

# Foreword

‘When we scrutinize the social processes of the globe,’ Harold D Lasswell and Myres S McDougal wrote, ‘we cannot fail to observe that some areas are occupied by peoples whose values and institutions are of such distinctiveness that they can readily be contrasted to their neighbors . . . we employ the term “culture” to designate any distinctive and stable pattern of community values and institutions.’<sup>1</sup> Viewed from the perspective of the individual members of those communities, their respective cultures—those distinctive and stable patterns of community values and institutions—constitute the essential ecologies of their ‘inner worlds’.<sup>2</sup> No wonder, then, that the incorporation of the international protection of human rights in the modern *corpus juris gentium*, which has focused on individual rights, has also included a concern for the protection of culture.<sup>3</sup>

Paradoxically, these same human rights instruments, by their very act of establishing transcultural standards of achievement, commit those to whom they are directed to changing their cultures to bring them into conformity with those prescribed standards. In other instruments, the international community undertakes to foster ‘development’, a process which involves imposed social change. Still other planks in contemporary international law’s platform commit the world community to foster trade and direct foreign investment as a means of securing development.

At the political level, change can radically transform community values and institutions and the power relations that sustain them. At the personal level, such changes can be traumatic. McLuhan and Fiore may have exaggerated the consequence, but they were surely right when they associated innovation with profound personal distress: ‘every major technical innovation will so disturb our inner lives that wars necessarily result as misbegotten efforts to recover the old images’.<sup>4</sup>

Of all of the modes of social change which contemporary international law endorses, none is more constant and potentially yet subtly intrusive than international trade. Every imported item carries the seeds of social

<sup>1</sup> HD Lasswell and MS McDougal, *Jurisprudence for a Free Society, Studies in Law, Science and Policy*, vol 1 (Martinus Nijhoff Publishers, 1992) 348.

<sup>2</sup> WM Reisman, ‘International Law and the Inner Worlds of Others’ (1996) 9 *St Thomas Law Review* 25.

<sup>3</sup> See, generally, Art 15, Covenant on Economic, Social and Cultural Rights, and especially the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005); see also, UNESCO, *Declaration of the Principles of International Cultural Cooperation* (1966).

<sup>4</sup> M McLuhan and Q Fiore, *War and Peace in the Global Village* (Ginko Press, 1968) 4.

change. A McDonald's in Changsha,<sup>5</sup> in changing traditional dining habits, can disrupt the dynamics and superordinations of the nuclear and extended family. Levi jeans in Kuala Lumpur can contribute to changing gender relations and even sexual mores. And so on. But the potential for precipitating cultural changes through the transnational sale of goods pales in comparison with the changes that can be wrought by trade in services via the Internet, which Professor Chander has felicitously labeled the modern 'Electronic Silk Road'.<sup>6</sup>

Cultures and sub-cultures have always been subject to the difficult and sometimes traumatic challenge of adjustment when the ecological and political contexts in which they were anchored changed. But usually these were comparatively rare occurrences. The vast processes of cultural interchange that we call globalisation now mean that every culture is continuously exposed to other cultures and, in varying degree, is subject to changes, sometimes wrenching, from without. Subject to continuous exposure to outside influences, a sense of beleaguerment will often excite a need for defense. Nowhere has this been more acute than in the interface of international trade law and international human rights law.

Hence the timeliness of Professor Shi's brilliant study of the tension between the international goals of free trade, on the one hand, and the maintenance of cultural diversity, on the other. The book's great value lies not only in its meticulous presentation and analysis of the policies expressed in the major legal instruments as well as the decision trends applying them, but even more importantly in the author's creative proposals for resolving the antinomies by bringing the conflicting policies of these sectors of international law into a reciprocally beneficial relationship, avoiding both the Scylla of protectionism and the Charybdis of cultural extinction.

This is an important contribution to legal scholarship and policy analysis and invention.

W Michael Reisman  
Yale Law School  
15 January 2013

<sup>5</sup> Changsha is the capital city of Hunan Province, a central southern province in China (author note).

<sup>6</sup> A Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press, 2013).

# I

## *Introduction: Globalisation as the Context*

Globalization lies at the heart of modern culture; cultural practices lie at the heart of globalisation . . . The huge transformative processes of our time that globalisation describes cannot be properly understood until they are grasped through the conceptual vocabulary of culture; likewise that these transformations change the very fabric of cultural experience and, indeed, affect our sense of what culture actually is in the modern world. John Tomlinson<sup>1</sup>

**G**LOBALISATION SETS THE main stage for this book; the balancing of trade norms and cultural values in the context of economic globalisation constitutes the central inquiry throughout the project. This chapter aims to sketch a framework for understanding the research background of this book, exploring the phenomena of globalisation, culture and trade, and the interaction among them.

### 1.1 GLOBALISATION AND CULTURE

Recent decades have witnessed a marked worldwide move in the direction of globalisation.<sup>2</sup> More than an intensified internationalisation,<sup>3</sup> globalisation can mean many things.<sup>4</sup> At the political and economic level,

<sup>1</sup> J Tomlinson, *Globalization and Culture* (1999) 1. Tomlinson goes far beyond traditional discussions on globalisation and economic issues to analyse the wide-ranging cultural, social and moral aspects of globalisation in this engaging and lucid book. He discusses the uneven nature of the experience of global modernity in different countries, and concludes that a genuinely cosmopolitan culture is unlikely to emerge unless we respect cultural difference and share a common sense of commitment about the world.

<sup>2</sup> See D Held and A McGrew (eds), *Global Transformations: Politics, Economics and Culture* (1999) 1.

<sup>3</sup> See NG Canclini, 'Cultural Policy Options in the Context of Globalization' in UNESCO, *World Culture Report* (1998) 157, 159 (discussing the qualitative differences between globalisation and internationalization); M Keane, 'Exporting Chinese Culture: Industry Financing Models in Film and Television' (2006) 3(1) *Westminster Papers in Communication and Culture* 11, 13–14 (addressing the difference between internationalization and globalisation).

<sup>4</sup> For different definitions or meanings of 'globalisation', see, eg J Liss, 'The Impact of Globalization and Technological Change on Culture and National Identity: A Call for Visionary Pragmatism', in D Browne (ed), *The Culture/Trade Quandary: Canada's Policy Options* (1998) 166 ('globalisation' in the policy literature); ME Footer and Christoph

## 2 Introduction: Globalisation as the Context

globalisation is a process of denationalisation of politics, markets and legal systems, characterised by the growing interdependence and interpenetration of human relations alongside with the increasing integration of the world's socio-economic life.<sup>5</sup> In a broader sense, globalisation is a complex, multilayered process that affects the social structures of nations<sup>6</sup> and is erasing 'the traditional boundaries between politics, culture, technology, finance, national security and ecology'.<sup>7</sup> Globalisation has not only radically changed the world's political<sup>8</sup> and economic orders, but also people's ways of conceiving the world.

A universal element of human life, culture manifests itself in a multiplicity of forms. Everyone has culture, and it makes us what we are.<sup>9</sup> Cultural identity is essential to understanding human behaviours.<sup>10</sup> From the perspective of basic human rights, culture represents the opportunities of self-expression and self-development for everyone.<sup>11</sup> From a collective perspective, culture defines the national character and identity.

Globalisation is widely viewed as a 'multidimensional' phenomenon, and culture is one dimension of globalisation.<sup>12</sup> Globalisation has a twofold impact on culture. On the one hand, it generates positive effects on culture through cultural exchange and innovation.<sup>13</sup> Progressive and healthy cultural exchange leads to mutual enrichment that opens up new perspectives and encourages the proliferation of new cultures.<sup>14</sup> Further, a greater degree of cultural exchange arouses awareness of cultural

B Graber, 'Trade Liberalization and Cultural Policy' (2000) 3 *Journal of International Economic Law* 115, 134 ('globalisation' in a psychological point of view).

<sup>5</sup> See F Webster, *Theories of the Information Society* (1995) 141.

<sup>6</sup> See AJ Lodge, 'Globalization: Panacea for the World or Conquistador of International Law and Statehood?' (2005) 7 *Oregon Review of International Law* 224, 224.

<sup>7</sup> See TL Friedman, *The Lexus and the O Tree: Understanding Globalization* (1999) 15.

<sup>8</sup> See Held and McGrew, above n 2, 1 (pointing out that globalisation suggests the limits to national politics).

<sup>9</sup> See HJ Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 3rd edn (1962) 262; see also C Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (2002) 189–90.

<sup>10</sup> United Nations, 'Cultural Diversity and Globalization: A Document for Reflection on the Subtheme of 'Culture' from the Millennium Forum of the United Nations', available at [http://www.forumsocialmundial.org.br/download/tconferencias\\_identidadecultural\\_prop\\_eng.pdf](http://www.forumsocialmundial.org.br/download/tconferencias_identidadecultural_prop_eng.pdf) (last accessed on 1 June 2012) (hereinafter UN, Cultural Diversity and Globalization) 7.

<sup>11</sup> This is perhaps the most widely accepted understanding of culture adopted by UNESCO. According to this conception of culture, in addition to art and literature, culture encompasses lifestyles, basic human rights, value systems, traditions and beliefs. See UNESCO, 'Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies, Mexico City, 26 July–6 August 1982', available at [portal.unesco.org/culture/en/files/./11919410061mexico./mexico\\_en.pdf](http://portal.unesco.org/culture/en/files/./11919410061mexico./mexico_en.pdf) (last accessed on 1 June 2012).

<sup>12</sup> See Tomlinson, above n 1, 13.

<sup>13</sup> See UNESCO, 'Our Creative Diversity: Report of the World Commission on Culture and Development' (finalised by J Pérez de Cuéllar, 1995), Executive Summary, 66 (discussing the celebratory picture of globalisation given by Mexican theorist Néstor G Canclini in his conception of culture as hybridization).

<sup>14</sup> See UNESCO, above n 11, 3.

difference, which, together with cultural specialisation, can expand the menu of choices for everyone.<sup>15</sup>

On the other hand, numerous texts have described globalisation's negative effects on culture.<sup>16</sup> The literature is replete with bleak forecasts for the fate of a national cultural identity faced with the hegemonic ideology of neo-liberalism; this pessimistic outlook prevails for several reasons.<sup>17</sup> First, cultural exchange is rarely a steady advance on all fronts at once. Globalisation is an unequal and asymmetric process that does not always involve a greater degree of exchange among different cultures. While certain cultures expand rapidly, others may shrink or even wither away.<sup>18</sup> Accompanied by the process of market deregulation and economic concentration, globalisation tends to impose one culture upon the others, which may result in a homogeneous global culture.<sup>19</sup> Rather than fostering mutual understanding among people, this reality may give rise to certain social and economic exclusions.<sup>20</sup> In particular, globalisation poses a serious challenge to ethnic minorities whose languages, customs, and ideas are easily drowned out by the din of mass media catering to the interests of majority communities.<sup>21</sup>

Meanwhile, the idea of 'culture' implicitly connects meaning construction with a particularity and fixed locality, while one of the effects of

<sup>15</sup> See JN Pieterse, *Globalization and Culture—Global Mélange* (2004) 57–58.

<sup>16</sup> See, eg N Obuljen, 'From our Creative Diversity to the Convention on Cultural Diversity: Introduction to the Debate' in N Obuljen and J Smiers (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 19–20; UNESCO, 'Meeting of the Experts Committee on the Strengthening of UNESCO's Role in Promoting Cultural Diversity in the Context of Globalization', Working Document, CLT/CIC/BCI/DC/DOC 5E (Paris, 21–22 September 2000)1–2.

<sup>17</sup> Neo-liberalism is a political-economic school of thought built upon neo-classical price theory and encourages deregulation, privatisation and free trade. For an unflattering account of neo-liberalism, see, eg S George, 'A Short History of Neoliberalism: Twenty Years of Elite Economics and Emerging Opportunities for Structural Change', available at <http://www.globalexchange.org/campaigns/econ101/neoliberalism.html> (last accessed on 1 June 2012).

<sup>18</sup> See T Cowen, *Creative Destruction: How Globalization is Changing the World's Cultures* (2002) 11.

<sup>19</sup> See UN, Cultural Diversity and Globalization, above n 10, 2; see also J Mandle, 'Globalization and Justice' (2000) 570 *Annals* 126, 134; DS Petito, 'Sovereignty and Globalization: Fallacies, Truth, and Perception' (2001) 17 *New York Law School Journal of Human Rights* 1139, 1139. The most classic example is that a standard form of American culture is being systematically transmitted to other cultures. A possible danger of spreading popular American mass culture is that the size and scale of the media of communication dominate what is promulgated, and that tastes and interests of minorities get lost. See, eg UNESCO, above n 13, 27. Prominent critics like TL Friedman have argued that globalisation has its own dominant culture, which is why it tends to be homogenising: 'Culturally speaking, globalisation is largely, though not entirely, the spread of Americanization—from big Macs to iMacs to Mickey Mouse—on a global scale.' See Friedman, above n 7, 1.

<sup>20</sup> See J Reeves, *Culture and International Relations: Narratives, Natives and Tourists* (2004) 185; see also UN, Cultural Diversity and Globalization, above n 10, 2–3.

<sup>21</sup> See E Brooks, 'Cultural Imperialism vs Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity' (2006) 5 *Journal of International Business & Law* 112, 128–29.

#### 4 Introduction: Globalisation as the Context

globalisation is proximity. Promoting more physical mobility than ever before,<sup>22</sup> globalisation has rendered the world a smaller place. The interaction between people from different cultures has increased accordingly.<sup>23</sup> This may weaken or destroy ethos, a given group's unique perspective on the world.<sup>24</sup> Globalisation tends to damage ethos particularly in economically disadvantaged societies, and has caused local culture to lose its uniqueness; as a result, these societies have lost their artistic creativity.<sup>25</sup> This gives rise to the concern that development may lead to the loss of identity, sense of community and personal meaning.

Thus far, no investigation, no matter how comprehensive, has been able to provide an authoritative evaluation of the exact impact of globalisation on culture. But it seems fair to state that globalisation may lead to both the best and the worst for culture. If the phenomenon manifests in a process in which different cultures and societies can participate with equality, globalisation can benefit all. If the process is directed and decided exclusively by economic powers, however, it may result in cultural homogenisation and social exclusion.<sup>26</sup> This raises the question of how different cultures can efficiently adapt to globalisation.

Culture's importance to individuals and nations means that cultural diversity is a fundamental aspect of modern society. As well as the assertions of national identity, cultural sovereignty and human rights,<sup>27</sup> other arguments, such as cultural pluralism and the natural occurrence of culture, also illustrate how imperative it is to defend culture from extinction, to protect culture against homogenisation and to celebrate culture in its diversity.

### 1.2 GLOBALISATION AND TRADE

This book touches upon economic globalisation, a much criticised process that integrates national economies into the international economy through trade, investment, and flows of capital and technology.<sup>28</sup> Among these elements, trade is the most commonly identified driving force behind

<sup>22</sup> See Tomlinson, above n 1, 27–29.

<sup>23</sup> See Diana Ayton-Shenker, United Nations Background Note: The Challenge of Human Rights and Cultural Diversity, available at <http://www.un.org/rights/dpi1627e.htm> (last accessed on 1 June 2012).

<sup>24</sup> See Cowen, above n 18, 50–51 (2002).

<sup>25</sup> Ibid, 47–72 (discussing ethos and the tragedy of cultural loss).

<sup>26</sup> See UN, Cultural Diversity and Globalization, above n 10, 3.

<sup>27</sup> See R Jennings and A Watts (eds), *Oppenheim's International Law*, 9th edn (1992) 87–88; see also AS Akermark, *Justifications of Minority Protection in International Law* (1997) 78–83.

<sup>28</sup> See CJ Bhagwati, *In Defense of Globalization* (2004) 3.

economic globalisation.<sup>29</sup> Free trade augments global welfare and helps achieve goals such as preventing war, elevating living standards, creating jobs, the equitable distribution of wealth, etc. It would be unthinkable to revert to the era of escalating trade protectionism. Economic globalisation follows the lead of trade agreements, which enables the process to occur fast and efficiently.<sup>30</sup> The most powerful trading system currently in place is the World Trade Organization (WTO), often cited as an icon of trade globalisation.<sup>31</sup>

The political sustainability of global economic development requires the adoption of common social safeguards.<sup>32</sup> This is particularly true when the effects of trade expansion and consequent economic integration are not uniformly positive. Furthermore, as trade liberalisation has advanced, it constrains the free exercise of regulatory power in non-trade matters by sovereign states, which were hitherto thought of as purely domestic regulatory decisions.<sup>33</sup> In fact, the WTO has been faced with increasing tensions between free markets and state regulation in recent years, termed ‘trade-related’ or ‘trade linkage’ problems.<sup>34</sup> Arguably, no such problem arises where the competing objectives are merely about trade protectionism, since liberalisation generally trumps protectionism in the absence of other considerations. However, the fact remains that numerous social considerations do exist and should not be ignored.

As pointed out, the relationship between free trade and state regulations tends to be a zero sum game: if one is pushed too far, any benefit for one is likely to come at a cost to the other.<sup>35</sup> In this sense, one essential mission of a global trading system is to reconcile the clashes between free trade and other social values; otherwise it may lead to a dual crisis—trade failure and regulatory failure. Although the concerns that motivate non-trade issues are diverse, one common aspiration is the harmonisation of regulatory standards, laws and business practices at both the national

<sup>29</sup> See Renato Ruggiero (the former WTO Director-General), ‘A Borderless World’, address to the OECD Ministerial Conference, Ottawa, 7 October 1998), available at [http://www.wto.org/english/news\\_e/sprr\\_e/ott\\_e.htm](http://www.wto.org/english/news_e/sprr_e/ott_e.htm) (last accessed on 2 June 2012).

<sup>30</sup> See Lodge, above n 6, 271–86.

<sup>31</sup> *Ibid.*, 300–01.

<sup>32</sup> See P Sutherland et al, ‘Challenges Facing the WTO and Policies to Address Global Governance’ in GP Sampson (ed), *The Role of the World Trade Organization in Global Governance* (2001) 92.

<sup>33</sup> See M Wolf, ‘What the World Needs From the Multilateral Trading System’ in Sampson, *ibid.*, 183–86.

<sup>34</sup> These problems include culture, environment, development, human rights and labour standards. The growth of relevant debates derives from two converging forces. First, more issues are now regarded as being trade related in the narrow sense that the norms governing those issues affect trade. Secondly, an increasing number of substantive areas become the subjects of internationally coordinated action or multilateral agreements. See, eg D Leebron, ‘Linkages’ (2002) 96 *American Journal of International Law* 5.

<sup>35</sup> See S Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System* (2003) 2.

## 6 Introduction: Globalisation as the Context

and international levels. This sets the stage for the discussion of the trade and culture issue in this book.

### 1.3 RAISING THE ISSUE: GLOBALISATION, CULTURE AND TRADE

One of the debates over global governance boils down to a conflict between free trade and cultural protection<sup>36</sup> in which globalisation—the simultaneous liberalisation and acceleration of trade—is deemed incompatible with the coexistence and development of local cultures.<sup>37</sup> The trade of cultural products in particular brings to light different conceptions of economic development, collective identity and cultural diversity, and illuminates the clash between the homogenising forces of economic globalisation and unhindered free trade on the one hand and the protection of local cultures for the sake of diversity on the other.<sup>38</sup>

#### 1.3.1 The Conflicting Conceptions about Trade and Culture

Starkly conflicting conclusions can be drawn about the trade of cultural products. On the positive side, the evidence strongly suggests that free trade represents a significant increase in human freedom by promoting the international exchange of cultural products and expanding consumer choice.<sup>39</sup> Tyler Cowen, an established cultural economist, offered a ‘gains from trade’ model to understand cultural exchange, which demonstrates how cross-cultural exchange drives cultural blossoming.<sup>40</sup>

Notwithstanding the tendency of trade to increase diversity over time

<sup>36</sup> See generally D Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’ [1997] *Utah Law Review* 545, 551, 563–75 (discussing how public international law manages the conflict between national culture and global governance). The debate between trade and cultural values goes back to the 1920s, when a number of countries introduced quotas in order to protect their fledgling film industries from a sudden influx of American films. See P Sauvé and K Steinfatt, ‘Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?’ in *Achieving Better Regulation of Services*, Conference Proceedings, AusInfo, Canberra (Productivity Commission and Australian National University, November 2000) 323.

<sup>37</sup> See R Prodi, ‘Globalization and Cultural Diversity: The Contribution of European Institutions’, in Ricciardelli, M, et al (eds), *Globalization and Multicultural Societies—Some Views from Europe* (2003) 137.

<sup>38</sup> T Franck has framed this opposition in international legal discourse as one between ‘legal-culture’ on the one hand—the staple of which is equal application to all regardless of difference, and ‘culture-culture’ on the other—the main concern of which is the protection of diversity in the face of the homogenising forces of an egalitarian application of international law. See T Franck, ‘The Legal-Culture and the Culture-Culture’ [1999] *American Society of International Law Proceedings* 271.

<sup>39</sup> See Cowen, above n 18, 5–6, 18.

<sup>40</sup> *Ibid.*, 12–13.

by accelerating the pace of exchange between new cultures,<sup>41</sup> trade liberalisation and economic growth do not always guarantee positive effects on the progress of culture. According to Cowen, trade commercialises and homogenises culture, and gives individuals, regardless of nationality, a similarly rich set of consumption opportunities. It makes countries or societies 'commonly diverse', as opposed to making them different from each other.<sup>42</sup> During this process, while the world as a whole has a broader menu of choices, some regions have lost their distinctiveness.<sup>43</sup> In particular, it has frequently been alleged that the worldwide diffusion and dissemination of mass culture products under the free trade regime has led to the suffocation of domestic cultural expressions.<sup>44</sup>

Cowen also outlines several exceptions or problems with the 'gains from trade' approach to cultural exchange. (i) Societal ethos: trade may harm or foster societal ethos when some small societies may require isolation to maintain their ethos; (ii) cost disease: traditional skills like hand weaving may fall out of use because of the adoption of less costly technologies; (iii) excess clustering: this likely happens where one country's industry dominates the world market; and (iv) quality of consumer tastes: foreign buyers may corrupt the standards of local taste.<sup>45</sup>

Further, Cowen points out that there are different types of cultural diversity. He distinguishes four types: cultural diversity within societies, diversity across societies, diversity across time, and operative or practical diversity. Cowen maintains that globalisation impacts these diversities differently; it is good for some, but not all, types of diversity. Trade increases cultural diversity within societies, even while it may reduce diversity across them: formerly culturally distinct societies will become more alike, offering the same rich menu of consumption.<sup>46</sup>

A common thread in Cowen's analysis is the belief that trade tends to foster both homogenisation and greater niche diversity at the same time. He further argues that trade provides societies with vastly more effective access to objective diversity. Cowen's own nuanced analysis leads him to

<sup>41</sup> Ibid, 15–16.

<sup>42</sup> Ibid, 129.

<sup>43</sup> Ibid, 17.

<sup>44</sup> See, eg Footer and Graber, above n 4, 134; Petito, above n 19, 1139–72; J Gray, *False Dawn: The Delusions of Global Capitalism* (1998) (arguing that global free trade is ruining the world's politics, economies, and cultures). J Tunstall, *Media are American* (1977) 57 (defining the 'cultural imperialism thesis' as the view that 'authentic, traditional and local culture in many parts of the world is being battered out of existence by the indiscriminate dumping of large quantities of slick commercial and media products, mainly from the US'); F Jameson, 'Globalization and Strategy', *New Left Review*, July/August 2000, 49–68 (holding that the standardization of world culture, with local popular or traditional forms driven out or dumbed down to make way for American television, American music, food, clothes and films, has been seen by many as the very heart of globalisation).

<sup>45</sup> See Cowen, above n 18, 49–65.

<sup>46</sup> Ibid, 125–29.

observe that cultural criticisms of globalisation often amount to a narrow or one-sided view of a multifaceted process.

In addition to these concerns, it should be noted that cultural issues could not be adequately addressed solely through a trade prism, as trade rules are not the only threat to a cultural regulatory framework. Rapid progress in technological developments has shrunk the world and driven economic globalisation to an unprecedented degree. The digital revolution renders it easier and less expensive to produce and distribute cultural products. While the practical benefits of these advances have been accompanied by an increase in the choice of modes and quality of cultural products, and explosions of cultural creativity, new technologies have further fuelled the debate around culture shock, national identity and the threats to cultural sovereignty.<sup>47</sup> There has been growing concern that the technology-driven developments in the production and distribution of cultural products might well be beyond the reach of effective regulation. This adds an extra layer of complexity to the problem of trade and culture.

### 1.3.2 Three ‘Duals’—Dual Nature, Dual Legislators and Dual Systems

Cultural products present themselves dually, as both tradable objects and vectors of identity.<sup>48</sup> This creates a drastic confrontation between two divergent logics—‘culture-as-commerce’ and ‘culture-as-identity’—with little likelihood of a plausible synthesis.<sup>49</sup> Typically, one group of countries (with France and Canada at the forefront) is concerned that economically predominant forces homogenise or dilute national cultures or identities.<sup>50</sup> Positing the importation of cultural products as a threat to national identity, they frequently invoke cultural protection as a strategy to restrict trade in culture. On the other side of the debate is the contention that, with the advent of a knowledge-based economy, the prosperity of the media industry and the rapid innovation of technology, cultural industries have become more strategically critical to national economies.

<sup>47</sup> EG McAnany and KT Williams, *Mass Media and Free Trade: NAFTA and Cultural Industries* (1996) vii.

<sup>48</sup> For a detailed account of this dual nature, see T Knight, ‘The Dual Nature of Cultural Products: An Analysis of the World Trade Organization’s Decisions Regarding Canadian Periodicals’ (1999) 57 *University of Toronto Faculty of Law Review* 165; see also RJ Neuwirth, ‘The “Cultural Industries”: A Clash of Basic Values?—A Comparative Study of the EU and the NAFTA in Light of the WTO’ in F Palermo and GN Toggenburg (eds), *European Constitutional Values and Cultural Diversity* (2003) 95.

<sup>49</sup> See Kennedy, above n 36, 563–75 (discussing how international law manages the conflict between national culture and global governance).

<sup>50</sup> See D Goulet, ‘The Evolving Nature of Development in the Light of Globalization’ (2004) 6 *Journal of Law & Social Challenges* 1, 11–13; see also CE Baker, ‘An Economic Critique of Free Trade in Media Products’ (2000) 78 *North Carolina Law Review* 1357, 1357–435.

Given the huge economic interests represented by cultural industries, it comes as no surprise that the US, as the largest exporter of cultural products, criticises trade restriction as a pretext for economic protectionism. Alongside these traditional players, more and more developing countries with time-honoured cultural heritages and emerging cultural industries paint different pictures of the culture–trade nexus.<sup>51</sup>

The coexistence of dual lawmakers and legal instruments adds further discord to the issue. Historically, while the idea of cultural protection can arguably be traced as far back as the origins of state sovereignty,<sup>52</sup> the modern doctrine of cultural diversity did not begin to take shape until the emergence of multilateral trading systems,<sup>53</sup> represented by the General Agreement on Tariffs and Trade (GATT)/WTO framework. With free trade as its leitmotif, the WTO regime does not legalise ‘cultural exception’, nor does it grant cultural products any special treatment. The United Nations Educational, Scientific and Cultural Organization (UNESCO), one of whose central mandates is to promote cultural diversity, adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter ‘the UNESCO Convention on Cultural Diversity’ or ‘the UNESCO Convention’), which came into force on 18 March 2007. An indication that the UNESCO strengthens its role in cultural protection, the Convention further intensifies the collision between culture and trade.<sup>54</sup>

The conflict between culture and trade has existed over a long period of time. It persists, particularly on the present international law agenda, and has procured prime attention with the implementation of the UNESCO Convention. The coexistence of the two international organisations WTO and UNESCO, and the corresponding legal instruments charged

<sup>51</sup> Traditionally, the debate over trade–culture is defined as a choice between American hegemony and cultural diversity, or a choice between Hollywood films and domestic films. Accordingly, the issue of culture and trade has been mostly argued among the US, French and Canada, with few voices heard from other countries. The situation has recently changed, however, with more participation of other countries, including Australia, China, Korea, Japan and India. In addition, while Europe has a keen interest in the protection of cultural expression, particularly relating to its audiovisual sector, most developing countries pay more attention to the protection of their traditional cultures. See Lee Seunghwan, *Heritage Conventions Intertwine with the Concept of Cultural Diversity: Asian and European Perspectives*, in Obuljen and Smiers, above n 16, 219–20.

<sup>52</sup> See *Petito*, above n 44, 1139.

<sup>53</sup> The discourse over trade and culture has its antecedents in the work of the Frankfurt School in the 1930s and 1940s, which coined the term ‘cultural industry’ in its criticism of the emerging radio, film and recorded music sectors. After the Frankfurt School approach lost ground to the political economy approach in the 1970s and 1980s, the discourse over trade and culture began to be formulated as a debate, which has continued up to the present. See, eg J Sinclair, ‘Culture and Trade: Theoretical and Practical Considerations’, in McAnany and Williams, above n 47, 30.

<sup>54</sup> The UNESCO Convention on Cultural Diversity was adopted at UNESCO’s 33rd general conference on 25 October 2005. Some 148 Members of UNESCO supported the final draft, with Israel and the US voting against and Australia, Honduras, Liberia and Nicaragua abstaining. For more discussions on the UNESCO and UNESCO Convention, see Chapter 4 below.

with different missions, exemplifies the continuously asserted decentralisation or fragmentation of international law,<sup>55</sup> a topic ripe for attention at a higher level.<sup>56</sup> How the WTO and UNESCO can tackle the issue in a cooperative way presents an important subject for international law scholars.

In short, economic globalisation has caused a widespread panic regarding the loss of cultural identity, leading to the resistance to trade in cultural products. The increasing interface and dissonance between trade and culture has resulted in an escalating number of irritants and disputes, which call for an appropriate response from international law. The strife has gradually morphed into a topic of global concern with the heightened collision, the decentralised international legal enforcement and the more diverse participation of various countries.

Against this backdrop, this book seeks to address the juxtaposition between neoliberal trading system and cultural policy options. It intends to provide a balanced view of the challenges inherent in protecting and promoting cultural diversity while at the same time pursuing trade liberalisation. Touching upon an intractable issue in international law, the interrogation of this topic is of an indisputable theoretical and practical necessity.

#### 1.4 THE STRUCTURE OF THE BOOK

Centring on the reconciliation of free trade with cultural diversity in the context of economic globalisation, the book is divided into nine chapters and follows the path described below.

Subsequent to this introduction, Chapter 2 is rooted in a variety of theoretical orientations with a view to exploring how we should understand ‘culture’ as a complicated social phenomenon and extremely dynamic concept. The objective of the chapter is to draw together diverse publications from social science and offer a synthesis that helps us to

<sup>55</sup> See, eg J Pauwelyn, *Conflict of Norms in Public International Law—How WTO Law Relates to Other Rules of International Law* (2003) head page (“with no single “international legislator” and a multitude of states, international organizations and tribunals making and enforcing the law, the international legal system is decentralized”).

<sup>56</sup> On 5 May 2002, the International Law Commission (ILC) set up a Study Group on the topic of the ‘fragmentation of international law’ to address this urgent issue. See G Hafner, ‘Risk Ensuring from Fragmentation of International Law’, ILC Report on the Work of its 52nd session, General Assembly Official Records, 56th session, supplement No 10 (A/55/10), 321–29. The Study Group concluded four years of work and stated that the emergence of new and special types of law, self-contained regimes, and geographically or functionally limited treaty systems create problems of coherence in international law. See International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group (Finalized by Martti Koskenniemi)’, UN Doc A/CN.4/L.682, 3 October 2006, available at [http://untreaty.un.org/ilc/guide/I\\_9.htm](http://untreaty.un.org/ilc/guide/I_9.htm) (last accessed on 1 June 2012).

understand 'culture' from comparative perspectives and, more importantly, our imperative to protect culture and cultural diversity. To this end, Chapter 2 presents an array of approaches for interrogating culture: humanist, anthropological, culture-as-commerce, culture-as-identity, culture as human rights and culture as resource. It concludes with some further thoughts on the interrelationship among these different viewpoints.

In an era of globalisation, domestic cultural regulation holds the key to resolving the culture and trade issue, because each state is obliged to bring its regulatory framework into compatibility with its trade obligations. Chapter 3 begins with a discussion of the justifications for necessary and appropriate cultural policy measures, and the challenges that policy-makers are faced with in formulating these measures in the new media environment. The chapter continues with an examination of several of the most frequently used measures, including foreign ownership restriction, content regulation featuring quota system, subsidies, intellectual property rights mechanisms and censorship. It also seeks to identify the dialectic relationships among culture, economy, technology and politics in framing tenable cultural policy measures. The discussion in this chapter is of particular relevance to the proposed design for a WTO-compatible domestic cultural policy measures outlined in Chapter 8.

Chapter 4 begins with a study of the evolution of UNESCO's cultural missions. Next, it discusses the developments of UNESCO's theories and approaches to culture and cultural diversity, with a focus on culture and development, and culture and globalisation. This section continues with an examination of the newly adopted UNESCO Convention on Cultural Diversity, focusing on its negotiation disputes, main contents, advantages and disadvantages, successes and failures. The chapter then lays the foundation for the examination of potential channels of connection between WTO rules and the UNESCO Convention later in Chapter 8.

Chapter 5 presents a study of the theoretical and legislative framework regarding the treatment of culture under the existing GATT/WTO system. First, it reviews an institutional transformation from the Havana Charter to the WTO Agreement on Establishing the WTO. The second section of Chapter 5 analyses the 'screen quota' contained in GATT Article IV, the Uruguay Round negotiation and conflict around audiovisual services, the 'agreement to disagree' compromise finally reached, the exception clauses applying to cultural products, anti-dumping, subsidies, safeguard measures and their applicability to cultural products. In an attempt to offer a full picture of the treatment of culture in the GATT/WTO, this chapter also touches upon several emerging issues, including investment and intellectual property, and explores to what extent they may be related to cultural protection.

Chapter 6 focuses on the judicial practice involving cultural products under the GATT/WTO regime. The detailed case studies provide a critical

analysis of the WTO's approach to trade disputes that concern cultural issues. Following an introduction of the GATT/WTO dispute settlement mechanism, Chapter 6 analyses two WTO cases, *Canada—Periodicals*<sup>57</sup> and *China—Publications and Audiovisual Products*.<sup>58</sup> The examination centres on several key issues, including the possibility of invoking the UNESCO cultural instruments as a general defence, the applicability of a public morals exception to cultural products, the incoherence among WTO agreements arising from the overlap of cultural goods and services, and the degree to which cultural content may be used to distinguish 'like products'. This chapter relies heavily on case studies, but offers some analysis as well, identifying problems that take precedence over mere fact statements. This chapter also reiterates the challenges faced by the WTO in settling disputes around the culture and trade issue.

Chapter 7 analyses the treatment of culture under regional frameworks, featuring the EC/EU and the North American Free Trade Agreement (NAFTA). Beginning with the observation that cultural diversity in the EC/EU is a constitutional value, this chapter traces the status of culture at the EC/EU treaty level, then discusses the EC directives on audiovisual service and judicial practice on cultural diversity by the European court. Next, the chapter turns to NAFTA and explores its cultural exception clause, and the weakness and strength of the clause in practice. The chapter concludes with a brief look at the interface of global (WTO) and regional regimes regarding cultural issues.

Chapters 5–7 furnish a comprehensive examination of the status quo treatment of culture in global and regional trade agreements. This trend analysis seeks to identify the challenges trade regimes encounter in dealing with cultural products and tries to diagnose the problems in resolving culture-related trade disputes. These chapters serve as the groundwork for mapping out international and domestic reform proposals in Chapter 8.

Based on the research set out in in previous chapters, Chapter 8 proposes a jurisprudence through which the two separate international legal norms—ie the UNESCO Convention and the WTO agreements—might change from a state of coexistence to one of cooperation, and, by extension, the conflict between trade liberalisation and cultural diversity might move towards synergy. Following the review of the necessity and urgency of addressing the trade and culture stalemate, Chapter 8 makes a two-level proposal: the compatibility of cultural policy measures with

<sup>57</sup> WTO, *Canada—Certain Measures Affecting Periodicals*, complained by the US, WT/DS/31, request for consultations received on 11 March 1996, Panel Report circulated on 14 March 1997 and Appellate Body Report circulated on 30 June 1997.

<sup>58</sup> WTO, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, complained by the US, WT/DS/363, request for consultations received on April 10, 2007, Panel Report circulated on 12 August 2009 and the Appellate Body Report circulated on 21 December 2009. DSB adopted the reports on 19 January 2010.

trade obligations on a domestic level and the potential linkage of WTO rules with the UNESCO Convention at the international level. In the latter, this chapter suggests possible procedural links and, more importantly, methods of treaty interpretation that might help bridge the gap between these two sets of instruments.

Chapter 9 concludes with a summary of the broader lessons learned throughout this work and looks beyond, to the challenges faced ahead. It emphasises again that international trade and cultural diversity should not be enemies, that, instead, WTO and UNESCO should work together to bring cultural concerns into trade framework against the backdrop of economic globalisation.