of modern IEL research has weaknesses that must be taken into account in adjusting to the prevailing conditions of uncertainty. And at the same time, each stream has strengths that nevertheless ensure its role in the future of IEL research.’³¹² Similarly, Greg Shaffer explicitly notes that there is ‘no single ‘correct’ approach’.³¹³ That sort of respectful openness towards different methodologies and approaches is healthy for the field, even as it is encouraging towards methodological experimentation and such novel methodological approaches as are offered in this article and the associated case studies.

Such openness is bolstered by the welcome that this methodology has experienced from those that work in and study these fields. It is clear that it is not necessary here to definitively resolve all the issues associated with comparative legal cultural analyses of IEL fields. Merely raising the idea within the field can lead to a flowering of scholarship and consideration of the issues. The present and future publications associated with the work using the suggested methodology, along with related conference presentations, will

³¹⁰ Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP L 43, 63 (1998).

³¹¹ *Id.* at 61-62. (She further notes that ‘[i]t is important to remember that truth and certainty are separate concepts, and that a conclusion may be true without having been proven true.’).

³¹² Tomer Broude, *At the End of the Yellow Brick Road*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 27 (Colin B. Picker, Isabella D. Bunn, Douglas W Arner, eds., 2008).

³¹³ Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship* in INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE 41 (Colin B. Picker, Isabella D. Bunn & Douglas Arnereds., eds., 2008)

hopefully serve to alert the field to the utility of the proposed methodology. The earlier case-studies hopefully will be followed by field-specific empirical research to both expand on the works, as well as to continue to test the methodology for validity across a whole range of fields and issues.