The Law and Politics of International Regime Conflict

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Culture is One Thing and Varnish is Another*

I. Introduction

Cultural concerns almost derailed 'the most lucrative trade agreement in history'[1]—the free trade agreement between the European Union and the United States—before formal negotiations had even begun. Prompted by the prospect of a French veto against the negotiating mandate for the European Commission, European trade ministers haggled a full day over a compromise formula that would ensure special treatment for audiovisual services. The incident illustrates the ambivalent attitude of policy makers to trade in cultural products. On the one hand, the market for cultural products—such as films, music, books, magazines, and artworks—is among the largest of any branch of the industry, with an estimated global volume of approximately $1.3 trillion per year.[2] On the other hand, cultural products have the unique potential 'to win the minds of men',[3] setting them apart from other commodities. As early as 1914, the Irish playwright George Bernard Shaw predicted in *The New Statesman* that '[t]he cinema is going to form the mind of England. The national conscience, the national ideals and tests of conduct, will be those of the film'.[4]

Among the critical voices are those who fear the extinction of traditional cultures. When, during the soccer world cup of 1998, Buddhist monks in Bhutan were cheering for Brazil's striker Ronaldo in front of a communal television set,[5] the world witnessed a surprising encounter of the sacred and the profane, the

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* Ralph Waldo Emerson, *Journals,* referenced in Encyclopædia Britannica Online.

[1] B. Fox, 'US enthusiastic about trade deal despite culture opt-out', *EU Observer*, 24 June 2013.

[2] The UNESCO Institute for Statistics, *International Flows of Selected Cultural Goods and Services, 1994–2003* (2005) estimates that products worth at least $60 billion are traded across borders. More recent figures were, unfortunately, unavailable from the Institute as of the date of completion of this study.

[3] Thus the title of a classic monograph examining the use of media in cold-war propaganda, P. Grothe, *To Win the Minds of Men* (1958).

[4] G.B. Shaw, 'The Cinema as a Moral Leveller', *The New Statesman*, 27 June 1914, republished in *The New Statesman*, 28 May 2007, <http://www.newstatesman.com/200705280059>.

[5] These images went around the world as Khyentse Norbu's film *The Cup* was shown at the 2000 Cannes Film Festival. *See* A.O. Scott, 'TV and Soccer Invade a Buddhist Monastery', *New York Times*, 28 January 2000.

traditional and the modern, the local and the global. Yet some Bhutanese expressed apprehension about the arrival of television to the mountain kingdom. 'In the long run', Nyema Zam, the country's top television executive, worried, 'it may not be good for the culture that we have worked so hard to protect'.[6] Will foreign TV make the Bhutanese forget what it means to be Bhutanese?

Other critics have focused on the purported political subversiveness of cultural products. In conversations with the weekly paper *Die Zeit*, believers at the Rahman mosque in Aachen, Germany, expressed regrets that Islamic countries were not among the world's most influential political players. One of them, identified as Abu Hafsa, averred that the perceived Western dominance in international politics was not so much due to superior military capacities or economic power as to intrusive cultural politics. Abu Hafsa suggested that 'for every hospital that development workers build in Morocco, five new cinemas are built'—as a strategy to maintain Western political strength.[7]

Another widespread perception is that the cross-border trade of cultural products reinforces trends towards the commoditization of culture and its selective globalization. The Los Angeles rock band, Red Hot Chili Peppers, has coined the graphic term 'Californication' to describe this phenomenon. 'Californication globalizes a recipe for personal happiness ('marry me girl, be my fairy to the world'); it affects the way we see our bodies ('pay your surgeon well to break the spell of aging'); it informs a society's perception of other peoples ('psychic spies from China who try to steal your mind's elation'). In other words, Californication creates the world through its artefacts: while 'space may be the final frontier' for human beings, it is actually 'made in a Hollywood basement'.[8]

In response to anxieties similar to those expressed in Thimphu, Aachen, and Los Angeles, many governments have adopted measures to regulate trade in cultural products. Cultural policy may seek to promote local cultural expressions or restrict the entry or dissemination of foreign cultural expressions. Commonly adopted measures range from subsidies for local creators and distributors to infrastructure support, and from screen quotas and language restrictions to outright trade barriers. Yet, should governments be in the business of regulating which cultural expressions their citizens have access to? And, if the answer is yes, which type of policy for regulating cinematographic films, broadcasting, publishing, or cultural institutions is appropriate?

While these questions have occupied cultural policy makers for some time, in the past decade the regulation of trade in cultural products has also turned into a pressing and highly controversial issue of international law. Cultural policy may

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[6] S. Sengupta, 'Bhutan Lets the World In (but Leaves Fashion TV Out)', *New York Times*, 6 May 2007.

[7] A. Metzger, 'Unter Strengen Brüdern', *Die Zeit*, 27 March 2008, 13–7.

[8] Red Hot Chili Peppers, 'Californication', from the album *Californication* (Warner Bros./WEA, 1999). This is of course a harsh assessment of the cultural industry. Ironically, the Los Angeles-based rock band is arguably as much part of Californication as the entertainment industry that it denounces.

fall under the disciplines of several international treaties or 'regimes'—the regimes of the World Trade Organization (WTO), the Cultural Diversity Convention adopted under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and human rights treaties. This study is an attempt to shed light on the question of how these regimes relate to one another.

As an arbitral tribunal constituted under the Law of the Sea Convention put it, it is 'commonplace' in contemporary international law 'for more than one treaty to bear upon a particular dispute' among states. 'There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.'[9] The consequence of this differentiation—some have said 'fragmentation'—of the international order is increasing uncertainty as to the precise scope and meaning of treaty commitments: should several parallel treaties be applied in splendid isolation from one another? Should they be interpreted 'in harmony' so as mutually to reinforce one another? What should an interpreter do if it turns out that simultaneous compliance with the provisions of several treaties is impossible? May she decide to give precedence to commitments under one treaty over commitments under another treaty?

While these are questions of great consequence for the doctrine of international law, they also have important ramifications for international politics. Any argument that the reach of the *legal* rules of one regime should be limited to accommodate those of another regime implies an argument about the demarcation of the *political* boundaries between these regimes, as the pursuit of the goals of one regime is in part subordinated to the interests of another regime. Since legal arguments regarding the appropriate relationship between different regimes are difficult to dissociate from the political context in which they are raised, the present study attempts to explore both the law and politics of regime conflicts arising from the regulation of trade in cultural products.

Before laying out the argument of the present study in further detail, however, a few preliminary observations are in order. Any study of trade in cultural products must proceed from a working definition of the phenomenon of 'culture'. On the basis of this working definition, I will briefly explore the most common policy motivations for the government regulation of trade in cultural products. I will then outline the rules of international law that bear, and impose limits, upon a government's liberty to regulate trade in cultural products. Finally, the emergence of a multiplicity of different rules of international law pertaining to trade in cultural products will be placed within the context of a broader debate among international law specialists—the diversification or 'fragmentation' of the international legal order.

[9] *Southern Bluefin Tuna case* (Australia and New Zealand v. Japan), Award of 4 August 2000 (Jurisdiction and admissibility), XXIII *UNRIAA* (2004) 23, para. 52. The arbitral tribunal was constituted under Annex VII of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 *UNTS* 3.

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II. Regulating Trade in Cultural Products

A. A definition of culture

Technically, cultural products are not difficult to define: goods that fall under certain headings of the Harmonized System of the World Customs Organization (WCO) and services that fall under the relevant headings of the United Nation's Central Product Classification (CPC)[10] are cultural products. Yet such a technical definition says little about the essential underlying question: what is culture? Culture resists attempts at an easy definition. As Seyla Benhabib has noted, two traditional strands are prevalent in cultural theory. On the one hand, German Romantics defined *Kultur* in opposition to *Zivilisation*—as the unique values, meanings, linguistic signs, and symbols of a people.[11] On the other hand, mid-twentieth century anthropologists, critical of Eurocentric notions of culture, viewed culture as the entirety of practices of signification, representation, and symbolization that are structurally reproduced within a society in a way that is not reducible to the individual intentions of its members.[12] To Benhabib,

> much contemporary cultural politics today is an odd mixture of the anthropological view of the democratic equality of all cultural forms of expression and the Romantic, Herderian emphasis on each form's irreducible uniqueness….[13]

Most theorists of culture today would be inclined to define culture through a combination of three elements: a conservative element of collective identity, which implies the existence of a discernible group with 'shared complexes of values, beliefs or behaviors';[14] a progressive element, which highlights that shared social meaning is constantly created anew; and a temporal element, which sees in culture 'the stock of knowledge from which participants in communication supply themselves with interpretations',[15] so as to connect their present practice with the past. Similarly, Webster's Dictionary proposes a broad notion of culture as the 'total pattern of human behavior and its products embodied in speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations'.[16]

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[10] United Nations Central Product Classification Version 1.1, Statistical Papers, Series M, No. 77 (2004). In addition, the International Monetary Fund's (IMF) fifth edition of the Balance of Payments Manual (BPM5) and the Extended Balance of Payments Services Classification (EBOPS) of the Organization for Economic Development and Co-operation (OECD) may be used. The EBOPS is congruent with the BPM5 but classifies services in further detail.

[11] S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (2002) 2.

[12] Benhabib, note 11, at 3. [13] Benhabib, note 11, at 3.

[14] UNESCO, *World Culture Report 1998: Culture, Creativity and Markets* (1998) 22.

[15] J. Habermas, *The Theory of Communicative Action*, Vol. 2, trans. T. McCarthy (1987) 138. J. Habermas, *Theorie des kommunikativen Handelns, Band 2* (4th edn, 1987) 209: '*Kultur* nenne ich den Wissensvorrat, aus dem sich die Kommunikationsteilnehmer, indem sie sich über etwas in einer Welt verständigen, mit Interpretationen versorgen.'

[16] Webster's Third New International Dictionary. For a scholarly definition to the same effect, see F. Jefkins and F. Ugboajah, *Communication in Industrialising Countries* (1986) 151: 'Culture may be defined as the organisation of shared experience which includes values and standards of perceiving,

These scholarly and lexicological definitions are more extensive than popular understandings of culture. First, the definitions are not limited to traditional forms of folkloric heritage. Rather,

> [c]ultural diversity is more than appearance, more than folklore, song and dance. It is the embodiment of values, institutions and patterns of behaviour. It is a composite whole representing a people's historical experience, aspirations and world-view.[17]

Second, the prevailing contemporary definition of culture does not privilege elite culture or 'high culture' over popular culture. While one may take issue with the far-reaching claim that culture is 'Coca Cola as much as Chopin'[18] (thus reducing culture essentially to lifestyle), most theorists would include Madonna as much as Mozart, *The Lion King* as much as *King Lear*. This encompassing view stands in stark contrast to a tradition of critical theorists following Hannah Arendt and Theodor Adorno. To Arendt, '[o]nly what will last through the centuries can ultimately claim to be a cultural object'.[19] The bulk of popular culture, by contrast, consists of 'consumer goods, destined to be used up, just like any other consumer goods'.[20] They are, to cite Adorno, 'no longer also commodities, they are commodities through and through'.[21] To critical theorists, mass culture, as popular entertainment products are often called, is a contradiction in terms: by seizing on cultural objects and subjecting them completely to the logic of profit extraction, the *Kulturindustrie* produces no culture at all.[22] While Arendt and Adorno's powerful analyses remain pertinent tools of critique,[23] it is fair to say that, today, the encompassing and egalitarian, anthropological concept of culture has prevailed.[24]

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judging and acting within a specific social milieu at a definite historical state. In other words, culture is the complex of material and spiritual goods and values created by human activity in the process of social development.'

[17] <https://www.diversite.org/db/x.php?title=cultural%20diversity&dbcode=pr&go=e&id=12055170>.

[18] R. Holton, 'Globalization's Cultural Consequences', 570 *Annals of the American Academy of Political and Social Sciences* (2000) 142. The objection would be that 'Coca Cola', or in fact other food items, do not embody a sufficient element of creative invention on the part of the cultural creator.

[19] H. Arendt, 'The Crisis in Culture: Its Social and Its Political Significance', in *Between Past and Future: Eight Exercises in Political Thought* (1968) 202.

[20] Arendt, note 19, at 206.

[21] T.W. Adorno, 'Culture Industry Reconsidered', 6 *New German Critique* (1975) 12 at 13.

[22] Arendt, note 19, at 211.

[23] *See,* for example, the UNESCO Report, *Culture Industries: A Challenge for the Future of Culture* (1982) 10, where the authors warn of a gradual 'marginalization of cultural messages that do not take the form of goods, primarily of values as marketable commodities'.

[24] *See,* for example, UNESCO, *Studies and Documents on Cultural Policies 3: Cultural Rights as Human Rights* (1970) 10, which identifies 'a growing disinclination to define culture in elitist terms' and 'a new recognition of the diversity of cultural values, artifacts, and forms, even within the same country'. Similarly, the UNESCO General Conference's *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It* (1976), 19C/Resolution/B 28, Annex I, 29 et seq., states 'that culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all'; instead, 'the concept of culture has been broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities'.

B. International legal rules

If 'culture' is defined as the ensemble of a society's distinct practices of signification, representation, and symbolization, its regulation comprises the variety of different policies that influence such practices. Governments have many political tools at their disposal to shape a society's way of life and define the conditions under which its members can interact with members of other communities. Cultural regulation is a vast field of policy. It is as much about frequency allocation, television programming, print-media sales, and digital access policies, as it is about concert halls and opera houses.

Some of these regulatory measures have a significant impact on international trade. Cross-border trade in cultural goods and services is, almost by definition, negatively affected when governments subsidize television productions in a particular language, require that theatres reserve quotas for domestic films, restrict the importation of (or access to) music recordings or books, limit the licensing and ownership of broadcasting companies, or introduce tax shelters in support of cultural operators that have elected residency in a particular territory.[25] Conversely, governments may facilitate cross-border trade by promoting domestic cultural products abroad or by providing incentives for the dissemination in their territory of foreign cultural expressions that they consider under-represented. All these measures are based on an implicit preference in favour of one class of cultural expressions (such as local products or products that are under-represented in a particular market) over another. As a consequence, producers and distributors who are not among the beneficiaries of such measures may perceive cultural policies as trade barriers, directed at impeding equal access to the market.

The restriction (or, facilitation, as the case may be) of cross-border trade flows can be an accidental side effect of cultural policy as it can be its principal purpose. Often, government regulation of culture is motivated by perceptions of how increased international commerce impacts local cultural practices. It may be inspired by the fear of a worldwide 'convergence toward a common set of cultural traits and practices'.[26] The root causes of such a purported threat of cultural homogenization are often perceived to lie in the market economy: multinational corporations allegedly promote a type of 'consumer capitalism' that is 'built on the standardized brand image, mass advertising' and 'the culture industry of Hollywood', all of which evoke 'sale dreams of affluence, personal success, and erotic gratification'[27]—in one word, Californication.[28] The export of culture, on

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[25] Canadian Industries Cultural Advisory Group on International Trade, *Canadian Culture in a Global World* (1999), <http://www.infoexpert.gc.ca/trade-culture>; M.E. Footer, C.B. Graber, 'Trade Liberalization and Cultural Policy', 3 *Journal of International Economic Law* (*JIEL*) (2000) 115 at 122.

[26] R. Holton, 'Globalization's Cultural Consequences', 570 *Annals of the American Academy of Political and Social Sciences* (2000) 142.

[27] Holton, note 26, at 142.

[28] It is difficult to deny that some measure of cultural 'copying' takes place worldwide. In its pure form, however, the homogenization thesis is untenable. First, the omnipresent equation of homogenization and Americanization is factually doubtful. Post-colonial states, for example, often tend to be

this view, constitutes a threat to cultural diversity. As a non-governmental organization puts it,

> [c]ultural diversity is a reflection of people's connection to their local environment, to the living world. Centuries of conquest, colonialism and 'development' have already eroded much of the world's cultural diversity, but economic globalization is rapidly accelerating the process. . . . Deprive a people of their language, culture and spiritual values and they lose all sense of direction and purpose.[29]

While some dread homogenization, to others cultural polarization—or what has been graphically called the 'clash of civilizations'—is the more likely effect of international trade in cultural products.[30] On this account, the consequence of attempts to impose Western models of life and 'consumer capitalism' in other parts of the world is not so much assimilation than violent rejection. As a counter-reaction to perceived Western cultural imperialism, non-Western peoples will aim for 'modernization without westernization'.[31] To Samuel Huntington, the key reason for polarization is the 'basic' character of culture (or, as he puts it, civilization):

> differences among civilizations are not only real; they are basic. Civilizations are differentiated from each other by history, language, culture, tradition and, most important, religion. The people of different civilizations have different views on the relations between God and man, the individual and the group, the citizen and the state, parents and children, husband and wife, as well as differing views of the relative importance of rights and responsibilities, liberty and authority, equality and hierarchy.[32]

The contention is that cultural characteristics are more fundamental than political and economic ones. Claiming that religion constitutes the key to cultural difference, Huntington sets up Islam as the quintessential 'other' vis-à-vis Western culture.[33]

more receptive to cultural imports from the former *Métropole* than the United States (Holton, note 26, at 143). Similarly, regional powers—such as Indonesia in the Pacific region or India in South Asia—may induce cultural mimesis in neighbouring countries to a stronger extent than the Big Three, the United States, the European Union, and China (A. Appadurai, 'Disjuncture and Difference in the Global Cultural Economy', in M. Featherstone (ed.), *Global Culture* (1990) 170). Second, the mere presence of foreign brand names, such as CNN or Walt Disney, does not yet justify the conclusion of cultural assimilation. Multinationals often adapt their business strategies to local customs (J. Nederveen Pieterse, *Globalization and Culture: Global Mélange* (2003) 50).

[29] <https://www.diversitas.org/db/x.php?title=cultural%20diversity&dbcode=pr&go=e&id=12055170>.

[30] S.P. Huntington, 'The Clash of Civilizations?', 72 *Foreign Affairs* (1993) 44.

[31] Huntington, note 30. [32] Huntington, note 30, at 24–5.

[33] As another commentator reductively put it, the polarization hypothesis often boils down to an irresolvable conflict of 'Jihad vs. McWorld' (B.R. Barber, *Jihad vs. McWorld* (2003)). In response to the polarization account, critics have pointed out the close ties between countries in 'the West' and those forming Huntington's 'rest' (*see* Section VI of Huntington's essay). Such ties are reflected in political and economic interdependence or flows of military technology. Hence, as Jan Nederveen Pieterse argues, '[d]iversity is one side of the picture but only one, and interaction, commonality or the possibility of commonality is another' (Nederveen Pieterse, note 28, at 46). To Nederveen Pieterse, Huntington's one-sided account ultimately results from an undue conflation of cultural politics and national security. In Huntington's account, '[c]ulture is politicized, wrapped in civilizational packages that just happen to coincide with geopolitical entities' (at 45). In other words, Huntington simply superposes the 'clash of civilizations' frame onto a conventional security analysis.

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Again others envisage—usually in positive terms—a worldwide hybridization of cultures as a result of increased trade flows. The growing interconnectedness of the world promotes 'the intercultural exchange and the incorporation of cultural elements from a variety of sources within particular cultural practices'.[34] Underlying the hybridization account is a dynamic, anthropological definition of culture as 'behavior and beliefs that are learned and shared: learned so it is not "instinctual" and shared so it is not individual'.[35] Culture is an open practice, a transnational, even translocal process of learning and self-realization, in which local identities are reinvented within a global frame of reference.[36] The 'babylonic heart of the World Society', Ulrich Beck says, 'beats in the gallimaufry of language and identity'.[37]

The gist of the hybridization hypothesis is captured by terms such as 'glocalization',[38] the 'non-traditionalist renaissance of the local',[39] the 'global cultural ecumene',[40] or a 'world in creolization'.[41] The conservative notion of the protection of cultural purity (on this account) is futile. Instead, the hybridization account emphasizes that globalization creates, above all, new cultural spaces.[42] There is nothing inherently positive or negative in this development. On the plus side, glocalization has made opportunities for cultural expression available to a larger share of the population; on the minus side, it has heightened the potential of cultural conflict.

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[34] Holton, note 26, at 148.

[35] Nederveen Pieterse, note 28, at 46.

[36] *See* U. Beck, *Politik der Globalisierung* (1998) 57 and 118.

[37] Beck, note 36, at 58–59: 'Nicht in der Tendenz zur sprachlichen Uniformierung, sondern im Sprachen- und Identitätswirrwarr schlägt das babylonische Herz der Weltgesellschaft.'

[38] The term is believed to emanate from Japanese, originally describing a successful business model built on the idea of thinking globally but acting locally. It was presumably introduced into mainstream social science discourse by R. Robertson, 'Glocalization: Time–Space and Homogeneity–Heterogeneity', in M. Featherstone, S. Lash, R. Robertson (eds), *Global Modernities* (1995) 25. *See* also Robertson's substantial *Globalization: Social Theory and Global Culture* (1992).

[39] P. Drechsel, R. Schmidt, B. Gölz, *Kultur im Zeitalter der Globalisierung: Von Identität zu Differenzen* (2000) 141: 'nicht-traditionalistische Rennaissance des Lokalen'.

[40] A. Appadurai, 'Disjuncture and Difference in the Global Cultural Economy', in *Modernity at Large: Cultural Dimensions of Globalization* (1996) 28.

[41] U. Hannerz, 'The World in Creolization', 57 *Africa* (1987) 546.

[42] Technological invention has been a key facilitator of rearranging the relationship between the local and the global space—beginning with the invention of the commercial printing process in early modernity, which gave rise to 'supraregional, space-independent forms of communication' including newspapers and magazines (G. Romano, 'Technologische, wirtschaftliche und kulturelle Entwicklungen der audiovisuellen Medienmärkte in den letzten Jahren', in C.B. Graber, M. Girsberger, M. Nenova (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (2004) 1 at 5: 'überregionale, raumunabhängige Kommunikationsformen'). While such new media were based on universal conventions (starting from technological print standards to content-based journalistic standards), they nonetheless proved to be as much carriers of local expressions as links to the world at large. In many ways, 'locality could only be experienced in contradistinction to globality' ('Lokalität wird ja nur in Absetzung von Globalität überhaupt erfahrbar'). Worldwide Internet connectivity has further accelerated the conquest of global fora by localized individuals: some home-produced videos, posted on YouTube, have found more global viewers than commercial TV broadcasts. For an excellent discussion of the evolution of network connectivity through the Internet, Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).

Today, governments are no longer free to address perceived cultural homogenization, prevent perceived cultural polarization, or influence cultural hybridization as they please. Cultural polices are no longer part of a sovereign *domaine reservé*. Increasingly, states must justify their domestic cultural policies 'one level up', at the international level. The regulation of cultural products is now subject to a wide array of rules of international law. The global framework for regulating the cultural industries is mainly composed of the following legal arrangements:[43]

– *The trade regime*. The most important global rules for regulating international trade have been established under the auspices of the WTO. Only one provision of WTO law addresses cultural products specifically: according to Article IV of the General Agreement on Tariffs and Trade (GATT),[44] the regulation of cinematograph films shall take the form of screen quotas. There is no general cultural exception. Thus, all other cultural products are as much subject to the disciplines of WTO law as any other commodity or service. Specifically, with respect to goods, discrimination on the basis of nationality is prohibited,[45] and some subsidies are prohibited or actionable.[46] With respect to services, providers from different foreign countries must be provided equal market access.[47] At the regional level, some economic aspects of trade in cultural products are subject to the law of the European Union, the North American Free Trade Agreement (NAFTA),[48] or regional trade agreements.

– *The human rights regime*. Cultural expressions cut across various recognized human rights. In the area of civil and political rights, the 'communication rights' of freedom of expression and the right to information are the central

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[43] Law-making in the three principal policy arenas—international trade, human rights, and cultural policy—has not occurred in wholly separate worlds. As will be shown in Chapters 2 and 3, the evolution of the culture regime cannot be explained without developments in the areas of trade and human rights. On the one hand, the trade regime appeared not to be receptive to concerns of culture. On the other hand, the human rights regime provided a powerful justification for cultural concerns; however, the language of the 'right to take part in cultural life' and other human rights guarantees proved too vague to accommodate the interests of cultural regulators. As a result, the CDC emerged as a specific instrument for cultural products, which couples the characteristically technical tone of trade agreements with language from some of UNESCO's more recent, hortatory resolutions on cultural diversity (in particular, the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001). Other instruments of lesser interest for the purposes of the present analysis of regime conflict, but certainly not of lesser practical importance, have been concluded in the areas of intellectual property protection and technical standard setting: Berne Convention for the Protection of Literary and Artistic Works, 24 July 1971, as amended in Berne, 28 September 1979; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva, 29 October 1971; Convention relating to the Distribution of Programme-carrying Signals Transmitted by Satellite (Satellite Convention), 1 January 1974.

[44] General Agreement on Tariffs and Trade (GATT 1947), 30 October 1947, 55 *UNTS* 194; General Agreement on Tariffs and Trade (GATT 1994), 15 April 1994, 1867 *UNTS* 187.

[45] This follows from the requirement of most-favoured nation (MFN) treatment, Article I:1 GATT; and the national treatment obligation, Article III GATT.

[46] Agreement on Subsidies and Countervailing Measures (SCM Agreement), 15 April 1994, 1869 *UNTS* 14.

[47] Services covered by Article II:1 of the General Agreement on Trade in Services (GATS), 15 April 1994, 1869 *UNTS* 183, are subject to the requirement of most-favoured nation treatment.

[48] North American Free Trade Agreement, 17 December 1992, 32 *ILM* (1993) 289 and 605.

entitlements. In the area of cultural rights, these communication rights are complemented by the right to take part in cultural life. The principal international instruments that are relevant for regulating the production of forms of cultural expressions are the Universal Declaration of Human Rights of 1948;[49] the International Covenant on Economic, Social, and Cultural Rights of 1966;[50] and the International Covenant on Civil and Political Rights of 1966.[51]

– *The culture regime*. Since its inception in 1945, UNESCO has provided the most important institutional framework for negotiating international rules in the domain of cultural policies. Some international treaties dating back to the early years of the organization deal with important aspects of cultural production: for example, the Florence Agreement of 1950 promotes the tariff-free exchange of books and other cultural, scientific, and educational material across borders.[52] The 'Magna Charta of International Cultural Policy',[53] however, is the Convention on the Protection and Promotion of the

[49] Article 19 reads: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers' (10 December 1948, GA res. 217A (III), UN Doc A/810 at 71).

[50] Article 15 reads:

'1. The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications;
   (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields' (16 December 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 *UNTS* 3).

[51] Article 19 reads:

'1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals' (16 December 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 *UNTS* 171).

[52] Agreement on the Importation of Educational, Scientific and Cultural Materials, Florence, 17 June 1950, 131 *UNTS* 25 and Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, Nairobi, 26 November 1976, 1259 *UNTS* 3. *See* also the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural character, Beirut, 10 December 1948, 197 *UNTS* 3.

[53] V. Metze-Mangold, C.M. Merkel, 'Magna Charta der internationalen Kulturalpolitik: Die UNESCO-Kulturkonvention vor der Ratifizierung', *Media Perspektiven* (2006) 362.

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Diversity of Cultural Expressions (Cultural Diversity Convention (CDC)) of 2005.[54] The CDC, which entered into force in March 2007, authorizes (and, to a lesser extent, obliges) its parties to protect and actively promote diverse cultural expressions in their territory, including in the film and media sectors. The global rules enshrined in the CDC have a regional forerunner in the framework of the Council of Europe—the European Cultural Convention of 1954.[55]

The relationship between these international regulatory regimes may well be conflictual. Each regime promotes different, and ultimately incommensurable, policy goals such as open markets, diversity of cultural identities, and equal opportunities for cultural participation in a society. Each policy goal has its own characteristic justification. Open markets are justified in the name of economic efficiency; cultural identity politics are deemed necessary for enabling members of a polity independently to shape their future; and cultural participation is considered an essential component of a life in dignity. In a sense, each regime speaks a different language, in which the policy goals of other regimes are difficult to express. By reframing cultural policies in its own terms, each regime highlights particular aspects of national regulation relating to cultural products—its market-distorting effects, its effectiveness in perpetuating a community's identity, or its capacity to turn a large number of people into 'cultural speakers'. At the same time, each regime tends to remain blind to adverse effects generated for other legitimate goals.

What happens if different regimes, constituted by a largely identical group of member states, pull in different directions and towards different normative outcomes? The potential for legal conflict is significant. One and the same national policy measure—say, a subsidy for independent domestic film producers—may fall squarely under the 'white list' of desirable practices under UNESCO's CDC and under the 'black list' of prohibited or actionable subsidies under WTO law. At the same time, it is difficult to predict how such a measure would fare under the human rights regime: would it be a desirable strategy to ensure larger domestic participation in cultural life or an attempt to curtail communicative freedoms with respect to foreign productions?

The multiplication of international regimes has created the potential of conflicting rulings of different international tribunals and institutions for the settlement of disputes[56] (a concern that has been debated in great detail in relation to the dispute resolution regimes of UNCLOS and the WTO,[57] and to a lesser

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[54] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, CLT-2005/CONVENTION DIVERSITE-CULT REV.

[55] European Cultural Convention, Paris, 19 December 1954, *ETS* 18.

[56] For an extensive discussion of this dimension of regime conflicts, *see* Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2004).

[57] In the *Swordfish* dispute between the European Communities and Chile, the European Communities brought the case before the WTO in April 2000, while Chile initiated dispute settlement before International Tribunal for the Law of the Sea (ITLOS) in December 2000. For a discussion and

extent in relation to arbitral tribunals under bilateral or multilateral investment treaties[58]). In the example of state aid for independent domestic film productions, one could imagine that the WTO's Dispute Settlement Body (DSB) would condemn a subsidy that is conditional upon the use of domestic products as a violation of international trade rules; that the Conciliation Commission under UNESCO's CDC[59] or the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions would specifically commend this very same subsidy as an appropriate strategy for creating access to a people's own culture; and that the Committee on Economic, Social, and Cultural Rights would implicitly back the measure by criticizing that citizens of the particular state in question do not have adequate opportunities to take part in cultural life, notably in the audiovisual sector.

While the risk of competing judicial decisions is clearly an important consequence of the multiplication of international regimes, it is not the only aspect—and perhaps not even the most important one. Norms of international law are more than merely raw material for adjudicators. International law is mostly used *outside* formal dispute settlement—by states in their dealings with one another, in diplomatic relations, negotiations in international fora or expert committees.[60] In these instances, international law provides the structure through which states interact with one another. States may put forward claims against one another, agree on consensual definitions of situations or shared beliefs (such as cause-and-effect relationships), and express shared values in the language of the law. Regime conflicts at this level are as real, and may be as disruptive of international order, as conflicting judgments or awards.

When confronted with conflicting regimes, the central challenge for international policy makers and lawyers is the absence of any obvious hierarchy among them. The relationship between the trade, culture, and human rights regimes is a

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further references, see J. Neumann, 'Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) (2001) 529.

[58] Two recent disputes—the *Softwood Lumber* dispute between Canada and the US and the *Sweeteners* dispute between Mexico and the US—illustrate the added complexities arising from multiple arbitral proceedings initiated by private investors concurrently with state-state proceedings. In addition to raising novel questions regarding the relationship between the trade and investment chapters of NAFTA, the disputes also brought up the relationship between NAFTA and the WTO. For a concise overview, *see* J. Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" Is Cooking', 9 *JIEL* (2006) 197.

[59] As the name of the Commission suggests, its findings are not binding on the parties to the dispute but must merely be 'considered in good faith'. The procedure set out in Annex I of the CDC, however, is quasi-judicial. Not only will the parties each appoint two conciliators to a commission of five, thus approximating it to an arbitral procedure; the procedure is crafted in such a way that it will mandatorily result in a 'decision' of the commission (Annex I, Article 5 of the CDC). This sets the CDC's conciliation procedure apart from common institutional mediation and conciliation rules, which highlight the conciliator's role to assist the parties in resolving their dispute themselves.

[60] One may add that, increasingly, non-state actors also use international law in interactions with governments at the global level (e.g. through agitation, an affiliated status in international organizations, or amicus curiae briefs in dispute settlement).

case in point.[61] Formally, all three regimes are constituted by international treaties of equal rank. Substantively, each of these regimes can make a plausible claim to being the most important one: WTO lawyers may intuitively feel that their rules are the most 'serious' ones, since the prescriptions of their regime are detailed, administered by a highly developed system for the settlement of disputes, and enforceable through economic sanctions (the possibility of suspending concessions and other obligations in case of non-compliance). The UNESCO's CDC regime, by contrast, may claim to be the most specific regulatory instrument for cultural products—a '*lex specialis culturae*'. One may argue that 'reasonable governments have concluded' that cultural products 'require[s] a particular approach'; that the CDC is 'the international agreement which is most directly relevant to the matters raised' by cultural policies; and that, therefore, the CDC contains the most appropriate approach to cultural regulation.[62] The human rights regime, finally, may claim that the other two regimes contain technical rules that must ultimately be read in light of the overarching goal of enhancing human flourishing. A dignified life is best enhanced through communicative freedom and wide participation in cultural life.

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III. Regime Conflict and the Fragmentation of International Law

Cultural polices are now subject to a permanently instable normative triangle of trade rules, culture rules, and human rights. A similar multiplication of international legal norms can be observed in other fields of regulation. While the role of international law in international relations was once a rather modest one—essentially the allocation of jurisdictional competence among 'co-existing independent communities'[63]—the second half of the twentieth century has brought about a dramatic structural transformation of the international system. In over 50,000 international treaties (15,000 of which are of the multilateral type),[64] states have

[61] However, the CDC does defer to the human rights regime and, to a lesser extent, to the WTO regime. The respective conflict clauses of the CDC—Article 2(1): 'Principle of respect for human rights and fundamental freedoms' and Article 20: 'Relationship to other treaties: mutual supportiveness, complementarity and non-subordination'—will be discussed in Chapter 8.

[62] The quotations are from the First Written Submission by the European Communities in *EC—Measures Affecting the Approval and Marketing of Biotech Products,* DS291-3, 17 May 2004, paras 457 and 459, in which the European Communities made precisely this argument with respect to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000.

[63] *S.S. Lotus (France v. Turkey),* 1927 PCIJ, Series A, No. 10, 18. This 'switching mechanism sending a dispute to one or another system of law or to its courts' (W.M. Reisman, *Jurisdiction in International Law* (1999) xiii) was usefully complemented by a small body of substantive rules focused on interstate coordination (for example, the law of diplomatic relations).

[64] Presentation by B. Smith, Office of Legal Affairs, 'International Treaty Law: The Role of the Office of Legal Affairs, the Sixth Committee and the International Law Commission', Monrovia, 11–14 July 2006, slide 14 (on file with the author); C. Ku, 'Global Governance and the Changing Face of International Law', ACUNS Keynote Paper 2001–2, 45.

submitted themselves to international legal rules in almost any conceivable area, including trade relations, monetary policy, environmental standards, public health, and the treatment of both aliens and their own citizens. Many such international norms are administered by robust bureaucratic arrangements.

How do these multiple international treaties relate to one another? The proliferation of issue-specific rules and institutions has triggered fears that international law is undergoing a process of 'fragmentation'.[65] Both scholars and political activists have voiced concerns that some regimes appear to operate 'in splendid isolation' from the rest of international law, and the WTO has been a frequent target of such criticism. Under the heading of 'trade and…', a substantial and growing body of scholarship has evolved, concerned with the WTO regime's perceived lack of consideration for international human rights law, health regulations, labour standards laid down in the conventions of the International Labour Organization, or multilateral environmental agreements.[66] The controversy regarding the relationship between WTO law and other societal concerns points to something more than mere instances of accidental conflicts of norms. As briefly explored with respect to trade in cultural products, at the root of the controversy lie incommensurable policy goals, justified through characteristic discourses. Gunther Teubner has thus aptly spoken of a 'collision of discourses'.[67]

It is this dimension of *collisiones discursuum* that sets regime conflicts in contemporary international law apart from more traditional scenarios of conflicts of norms within the legal order. When Wilfred Jenks wrote his seminal article on *The Conflict of Law-making Treaties* in the 1950s, he pointed to a new phenomenon—accidental overlaps between 'the functional jurisdictions of different international organizations',[68] which 'may present a closer analogy with the problem of conflict of laws than with the problem of conflicting obligations within the same legal system'.[69] In response, Jenks envisioned that a small and friendly minded community of international judges and legal advisors, vested with sufficiently effective conflict rules, would resolve these conflicts through 'prudence in drafting', 'general agreement', and 'judicial determination'.[70] The image of contemporary regime conflicts is markedly different from Jenks' vision: in each international regime, a variety of states, non-governmental organizations, lobbyists, and pressure groups appropriate the regime's legal discourse to garner support for their preferred policy goals. Regime conflicts have thrown international law into 'a state of arrested

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[65] For a good overview of the scholarly debate, *see* the special journal issue 31 *New York University Journal of International Law and Politics* (*NYU J. Int'l L. & Pol.*) (1999) 679–933.

[66] A good overview is contained in J.P. Trachtman, 'Trade and…Problems, Cost-Benefit Analysis and Subsidiarity', 9 *European Journal of International Law* (*EJIL*) (1998) 32.

[67] G. Teubner, 'De Collisione Discursuum: Communicative Rationalities and the Law', 17 *Cardozo L. Rev.* (1996) 901.

[68] C.W. Jenks, 'The Conflict of Law-making Treaties', 30 *British Yearbook of International Law* (*BYIL*) (1953) 401 at 416. Jenks' article is one of the earliest statements of the problem of functional fragmentation, which was only taken up systematically by legal scholarship decades later.

[69] Jenks, note 68, at 403.

[70] Jenks, note 68, at 419, 420, and 436; *see* also at 431–436.

ambiguity',[71] in which Jenks' project 'of developing into a coherent body of international law the multiplicity of law-making treaties on every aspect of modern life'[72] has become increasingly doubtful. Can modern international law justly be called a unified legal system? In fact, is there still such a thing as international law, in the singular; or are there today as many 'international legal orders' as there are international regimes?

In response to these challenging questions two powerful narratives have emerged in international law and political science scholarship, whose ideal-type versions[73] can be characterized as follows. According to a first, pluralist account, the global space has turned into a sphere of complex interaction among different functional legal regimes—interactions ranging from friendly complementarity to fierce competition. According to a second, unitary account, a single legal system is in place—public international law. Since the legal order must be presumed to be free of contradictions, all norms, including rules in special regimes of international law, can be related to one another in a meaningful way. On both sides, the debate is carried on with fervour. In defence of legal unity, Pierre-Marie Dupuy has warned that

> [i]f one assaults this unity, for example by reducing the law to a juxtaposition of various normatively defined, subject-matter specific sectors—environmental law, human rights, preservation of peace, outer space, the law of the sea, or world trade . . ., one will lose sight of the syntax which authorizes the creation and the validity of norms that deal with these different domains.[74]

To proponents of the pluralist concept of the international order, such insistence on the 'syntax' of public international law as a validity condition for all normative regimes at the international level is beside the point. Klaus Günther has stated polemically that

> [f]rom a legal pluralist point of view the insistence on the model of legal unity with a logical hierarchy of norms, a clear distinction between legal norms and other kinds of social norms and with a clear distinction between primary and secondary rules with its consequence of a clear assignment of the legislative power is nothing else but a self-deception of the professional lawyers.[75]

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[71] W.D. Coplin, 'International Law and Assumptions about the State System', 17 *World Politics* (1965) 615 at 625: 'International law today is in a state of arrested ambiguity—in a condition of unstable equilibrium between the old and the new. As a result, it no longer contributes as it once did to a consensus on the nature of the state system.'

[72] Jenks, note 68, at 420.

[73] Obviously, the 'unitary' and 'pluralist' accounts are to some extent stylizations. In order to avoid the impression that all scholars identified with one of the narratives follow the same, coherent theory, I will attempt to demonstrate some crucial differences among proponents of each account in Chapter 5.

[74] P.-M. Dupuy, 'L'unité de l'ordre juridique international', 297 *Recueil des Cours* (*RdC*) (2002) 1 at 204: 'Qu'on attente à cette unité, par exemple en réduisant ce droit à une juxtaposition de secteurs normalisés en raison de leur objet, droits de l'environnement, des droits de l'homme, du maintien de la paix, de l'espace extra-atmosphérique, de la mer ou du commerce . . ., et l'on perdra de vue la syntaxe qui autorise la création et la validité des normes traitant de ces différents domaines.'

[75] K. Günther, 'Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory', paper, Colloquium in Legal, Political and Social Philosophy, New York University School of Law, 25 September 2003, available at: <http://www1.law.nyu.edu/clppt/program2003/readings/gunther.pdf>.

What separates scholars in the unitary camp from those in the pluralist camp? Tentatively, the clash of the unitary and the particularistic approach can be conceptualized as a clash of positivist and sociological jurisprudence, of a normative theory of law and an empirical theory of law.[76] Proponents of the unitary view are chiefly concerned with the 'construction of a professionally plausible and logically coherent concept of law and doctrine' as 'both the starting point for and the final expression of knowledge of the nature of law'.[77] Proponents of the pluralist view often claim to observe social practice 'from the outside', distancing themselves from the perspectives of the legal system's participants, with the purpose of 'revealing the social consequences, environment or causes of legal policy and doctrinal or institutional development'.[78]

However, such a strict binary distinction fails to do justice to either approach. The 'juridical field' (Pierre Bourdieu) is simultaneously determined by external and internal factors, by 'the specific power relations which . . . order . . . the conflicts over competence' *and* 'the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions'.[79] Consequently, very few international lawyers actually hold views that correspond to either the pure normativism or the pure sociological

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[76] Günther, note 75. The pluralist narrative tends to be told from the external point of view of the observer, the unitary narrative from the internal point of view of the participant (for this distinction, H.L.A. Hart, *The Concept of Law* (2nd edn, 1997) 112). Pluralists often support their perception of legal plurality by an empirical (socio-legal) theory of law drawing on anthropology or sociology. Teubner and Fischer-Lescano's account is a good example. As *Luhmannian* 'second-order observers', the authors descriptively explore the role that global law plays in conflicts between competing rationality regimes. Universalists, by contrast, tend to be normative legal theorists. From the perspective of participants in the legal system, their quest is for the best possible interpretation of what the law says. Dupuy's *Unité de l'ordre juridique* is paradigmatic. Dupuy deliberately refrains from anchoring legal unity in empirical observation; instead, a Kantian categorical imperative and the formal recognition of the notion of international community in positive international law form the basis of his argument. Hence, it is tempting to assert that the pluralist and unitary narratives adopt so fundamentally different perspectives that juxtaposition hardly makes sense. But this would be only part of the story. Normative and empirical approaches operate on different planes only in their purest forms. Only if legal scholarship is defined as an exercise in flawless intellectual conceptualization, if the *Is* is completely decoupled from the *Ought,* can a bright line between normative legal theory and empirical legal theory be maintained. Most theories aspire to cover a bit of both grounds. Teubner and Fischer-Lescano do not content themselves with a description of legal practice within multiple rationality systems. Rather, they ultimately purport to sketch a *rechtstranszendierendes Metakollisionsrecht* (a meta-law of conflicts transcending the legal), thus shifting into normative gear (G. Teubner, A. Fischer-Lescano, *Regimekollisionen: Zur Fragmentierung des globalen Rechts* (2006) 128). Dupuy's theory, on the other hand, is not independent of real-world facts. The third pillar of legal unity is constituted by the actual universal acceptance (not acceptability!) of the rules of general international law. In short, pluralists may claim to be concerned with how international law actually operates; yet they routinely formulate normative recommendations for legal practice on the basis of such sociological observation. Universalists may seek knowledge of how international law should operate; yet they routinely refer back to social facts as an empirical grounding for their theory. Their different methodological points of departure notwithstanding, both pluralists and universalists are nonetheless participants in the same debate. *See* the detailed discussion in Chapter 5 of this book.

[77] R. Cotterrell, 'The Sociological Concept of Law', 10 *J. Law & Society* (1983) 241 at 242.

[78] Cotterrell, note 77, at 243.

[79] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings L. J.* (1987) 805 at 816.

ideal type. Most scholars consider it their professional responsibility to set out normative recommendations on the basis of expert knowledge of the legal system, while at the same time keeping in mind 'the need to make [international law] firmly reflect its political context'.[80] Martti Koskenniemi has affirmed the necessary 'in-betweenness' of legal argument between factual groundedness and normative aspiration, in the following terms:

> A professionally competent argument is rooted in a *social concept of law*—it claims to emerge from the way international society is, and not from some wishful construction of it. On the other hand, any such doctrine or position must also show that it is not just a reflection of power—that it does not only tell what States do or will but what they *should* do or will.[81]

A stark dichotomy of normative *versus* social theories of law thus risks overstating the degree of controversy. In fact, scholars in both 'camps' have described different aspects of the diversification of the international order in insightful ways, although they may not have engaged with other aspects of the phenomenon.

IV. The Plan of this Book

The premise of this book is that an adequate analysis of regime conflicts must take account of three characteristic dimensions: First, regime conflicts are often a consequence of *goal conflicts*. Policy goals are justified through characteristic discourses, which tend to be based on certain assumptions about the world, shared values, and specific patterns of argumentation. International regimes are arrangements that promote particular societal goals through their norms, rules, and procedures. Second, goal conflicts do not occur in a vacuum; they are institutionalized and perpetuated in international politics through the interaction of a variety of actors. The evolution of conflicting regimes is thus essentially a product of *institutional conflict* and *power struggle*. Third, regime conflicts may manifest themselves in *conflicts of legal rules*. If a state acts in conformity with the rules of one regime, its conduct may trigger a violation of the rules of another regime.

The initial sections of Chapters 2, 3, and 4 introduce each of these three dimensions of regime conflict in theory. In doing so, the discussion borrows from legal

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[80] B. Simma, 'From Bilateralism to Community Interest', 250 *RdC* (1994) 234 at 249. *See* also the treatment of normative and sociological approaches in A. Verdross, B. Simma, *Universelles Völkerrecht, Theorie und Praxis* (3rd edn, 1984) § 22: 'Die Aufgliederung in eine normative und in eine soziologische Betrachtungsweise ist über das gerade Gesagte hinaus von Bedeutung für jede Beschäftigung mit vr Fragen, wobei "normativ" in diesem Zusammenhang die wissenschaftliche wie praktische Befassung (nur) mit dem positiv vorgegebenen Rechtsstoff bezeichnet, während die *Völkerrechtssoziologie*, die heute allerdings noch in den Kinderschuhen steckt, ihr Augenmerk der *Faktizität* des VR zuwendet und demgemäß Wechselwirkung zwischen den Rechtsnormen und deren sozialem Substrat, insbesondere der internationalen Politik untersucht. Infolge der "besonderen Wirklichkeitsnähe" des VR ist eine derartige Ergänzung der Dogmatik hier noch dringender geboten als in anderen Rechtsbereichen, da sonst die Gefahr besteht, eine normative Scheinwelt anzunehmen, die nicht mehr in der realen Welt verankert ist.'

[81] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue 2006) 573–4 (Epilogue).

pluralism scholarship, international relations theory, and theories of rule conflict within the law developed in legal doctrine. The following sections of Chapters 2, 3, and 4 then demonstrate the pertinence of these three conflict dimensions by reference to the case study of regime conflicts triggered by trade in cultural products. While Chapter 2 analyses goal conflicts between 'cultural diversity' and 'free trade', Chapter 3 examines institutional conflicts within the WTO and UNESCO, and Chapter 4 explores the potential for rule conflicts among WTO rules, the CDC, and human rights.

While regime conflicts are to some extent legal in character, they cannot be reduced to conflicts among legal norms. The multidimensionality of regime conflicts raises the question as to whether international law can contribute to the management of regime conflicts in any meaningful way. Chapter 5 rehearses the prevailing scholarly approaches in this regard, ranging from a flat-out denial of any meaningful role for international law (as suggested by some legal pluralists) to a strong endorsement of international law's relevance (as held by scholars committed to a unified concept of international legal order). Chapter 6 outlines an alternative conception of legal plurality. As a descriptive matter, many of the insights of the pluralist approach to international law as a disaggregated legal order are difficult to contest, and the ambitious project of construing international law as an integrated and fully unified system is unavailing. However, *inter-regime compatibility* remains a realistic option. International law provides a common language for discursive engagement across regimes, based on shared, regime-transcendent discourse rules. This common language provides no guarantee of a unified legal order, free of internal contradictions. But it does open up an avenue for the coordination of the policies of various international regimes.

Chapters 7 and 8 then explore in further detail international law's potential to contribute to the management of regime conflicts. International law plays a useful role in bridging conflicting regimes in two distinct ways. First, international law can help *prevent potential conflicts of rules* through techniques of interpretation. Various arguments from systemic coherence permit actors to negotiate regime-transcendent interpretations. Second, international law provides tools for authoritatively *adjudicating conflicts of rules* where two prescriptions cannot be reconciled with one another in any plausible way. In this regard, the traditional priority rules of international law, such as the *lex specialis* or *lex posterior* maxims, turn out to be inadequate for giving preference to one norm over another norm in situations of regime conflict. Instead, I will argue that the transposition of conflict of laws principles to public international law may allow practitioners to make a more rational determination as to which rules should apply. Throughout these chapters of this study, the example of the regulation of cultural products under the regimes of the WTO, UNESCO, and human rights will be used to illustrate the role of international law in managing regime conflicts.

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