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CONFLICT AND COMPLEMENTARITY IN TRADE, CULTURAL DIVERSITY AND INTELLECTUAL PROPERTY RIGHTS

Tomer Broude

Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem

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ABSTRACT

This article generally addresses the interrelationship between international trade regulation, the international protection of intellectual property rights, and the protection and promotion of cultural diversity. The main themes explored will be the binary notions of *conflict* and *complementarity*, suggesting a rough map of the territory in which these fields have the potential to clash with each other; and in contrast, the areas in which they appear to be mutually supportive.

International trade and indeed property protection are in many senses not only a complement to cultural diversity, but a necessary component in its promotion and protection. They are necessary for the type of intercultural joy that Tagore wrote of. There are, however, significant areas of discord. What emerges from the analysis is that the foundational concepts of trade regulation, intellectual property protection and cultural diversity are so far removed from each other, in their perceptions of basic ideas such as culture, diversity, innovation, tradition, markets and rights, that substantive conflict is inevitable, if not upon the surface, then at a deeper level. That in the exceptional circumstances of overt conflict, a lawyerly solution may be found, is no remedy for the potentially disruptive – or at least non-constructive – effects of the parallel existence of such inherently different normative regulatory systems.

* Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; BA, LLB, Hebrew University of Jerusalem; SJD, University of Toronto. This paper was presented at a conference on "Cultural Diversity and International Trade" at the National Taiwan University, Taipei, June 2007

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“I am Proud of my humanity when I can acknowledge the poets and artists of other countries as my own. Let me feel with unalloyed gladness that all the great glories of man are mine”.

-RABINDRANATH TAGORE, LETTERS TO FRIEND (1928)

1. CONTEXT

1.1 Introduction

In his universal cultural possessiveness, the great Indo-Bengali poet – a cultural cosmopolitan who valued both community and progress - was surely speaking figuratively rather than literally, but there is no doubt that the enjoyment of the culture of "other countries" is dependent on effective access, and that such access is intertwined with questions of commerce, ownership and property. In addition, just as they may cause great joy to those who indeed gain access to them, foreign cultural expressions are perceived by many as a threat to their own culture. What is the balance between these considerations, and how is it to be achieved?

This article generally addresses the interrelationship between international trade regulation, the international protection of intellectual property rights, and the protection and promotion of cultural diversity. As we shall see, the relationship is complex, multifaceted, and replete with varied and at times counterintuitive and contradictory interactions. This complexity notwithstanding, the main themes explored here will be the simpler binary notions of *conflict* and *complementarity*, suggesting a rough map of the territory in which these fields have the potential to clash with each other; and in contrast, the areas in which they appear to be mutually supportive. To be more precise, I will focus on areas of conflict and complementarity between trade regulation and intellectual property rights, on one hand, and the protection of cultural diversity, on the other. Contradictions between international trade regulation and intellectual property rights protection – and such contradictions do exist at both the conceptual and practical levels – will not be dealt with as such.¹

¹ For good overviews and analyses of the legal relationship between international trade law and cultural diversity (in light of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted 20 October, 2005, entered into force 18 March, 2007 (the “CCD”)), see Anke Dahrendorf, *Trade Meets Culture: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection and Promotion of Cultural Expressions*, Maastricht Working Papers (2006); Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law* 9(3) J. INT. Econ. L.; and Tania Voon, *UNESCO and the WTO: A Clash of*

In focusing on the conflict and complementarity of trade, intellectual property and culture, this article expands on the question:² “Are trade and culture really conflicting values with opposing interests? Both trade and culture are expressions of human activity and exchange; the exchange not only of goods and services, but also of ideas.” Triangulating the problem, this question also encompasses intellectual property rights, that impact upon both commercial and cultural exchanges.

1.2 Globalization

The broader context of this inquiry is, inevitably, the context of globalization. There is little question that the celebrated rise in the international mobility of goods and services since the end of the Cold War has increased mutual intercultural exposure, not only of the kind Tagore revealed in. Much of the economic activity that drives this process has been regulated in accordance with the legal disciplines of the World Trade Organization (WTO) agreements,³ and among these, the Agreement on Trade-related Aspects of Intellectual Property (TRIPS).⁴ At the same time, we have witnessed the rise of international human rights law, including the protection of cultural rights,⁵ culminating most recently with the development of treaty-based international cultural diversity law as adopted in the UNESCO CCD.

What have these trends done to ‘culture’? A popular perception of the effects of globalization is the apocalypse of a “McWorld”, “[T]he onrush of economic [...] forces that demand integration and uniformity ... pressing nations into one commercially homogenous global network”;⁶ or the gradual international “Disneyization of Society”.⁷ In these visions, fragile local social and cultural structures are impaired or even erased by exposure to powerful forces, external and all-encompassing. This scenario owes much to neo-Marxist

Cultures? 55 INT. COMP. L. Q. 635 (2006).

² See Tomer Broude, *Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26(4) U. PENN. J. INT. ECON. L. 623, 692 (2005).

³ See *Marrakesh Agreement Establishing the World Trade Organization*, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1 (1994) (WTO Agreement).

⁴ See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81, (1994) (TRIPS Agreement).

⁵ See *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976 (the “ICESCR”).

⁶ Benjamin R. Barber, *Jihad Vs. McWorld*, ATLANTIC MONTHLY, Mar. 1992, at 53, 53. See also BENJAMIN R. BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (Ballantine Books 1996).

⁷ See Alan Bryman, *THE DISNEYIZATION OF SOCIETY* (London: Sage Publications, 2004).

thought, for it is often asserted that the devastation of local cultures is the product of a triumph of “cultural hegemony”⁸ or “cultural imperialism”⁹ on the “ideological battleground” of culture.¹⁰ Thus, ‘culture’ is readily depicted as a victim of neo-liberal economic globalization: the market overpowering mind.

Such views, however, are wide open to criticism. It is, for one, arguable that around the world, local cultures have withstood economic forces, even as they adjust to new influences and even ‘invasions’. Culture has always been the result of a process of exposure to fresh ideas and knowledge that fuse with the old, replacing it while creating something new.¹¹ National cultures may have post-modernly “reconceived themselves in order to persist in an era of intensified globalization.”¹² Some theorists reject the danger of the domination by a “western” monoculture, observing instead the emergence of “global cultures in the plural.”¹³ Globalization has therefore brought change, but not obliteration. Increased economic interactions bring with them natural demand for cultural change, a demand whose satisfaction cannot be prevented merely by legal means (as I have argued with respect to the cultural utility of Geographical Indications).¹⁴

Or one might argue that the notion of western cultural domination is itself a self-serving concept, that “[c]ultural imperialism’ is a critical discourse which operates by representing the cultures whose autonomy it defends in its own (dominant) Western cultural terms.”¹⁵ Similarly, but more practically, the imposition or requirement of intellectual property protection in societies where such protection never existed before, even if for the purpose

⁸ See, e.g., ANTONITO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., Int'l Publishers 1971).

⁹ For a full and critical exposition of the term, see JOHN TOMLINSON, CULTURAL IMPERIALISM: A CRITICAL READER (1991).

¹⁰ Immanuel Wallerstein, *Culture as the Ideological Battleground of the Modern World-System*, 7 THEORY, CULTURE & SOC'Y 31, 31 (1990).

¹¹ Compare TYLER COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES (2002).

¹² FREDERICK BUELL, NATIONAL CULTURE AND THE NEW GLOBAL SYSTEM 12 (1994). See generally JOHN R. HALL & MARY JO NEITZ, CULTURE: SOCIOLOGICAL PERSPECTIVES (1993); CULTURE, GLOBALIZATION AND THE WORLD SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY (Anthony D. King ed., 1997); GEORGE RITZER, THE MCDONALDIZATION THESIS (1998); 12 PUBLIC CULTURE (2000) (providing background material on *Globalization* (issue 12.1), *Millennial Capitalism and the Culture of Neoliberalism* (issue 12.2), and *Cosmopolitanism* (issue 12.3)).

¹³ MIKE FEATHERSTONE, CONSUMER CULTURE AND POSTMODERNISM 10 (1991); see also Ulf Hannerz, *Cosmopolitans and Locals in World Culture*, in 7 THEORY, CULTURE & SOCIETY 237, 243-44 (1990) (noting the interaction of territorial cultures with occupationally divided, transnational cultures).

¹⁴ See Broude *supra* note 2.

¹⁵ TOMLINSON, *supra* note 9, at 2.

of protecting culture, may in itself be viewed as a pressure for cultural change: “If a particular technology or ritual is not currently included as a form of protectable property, the recourse to Western law to ensure that others do not make profits therefrom almost certainly entails the acceptance of the property principle. What will it mean when non-Western forms of knowledge, technology and cultural practices are incorporated into intellectual property and copyright law?”¹⁶

1.3 Fragmentation

If globalization provides our economic and social context, the general *legal* context of this question is the problem of fragmentation in international law: to what extent are separately established legal regimes contradictory, to what extent do they coexist as parts of a whole? In the case of cultural diversity, some lawyers might well query if there is any conflict at all. Indeed, “in international law there is a strong presumption against normative conflict”,¹⁷ and many (though not all) of the possible legal conflicts between cultural diversity *law* and other fields of *legal* regulation have effectively been circumvented from a *technical* perspective.¹⁸ However, it is important to go beyond the practical conflict-regulation/conflict-avoidance rules themselves and to look at the underlying causes of scenarios and situations in which these rules may in fact be called upon, for it is in these very cases that a substantive clash exists. This is not in order to interpret problems away, but rather to better understand the nature of the problem. Thus, the present analysis is largely strategic and conceptual, bringing out the differences and similarities in the foundational concepts of these areas of law. Crucially, this exercise may introduce not only conflict but also complementarity, and as we shall see, the manifestation of either phenomenon cannot be assumed *ex ante* without more detailed and specific analyses.

As part of such case-by-case analyses, in addressing the extent that fragmentation exists

¹⁶See GEORGE YÚDICE, *THE EXPEDIENCY OF CULTURE* (Durham, NC: Duke University Press, 2003), at 2.

¹⁷ See International Law Commission (ILC), Report of the Study Group of the ILC, finalized by Martti Koskenniemi, *Fragmentation of International Law, Difficulties Arising from the Diversification and Expansion of International Law*, at para. 37.

¹⁸ See sources cited *supra* note 1, and also Joost Pauwelyn, *The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making?*, ASIL Insights, November 15, 2005 (available at: <http://www.asil.org/insights/2005/11/insights051115.html>); and Tomer Broude, *Comment: Cultural Diversity and the WTO: A Diverse Relationship*, ASIL Insights, November 21, 2005 (available at: http://www.asil.org/insights/2005/11/insightcomment051121_000.html).

in this area as a legal problem, it would of course be necessary to assess the particular legal applications of the trade-intellectual property-culture nexus, *de lege lata*. A careful examination of legal regimes thought to reflect conflicting social values when viewed generally, may at times serve to bring out mutual augmentation that not only avoids conflict through interpretation but may make the use of legal conflict–avoidance rules unnecessary.¹⁹ Here, I adopt the opposite methodological approach, examining the theoretical conflict between the three areas, in order to tease out the social conflict or complementarity that underlies them. Generally, it might be argued that to the extent that all three areas of law – trade regulation, intellectual property and cultural diversity – represent different objectives, histories and interests, there is a considerable chance that they will result in substantive conflict, even if such conflict is legally resolvable. And to the extent that they aim to facilitate similar goals etc., they may complement each other, if not perfectly. It is only on the basis of these general understandings that one should proceed to examine the technicalities of legal fragmentation.

The cultural aspects of globalization and the fragmentation of international law and - these are the context for what follows.

2. CONCEPTS

2.1 *Allegory*

Because ‘culture’ is such an inherently politically overloaded term, and ‘free trade’ and TRIPS are so ideologically charged, it may be useful to think of the problems associated with the trade-intellectual property-culture connection through a counterfactual parable that affords us two luxuries: a degree of political impartiality and a legal *tabula rasa*. This will prove helpful in discussing the more abstract concepts underlying conflict and complementarity in these areas.

Imagine that one day in the not too distant future, we discover intelligent, human-like

¹⁹ Compare Robert Howse and Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Friedrich-Ebert Stiftung, Dialogue on Globalization, Occasional Paper No. 30, April 2007: “A strategy is needed to identify some fairly precise and specific interconnections between the legal concepts and doctrines in the treaty texts...”. Also, in the context of sustainable development, see Tomer Broude, *Elements of the Principle of Integration in WTO Jurisprudence: Another Look at the Shrimp Cases*, in REPORT OF THE 72ND CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (London: ILA, 2006).

life on Mars (or conversely, that the Martians discover Martian-like life on Earth). Upon initial contact between Earthlings and Martians, natural curiosity is aroused and it becomes clear to both populations that each side has much to learn from the other.²⁰ For example, we, the Earthlings, have artful works and technological wonders that the Martians have never experienced before, like iPods, *Harry Potter and the Deathly Hallows*, *Pirates of the Caribbean* and McDonalds (not to mention the piano, the Holy Bible, Chinese calligraphy, the arch, *Gargantua et Pantagruel*, etc., etc., etc.). The Martians have innumerable shiny things and ideas whose beauty and utility we can hardly imagine – just picture yourself holding in your hand a well-illustrated guidebook to Mars, its cities and villages, with their abundance of new cultural and technological opportunities. Immediately, entrepreneurs from both planets are eager to engage in trade,²¹ and indeed, spaceships laden with goods start shuttling back and forth along the Earth-Mars trade route, like so many merchant galleys sailing across the Atlantic or the South China Sea in the 16th Century.

However, this utopian state of affairs is soon marred by a host of regulatory and legal issues (let us set most of them aside, such as the way interplanetary business transactions would be conducted without Incoterms, or the complicated sanitary and phytosanitary problems that would arise, and instead focus only on the difficulties related to trade, intellectual property and culture).

First, on both planets, while there is great enthusiasm for the novelties being traded, there appears to be considerable trepidation about the possibly detrimental effects of exposure to the ‘culture’ of the other planet. Increasingly, there are calls to take steps to protect Earth’s culture from change brought on by the interaction with Martians, and *vice versa*, even if this means curtailing trade and its economic and indeed cultural benefits; in human history, such concerns are not without merit.²² On Earth, UNESCO and national governments are called upon to strengthen Earth cultures through legal and financial means.

²⁰ For a classic literary treatment of the hypothetical clash of between peaceful Martian culture and the violent, consumer-driven culture on Earth, see ROBERT A. HEINLEIN, *STRANGER IN A STRANGE LAND* (1981).

²¹ A ‘new’ culture is a new market, for both buying and selling: a Chicago newspaper advertisement from 1893 humorously reads “Mars is peopled, and they want Kirk’s American Family Soap” (available at http://upload.wikimedia.org/wikipedia/en/5/5f/Kirks_Soap_Yerkes_Mars.jpg, citing JAY M. PASACHOFF, *CONTEMPORARY ASTRONOMY*, 2nd ed. (1981) as its source.

²² The meeting of Europeans with the Pre-Columbian cultures of the Americas resulted in the virtual extinction of many of the latter; see JARED DIAMOND, *GUNS, GERMS AND STEEL: THE FATE OF HUMAN SOCIETIES* (1997); and CHARLES C. MANN, *1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS* (2005).

For example, the Martians' traditional knowledge of psychic capabilities, rapidly disseminated among many Earthlings, permits people to 'attend' concerts from the comfort of their homes without purchasing tickets, resulting in reduced revenues at opera houses and football stadiums. People can now even inscribe musical recordings in their personal memory at digital quality, not only delivering the final blow to already outdated physical storage devices like Compact Discs, but in much reduced traffic on traditional file-sharing websites. Martian culture has enjoyed the knowledge of telepathy for ages, and now that it has been taught on Earth, old-fashioned Earthlings decry the impending death of e-mail as the customary form of human communication. And Martian psychokinesis threatens the very existence of well-established Earthling institutions such as the United Parcel Service (UPS), who is vigorously lobbying for the expansion of Earth legislation providing benefits to 'cultural industries'.²³ Similar problems present themselves on Mars, as Martians become enamored with Earth pastimes such as clubbing, mountain-biking and playing computer games. Clearly, it is necessary to provide some sort of legal framework to regulate trade between the planets, while addressing these serious cultural concerns.

Second, Earthling individuals and corporations who (on Earth) hold legally protected intellectual property rights have found it increasingly difficult to reap the profits of interplanetary trade, as unscrupulous Earthlings infringe their rights through sales made on Mars, where copyright, patent and trademark protected goods are widely duplicated and distributed royalty-free. Mars is not yet a member of the WTO,²⁴ and so has not adopted the TRIPS, leaving Earth intellectual property rights' holders essentially powerless in the face of what they consider to be rampant piracy.

This latter problem is significantly exacerbated, however, when it is discovered that the Martian normative system actually strictly prohibits exclusive rights in ideas, knowledge, and expressions of culture – Martian society has always been an absolute 'creative commons'.²⁵

²³ This would indeed be an interesting historical reversal; in *An Arbitration under Chapter 11 of the North American Free Trade Agreement between United Parcel Service and Government of Canada, Award on the Merits*, International Center for the Settlement of Investment Disputes, 24 May, 2007, UPS had argued that Canada Post could not benefit from the Canadian Publications Assistance Program because it was itself not a "cultural industry" protected by the exception in Article 2106 NAFTA.

²⁴ Although under article XII of the Marrakesh Agreement Establishing the WTO, Mars could in theory enter into accession negotiations, if not as a State, then as a Separate Customs Territory (Uruguay Round negotiators were prescient enough to establish a *World Trade Organization*, rather than a merely 'international' or 'global' one).

²⁵ "Creative Commons" is a non-profit organization whose aim is to facilitate the distribution of creative work for use by others, with reduced levels of restrictions; see www.creativecommons.org. For a critique, see Niva

Not only does this mean that Martians see utterly no reason to enforce Earthling intellectual property rights on Mars, but it further appears that fast-moving Earthlings have registered international patents for knowledge gained on Mars, a move that Martians view as a detestable form of ‘knowledge monopolization’, that *they* consider to be rampant piracy.

Soon, imports from Mars are being legally challenged by Earthlings as infringements of intellectual property rights on Earth. At the same time, in the face of real social derision from their compatriots, a forward-looking group of Martians turns to Earth law to claim that they are the rightful claimants to intellectual property in Mars-derived knowledge (one of the first of these was the *Mars Bar* litigation, after which the *Mars* trademark would be allowed to survive the registration of the identical geographic indication).

This light-hearted allegory demonstrates many of the conceptual problems associated with the trade-intellectual property-culture relationship, some of conflict, some of complementarity. Let us now try to disaggregate them, beginning with the concept of culture itself.

2.2 Culture

Culture is an inherently fluid term, not only in its content and evaluation, but in its very delimitation (to the extent that it is a notion that accepts any meaningful delimitation). However, if all biases are excluded and it is taken to its logical conclusion, ‘culture’ is so broad a concept that it may be understood as no less than a proxy for human society or even for humanity itself. Scientific definitions of ‘culture’ are numerous, and have themselves changed over time.²⁶ Moreover, as a sociological or anthropological term, ‘culture’ gravitates between definitions that emphasize the elements that define a social group at a given point in time,²⁷ and more dynamic conceptions that emphasize culture as a process of change,²⁸

Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74(2) *FORDHAM L. R.* 375 (2005).

²⁶ See Even Keith Eppich, *The Progress of “Culture”*, 1(3) *LORE: RHETORIC, WRITING, CULTURE* (2001)(e-journal available at http://www-rohan.sdsu.edu/dept/drwswebb/lore/1_3/progress_culture.htm).

²⁷ See, e.g., EDWARD B. TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART, AND CUSTOM* (1924), cited in Eppich, *Ibid.*: “Culture... taken in its widest ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society”.

²⁸ See, e.g., LESLIE WHITE, *THE SCIENCE OF CULTURE: A STUDY OF MAN AND CIVILIZATION* (1949), cited in Eppich, *Ibid.*: “Culture is, therefore, a thermodynamic system in the mechanical sense. Culture grows in all its aspects- ideological, sociological, and technological- when and as the amount of energy harnessed per capita

whether evolutionary or progressive. Thus, culture, as a value, has an internal paradox: it wishes for all the *gravitas* of constancy, even permanence, but at the same time is characterized by constant, unplanned change and dynamic development.

The interaction of culture with international (or, less formalistically, with ‘intercultural’) trade (and surely trade itself is part of human culture), provides opportunities for cultural evolution. Trade brings new and foreign products, services, practices, production methods and ideas to the local market; each of these is a potential agent of cultural change. As such, trade, as a process, emphasizes the fragility of a culture. Those who feel that their culture is at risk because of exposure to such global influences will protest and confront the international law that facilitates it,²⁹ advocating cultural protectionism. As demonstrated in the above allegory, these fears may be difficult to disentangle from vested economic interests - at the same time, those whose economic, non-cultural interests are threatened by international competition may use cultural arguments as protectionist defenses. As in other interactions between trade and non-trade values, the problem is in drawing the line between disguised trade protectionism and *bona fide* cultural concern, a dilemma that clearly arises when trade disciplines and cultural interests clash. Moreover, what emerges is that rules aimed at liberalizing trade will facilitate cultural change and conflict with static cultural preservation, while rules that allow trade restrictions may (or may not) complement cultural protection.³⁰

Clearly, both trade and culture can exist without intellectual property rights.³¹ Once established, however, intellectual property rights influence cultural change or stability in a number of ways. On one hand, they provide simplified channels of communication in the form of protected inventions, creative content, brands, titles, etc., which make the diffusion of knowledge more efficient.³² Such simplification is particularly necessary in cross-cultural

year is increased...’.

²⁹ See, e.g., Irene McConnell, *Looking Back at the “Battle Of Seattle”: Understanding the WTO, and the Roots of Civil Society’s Rage*, POST, Summer 2000, available at <http://www.ualberta.ca/PARKLAND/post/Vol-IV-No2/05mccconnell.html> (“[C]ommunal identity needs to be nurtured and protected against those who insist that culture is a commodity subject to the laws and values of the market place”).

³⁰ I admit to some skepticism about the capacity of legal trade restrictions to withstand pressure for cultural change; see Broude *supra* note 2: “If, however, culture is to be taken seriously as a justification for trade-restrictive policies, it must first be proven that these policies do indeed contribute to the protection and promotion of local culture and to the safeguarding of cultural diversity.”

³¹ Even in western societies, intellectual property rights are a relatively recent development; see HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2003).

³² “Diffusion is a particular type of communication in which the message content that is exchanged is

exchanges, in which the heterophily of participants is increased due to cultural differences.³³ In this respect, intellectual property rights may be expected to facilitate cultural exchange and indeed change. On the other hand, the exclusivity of intellectual property rights may raise the diffusion costs of new knowledge, hampering cultural exchange, or permitting it to occur only in knowledge areas in which the rights' holders consider the exchange to be cost-effective, thus making it contingent on their particular interests. Cultural shifts might then be restrained, having lower impact on the knowledge-receiving society. For the same reasons, intellectual property protection may also have a preserving effect on a knowledge-supplying society, if rights are used to protect cultural practices from dilution and abuse through duplication and diffusion.

In sum, as the allegory demonstrated, trade regulation and intellectual property rules may have different effects on culture, conflicting and complementary, depending not only on the specific instruments being used and the cultural exchange being affected, but also on whether the desired effect is of cultural change or rather cultural preservation. Having said this, however, several other concepts must be examined.

2.3 Diversity

In the context of globalization, cultural diversity - the value that the CCD aims to promote and protect - is an inherently dialectic concept. On one hand, diversity is promoted through increased exposure to cultural expressions. On the other hand, the fear is that such increased exposure may lead to reduced diversity through cultural change that homogenizes culture generally, even obliterating local cultures in specific circumstances. In the above allegory, there is no question that the diversity of culture offered to both Martians and Earthlings was enhanced exponentially the moment interplanetary contact was made. At the same time, however, it was mutual intercultural exposure that set certain expressions of local culture at risk.³⁴ With diversity comes choice, and choice is driven by intellectual and practical preferences such as personal utility, efficiency and indeed cost, that may set a low price on the preservation of existing culture. Thus, cultural diversity is best served when

concerned with a new idea"; EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS*, 5TH ED. (2003) AT 18.

³³ Building on Rogers, *Ibid.*, at 19.

³⁴ For detailed analysis along these lines, see Cowen, *supra* note 11.

exposure is increased, without reducing existing cultural expressions. One might think of this as "optimal exposure" – a hypothetical degree and/or form of exchange that results in the highest level of diversity, striking the balance between interculturality and cultural protection.

The tension between cultural protection, on the one hand, and intercultural exchange, on the other hand, is readily apparent in the CCD. Article 1 CCD speaks of the creation of conditions for cultures "...to freely interact in a mutually beneficial manner", of the need "to encourage dialogue among cultures... ensuring wider and balanced cultural exchanges..." and to foster interculturality in order to develop cultural interaction...". Article 2 CCD establishes a principle of equal dignity and respect for all cultures, a principle of equitable access to culture, and most importantly – a principle of "openness and balance". Taken together these can be understood as a cultural norm of national treatment, aimed at promoting international cultural exchange. In contrast, operative Article 6(2) CCD expressly refers to "domestic" cultural activities, goods and services (including in the informal sector), sanctioning measures that (within limits) provide preferred opportunities for production, dissemination, distribution and so on – ambiguous language whose non-ambiguous purpose is clearly the protection of domestic culture. For present purposes, what emerges is that the drafters of the CCD were well aware of the tension between protection and interculturalism in the context of promoting cultural diversity through choice. It is less certain that the legal structure they produced addresses it effectively.

Trade liberalization also aims to increase choice, but diversity in the sense just discussed is not a goal, merely a means to an end. Instead, the goal is economic efficiency. Classical trade theory is not concerned with the cultural effects of trade. Consider Ricardo's famous wine-cloth example of comparative advantage.³⁵ International economic efficiency is achieved through the choice offered by intercultural exposure – the opening of trade between Portugal and England.³⁶ As a result, however, cloth manufacture in Portugal ceases, with its techniques, traditions and lifestyles, and in the cultural sense, there is a loss of choice and diversity that could be maintained only through inefficient means. Thus, trade and

³⁵ See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 76 (Lloyd Reynolds and William Fellner eds., Richard D. Irwin, Inc. 1963) (1817).

³⁶ Note that as the Portuguese wine industry thrives on English trade, it would adjust to English cultural taste. In reality, the wines of Port (Oporto) flourished in the eighteenth century because of increased English demand brought on by unreliable supply from Bordeaux due to French-English strife; this was encouraged by the 1703 Treaty of Methuen, which granted Portuguese wine lower duties than those of France and Germany; See ROD PHILLIPS, A SHORT HISTORY OF WINE (2001) at 129–30, 137.

culture are complementary as far as diversifying exposure is concerned, but may conflict with each other if and when optimal exposure would entail economic protection to preserve diversity.

How do intellectual property rights impact upon diversity? To large extent, this would depend on their effect on the diffusion of knowledge. As we have seen, intellectual property can facilitate cultural change, either increasing diversity or reducing it. If rights result in higher costs of diffusion, this may serve to preserve existing cultural expressions at least at the margins, maintaining diversity. And if intellectual property rights are successfully employed to protect endangered cultural expressions, they should serve to prevent erosion of diversity.

2.4 Markets

From this discussion of culture and diversity, it should by now be evident that international trade, cultural diversity and intellectual property protection have, as areas of regulation, significantly different views of the function of markets, affecting their separate tendencies towards either conflict or complementarity.

To generalize, trade regulation sees free markets as the ultimate objective, tempered only by political economy constraints that make complete market liberalization unattainable, requiring less ambitious trade arrangements towards that goal.³⁷ As far as culture is concerned, liberal trade theory would consider the cultural characteristics of a "widget" (whether a good or service) as attributes that are worthy of consideration only to the extent that influence consumer preferences.³⁸ Cultural communities are groups of consumers like any other, which should be permitted to determine the free market price or added-value of the cultural content of each widget, in comparison to the readily available, culturally-different or culturally-indifferent alternatives. Thus, where consumers attach sufficient economic

³⁷ On the political economy of trade agreements, see KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2005).

³⁸ It is convenient to think of such cultural attributes as relating either to a culture of production (it is the process of the widget's creation and/or the method of its production that ordain it with cultural value that is to be protected); a culture of consumption (the widget becomes cultural by virtue of the context in which it is consumed, the way it is used); or a culture of identity (In this case, there is nothing idiosyncratic in the widget's production or in its consumption, but culture is nevertheless embedded in the widget by its very existence, and through its content, that are somehow representative of a cultural value that is associated with the relevant group's identity); see in greater detail, Broude *supra* note 2.

value to the preservation of local or traditional cultural products or practices, the local cultural widget will prevail (e.g., locally produced television programming, or perhaps concert-going despite the ability to enjoy performances from a distance). Indeed, "there is some evidence that people are willing to pay something to protect expressions of local cultural identity, even if they do not consume such cultural product directly themselves"³⁹ However, where the economic value of the cultural charge of the widget is low in the relevant market, the market share of the widget may well decrease, enacting significant changes in production, consumption and identity (e.g., Portuguese cloth production, as discussed above in the hypothetical, or the death of e-mail once telepathy is mastered, as in the allegory). In some cases, the "cultural" widget may even be excluded entirely from the market—the economic forerunner of cultural extinction.⁴⁰ As for the import side of affairs, it can be assumed that if consumers assign value to a foreign cultural widget for a reason related to its cultural attributes, it will succeed in the local market (e.g., "world music"), perhaps at the expense of local products.

In contrast to international trade theory, the concept of cultural diversity, with all its internal tensions, displays ambivalence towards freely operating markets, that present either opportunities or threats under different circumstances, as the allegory and subsequent examples above demonstrate. The success of foreign music among local consumers is an enhancement of cultural diversity, but if this success threatens to wipe out the local musical scene – or alternatively, if in order to gain a share in a large market, foreign musicians alter their creations to suit market tastes – then diversity is reduced. More mundanely, if the foreign product or service is simply less expensive or more effective than the local cultural product, diversity is necessarily reduced by the operation of markets. Cultural diversity policy is therefore wary of free markets and advocates market intervention, not only to prevent the erosion of cultural diversity, but to enhance it.

Intellectual property protection, in the main, is based on market economics, but is in essence a manipulation of the market, serving as an incentive for innovators who under free

³⁹ See DAVID THROSBY, *ECONOMICS AND CULTURE* (2001) at 132, citing Papandrea Franco, *Willingness to Pay for Domestic Television Programming* 23 J. CULTURAL ECON. 149 (1999).

⁴⁰ One could well conceive of cultural widgets as public goods, and of such cultural sacrifices to the market as "tragedies of the commons," in the sense that private preferences determine the demise of the "cultural" widget. But if preferences were pooled, it would persist. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) (discussing the original formulation of the tragedy of the commons in the context of the nuclear race).

market conditions would not receive suitable returns on their investment. As Kenneth Arrow famously put it:

“Information is a commodity with peculiar attributes, particularly embarrassing for the achievement of optimal allocation. In the first place, any information obtained, say a new method of production, should, from the welfare point of view, be available free of charge (apart from the cost of transmitting information). This insures optimal utilization of the information but of course provides no incentive for investment in research...In a free enterprise economy, inventive activity is supported by using the invention to create property rights; precisely to the extent that is successful, there is an underutilization of the information”;⁴¹ Identification of the optimal level of exclusivity to be accorded to rights’ holders is difficult; and some forms of intellectual property rights, such as trademarks and geographical indications, may incentivize investment in branding and marketing more than in innovation.

More importantly for present purposes, the derogations of intellectual property law from the operation of entirely free markets do not necessarily overlap with the similar derogations required for the optimization of cultural diversity. Complementarity, in this case, cannot be assumed, but must be examined on a case-by-case basis.

2.5 Innovation

Trade, intellectual property, and cultural diversity also represent differing, at times conflicting evaluations of innovation. Trade theory normally treats innovation as a factor in determining comparative advantage – either through the production of a new good (or service) or through the reduction of production and other costs.⁴² As noted by Arrow,⁴³ optimal use of the new information derived from innovative efforts would entail its free and universal use. Indeed, in traditional growth theory, innovation is regarded as an exogenous

⁴¹ See Kenneth Arrow (1962) “Economic Welfare and the Allocation of Resources for Invention,” in NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY* (1962).

⁴² See, e.g., W.E. Diewert, *The Effects of an Innovation: A Trade Theory Approach*, 20(4) THE CANADIAN JOURNAL OF ECONOMICS/REVUE CANADIENNE D’ECONOMIQUE 694 (1987).

⁴³ *Supra* note 41.

process, a by-product of investment in machinery or equipment,⁴⁴ and perhaps as a result there is virtually no reference to innovation in the pre-WTO agreements.⁴⁵ In contrast, as we have already seen, intellectual property protection is primarily justified by the value allocated to the incentivization of inventive activity.⁴⁶ As for cultural diversity, it cannot be said that it has a single approach to innovation. If an innovation is absorbed by society, it might be regarded as an increase in diversity, but also as a threat to diversity, if it replaces alternative existing cultural expressions.

2.6 Tradition

Tradition, as a concept that seems diametrically opposed to innovation, also maintains a complex relationship with trade, intellectual property and cultural diversity. For example, the free market orientation of classical trade theory would not attach any particular value to tradition, beyond that value allocated by market-based consumer preferences. Intellectual property protection, with all its emphasis on the value of innovation, has established the *sui generis* category of geographical indications as protectable rights, ostensibly as expressions of local traditions rather than innovation⁴⁷ – but at the same time, the field truly struggles with the ideas of “traditional knowledge” and “folklore” as worthy of intellectual property-like rights, one reason being the lack of innovation.⁴⁸ In contrast, cultural diversity values tradition, particularly through the notion of traditional knowledge, as a cultural expression conceptually equal to innovation.

In this context it is noteworthy that tradition can elicit a degree of skepticism as a consideration countering freer trade and innovation-based intellectual property rights.

⁴⁴ *But see* GENE M. GROSSMAN AND ELHANAN HELPMAN, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY (1983), who abandon this approach and develop a theory whereby innovation is a deliberate outcome of investment in research for the purpose of innovation-related profit.

⁴⁵ Notable exceptions are Articles 11.1(d) and 11.3 of the Tokyo Subsidies Code, that lists the encouragement of “research and development programmes, especially in the field of high-technology industries” as an objective the subsidization of which is not restricted by the agreement, even if achieved “by means of subsidies granted with the aim of granting an advantage to certain enterprises”.

⁴⁶ *Supra* note 41.

⁴⁷ *See* Broude, *supra* note 2; and more generally, *see* BERNARD O’CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS (2004).

⁴⁸ The literature on traditional knowledge is extensive; for one comprehensive, if outdated, discussion, *see* Srividhya Ragavan, *Protection of Traditional Knowledge* 2 MINN. INTEL. PROP. REV. 1 (2001).

“Tradition” can be invented;⁴⁹ and the communities that support them can be “imagined”.⁵⁰ At the same time, one of the endearing attributes of traditions is the way that they change and develop over time. In these senses, “tradition” suffers from the same internal tensions as culture more generally.

2.7 *Rights*

The final concept to be discussed is the concept of rights. Who, on Earth, holds rights in trade regulation, intellectual property and cultural diversity? And are these right holders the same as the stakeholders?

On the international plane, the law of international trade regulation normally grants direct rights only to states or state-like entities. There is a distinct gap between the right-holders and the actual stakeholders in this respect, because as trade theory assumes, the main stakeholders in international trade are private parties – traders, import-competing industries, consumers. One WTO panel elegantly bridged over this gap by using the term "indirect effect" to enhance the rightfulness of traders' stakes in trade liberalization.⁵¹ International trade law, however, remains formally built on a classical state-based legal system.

Intellectual property, in contrast, grants rights to a broad range of private actors (albeit through a system of state obligations to establish and enforce these private rights). These may be inventors or authors, but the assignability of intellectual property rights means that the ultimate right holders may not be the owners of creative minds but rather consumers and middlemen of creativity, and in particular, corporations who use patents and trademarks or trade in copyrighted creativity. There may be conflicts of interest between intellectual

⁴⁹ According to the historian Eric Hobsbawm: [Invented traditions are] “traditions” actually invented, constructed and formally instituted and those emerging in a less easily traceable manner within a brief and dateable period—a matter of a few years perhaps

“Invented tradition” is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past However, insofar as there is such reference to a historic past, the peculiarity of “invented” traditions is that the continuity with it is largely factitious.

See Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1–2 (Eric Hobsbawm and Terence Ranger eds., 1983).

⁵⁰ “Imagined communities” is a phrase coined by Benedict Anderson in the context of nationalism. See Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* 5–7 (2d ed., 1991).

⁵¹ See WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Panel Report, WTO Doc. WT/DS152/R, at 324.

property generators and these other right holders. In addition, the end-consumers of intellectual property – essentially society as a whole – are influenced by the balance of incentives and costs that is built upon the grant of exclusive rights in intellectual property.

As for cultural diversity, the nascent system of international law embarked upon in the CCD is a classical state-to-state system, but the "indirect effect" of the convention is to empower the stakeholders of cultural diversity, that is the people who create culture and the communities who benefit from it.

Thus, in any potential conflict in these areas, an initial problem to be understood is the multitude of different right holders and stakeholders involved.

3. CONCLUSIONS

International trade law has incorporated agreements on intellectual property law, but has no general cultural exception; international intellectual property law has no explicit reference to cultural diversity; and international cultural diversity law has no operative reference to intellectual property,⁵² treading softly when it deals with issues that may impact upon international trade. Having surveyed the significant conceptual differences that underlie these three areas of international law and social regulation, it is perhaps not surprising that what has emerged so far is such a non-integrated, indeed, fragmented construction of substantive law.

'Fragmented' need not, however, mean 'conflictual' in the legal sense. As noted at the outset, there are legal techniques for resolving potential clashes between different areas of law. Indeed, conflict rules are probably the first thing that a lawyer thinks of when considering the topic of this article. If disputes emerge regarding the role of the CCD in the WTO, or the role played by the TRIPS in the CCD, we will no doubt see these techniques enter into action. Normative hierarchies, procedural rules of jurisdiction, textual interpretations – all these will permit the judicial decision-makers to reach a legally sound decision.

The analysis in this article suggests, however, that this type of resolution, while

⁵² Walking through the drafts that led to the CDD, one sees how gradually all reference to the relationship to intellectual property rights was whittled away, until all that is left in the final text is one preambular reference.

maintaining the formal peace between different fields of law, is nevertheless defective, in that it will not address the underlying substantive conflicts.

Upon its adoption, the CCD was hailed by some pundits as an "anti-globalization" treaty. Surely this type of statement reflects a profound misunderstanding of the cultural aspects of economic globalization. As we have seen, international trade and indeed intellectual property protection are in many senses not only a complement to cultural diversity, but a necessary component in its promotion and protection. They are necessary for the type of intercultural joy that Tagore wrote of.

There are, however, areas of discord. What emerges from the above analysis is that the foundational concepts of trade regulation, intellectual property protection and cultural diversity are so far removed from each other, in their perceptions of basic ideas such as culture, markets and rights, that substantive conflict is inevitable, if not upon the surface, then at a deeper level. That in the exceptional circumstances of overt conflict, a lawyerly solution may be found, is no remedy for the potentially disruptive – or at least non-constructive – effects of the parallel existence of such inherently different normative regulatory systems.

To tie these two threads together – that of conflict and that of complementarity – the inner tensions of cultural diversity and its relationship(s) with trade regulation and intellectual property protection are far from being effectively and integratively regulated in international law today. This is not to detract from the considerable achievement of the adoption of the CCD, but merely to say that its entry into force should be considered as the start of the journey, not its end.