

The UNESCO Cultural Diversity Convention and the WTO Conflict of Laws as an Analytical Perspective *

Shiho Kato

I. Introduction

This paper aims to examine the potential role of conflict of laws, or private international law,⁽¹⁾ in coordinating the relation among different treaties in public international law. In particular, it focuses on the conflict of rules and principles⁽²⁾ between WTO law and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter the Cultural Diversity Convention, or the CDC⁽³⁾).

Under the General Agreement on Tariffs and Trade (GATT)/WTO system,

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- (1) In this article, the notion of conflict of laws is used as meaning the body of law that deals with conflict of domestic laws in case of a dispute over legal relationships which are connected to more than one legal order.
- (2) In this article, the notion “conflict of rules and principles” is used as meaning “a situation where two rules or principles suggest different ways of dealing with a problem.” See Report of the Work of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, A/CN.4/L.682, 18 July 2006 [hereinafter referred to as “Fragmentation Report”], para. 25, *available at* <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>.
- (3) See <<https://en.unesco.org/creativity/convention>>.

nation-states have pursued a free-trade policy for goods and services beyond borders. Cultural goods and services, such as movies, television programs, and so forth, are not the exception.⁽⁴⁾ With such cultural exchange beyond borders, people have been able to access and enjoy foreign cultural goods and services. Free trade of cultural goods and services has thus contributed to a deeper understanding between people beyond borders. In other words, historically and even nowadays, trade beyond borders has been a precondition for cultural diversity.⁽⁵⁾

However, there has also been tension between trade and culture. For example, it is known that some states, facing the overwhelming dominance of the American film industry since the 1920s, introduced a so-called screen quota system requiring certain screening days and/or theaters for their domestic films.⁽⁶⁾ While this system was adopted to protect and cultivate domestic film industries, the United States criticized it from a commercial and free-trade viewpoint.⁽⁷⁾ Historically, such protective cultural policies—such as local content requests, import bans of foreign cultural goods and services, tax privileges, or subsidies for local cultural goods and services—have caused some international trade disputes in the audiovisual industry and the publication industry.⁽⁸⁾ This “trade and culture” conflict has become one of the topics

(4) As a recent example, the Government of Japan has adopted a new initiative, called “Cool Japan Initiative,” to promote an oversea expansion of Japanese cultural contents, such as animations, manga, characters, games and so-forth. See Japanese Cabinet Office, Cool Japan Strategy, <https://www.cao.go.jp/cool_japan/english/index-e.html>.

(5) Michael Hahn, A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law, *Journal of International Economic Law*, Vol. 9, No. 3 (2006), p. 515, p. 520.

(6) See *id.* p. 522. See also, Sungeun Shim, Eizō Media no Kokusaika: Niti/Bei/Ei no Seisaku Hikaku wo Chūshin nishite [The internationalization of audiovisual media: a comparison of the policies in Japan, the United States, and the United Kingdom], *NHK Hōsō Bunka Kenkyū Nenpō* [Yearbook of NHK Broadcasting Culture Research], No. 51, p. 105 (2007), p. 113.

(7) See Shim, *ibid.*

during the GATT's multilateral trade negotiation, the Uruguay Round.

With this background, the General Conference of the UNESCO adopted the Cultural Diversity Convention in 2005.⁽⁹⁾ The creation of the CDC, however, has generated a risk of conflict between its rules and principles and those of WTO law. This conflict of rules and principles in different treaty systems, sometimes called a “conflict of regimes,” is a general problem in modern public international law, which is due to the functionalization or differentiation of the international law system, generally referred to as the phenomenon of “fragmentation of international law.”⁽¹⁰⁾

The Study Group of the International Law Commission on Fragmentation of International Law published a seminal report, generally called the *Fragmentation Report*,⁽¹¹⁾ which mainly concluded that there is a limitation of traditional principles in public international law, such as the principles of *lex specialis* or *lex posterior*, to coordinate a conflict of regimes in public international law.⁽¹²⁾ The report thus suggests that much attention should be paid to searching for new methods to solve conflicts of norms among different international treaties.⁽¹³⁾

In this context, while there have been several discussions in public international law doctrine on the topic, it is noteworthy that recent literature has paid attention to the conflict of laws doctrine to find a solution to the conflict of treaties in public international law.⁽¹⁴⁾ Furthermore, a recent academic work adopts some approaches in the conflict of laws doctrine to search for a more promising solution to

(8) Takao Suami, *Bōeki to Bunka* [Trade and Culture], in Akira Kotera (ed.), *Tenkanki no WTO: Hi-Bōeki teki Kanshin Jikō no Bunseki* [WTO at the crossroads: An Analysis of Non-Trade Issue Linkages], (Tōyo Keizai Shinpōsha, 2003) p. 229, pp. 233-238.

(9) See, in *II*.

(10) See generally, *Fragmentation Report*, *supra* note 2.

(11) *Ibid.*

(12) *Id.* para. 488.

(13) *Id.* para. 493.

the conflict of rules and principles between WTO law and the CDC. Hence, it seems appropriate to further contribute to these recent discussions on the side of the conflict of laws doctrine. To this end, the WTO–CDC conflict could provide a good but less examined example. Against this background, this paper addresses the matter from a conflict of laws perspective.

In the following sections, the paper first provides an overview of the CDC as well as its relationship with the WTO (II.). It then briefly describes a few doctrines that focus on conflict-of-laws principles and methods for solving conflict of treaties in public international law (III.). Lastly, it argues that a conflict of laws perspective may be useful and shows how it could help in dealing with norm conflicts in international law (IV.).

II. The Cultural Diversity Convention

In this section, we first illustrate how the “trade and culture debate” *within* the WTO has developed into the creation of a new convention *outside* it, that is, in UNESCO (A.). Then, we provide an overview of the basic structure of the CDC and illustrate its potential conflicts with WTO law (B.).

A. Background: From the WTO to UNESCO ⁽¹⁵⁾

Trade and culture conflicts intensified especially around the end of the

(14) See, e.g., Andreas Fischer-Lescano & Gunther Teubner, Regime Collisions: The Vain Search for Legal Unity in the Fragmentation in International Law, *Michigan Journal of International Law*, Vol. 25, Issue 4 (2004), p. 999. Yet, for an earlier work, see C. Wilfred Jenks, The Conflict of Law-Making Treaties, *British Year Book of International Law* (1953), p. 401. See also, in *III*.

(15) For a detailed explanation and analysis of these history written in Japanese, see Toshiyuki Kono, Bunka Tayōsei to Kokusai-Hō (1)(2) [Cultural Diversity and International Law (1)(2)], *Minshō-Hō Zasshi [Journal of Civil and Commercial Law]*, vol. 135, No. 1, p. 58 and No. 2, 287 (2006).

1990s.⁽¹⁶⁾ In fact, some mostly European states, such as France and Canada, strongly but unsuccessfully demanded the insertion of a cultural-exception clause in WTO law during the Uruguay Round.⁽¹⁷⁾ After this failure, the cultural-exception proponents attempted to shift the forum for negotiation and rulemaking to another culture-oriented international institution—UNESCO.⁽¹⁸⁾

There are two important movements behind this shift, both on the part of UNESCO and on the part of the states advocating a cultural exception. On the one hand, around the beginning of the 1990s, an initiative led by UNESCO as well as the United Nations sought to pursue further acknowledgment of the cultural dimension of development.⁽¹⁹⁾ In 1995, the World Commission on Culture and Development, created by UNESCO and the United Nations, published the seminal report *Our Creative Diversity*,⁽²⁰⁾ which firmly recognized the importance of culture in the development process. It is worth noting that the report, after describing culture as “the foundation of our progress and creativity,”⁽²¹⁾ states that “[t]he diversity and plurality of cultures has benefits comparable to those of bio-diversity.”⁽²²⁾ The need for efforts to preserve cultural diversity was also acknowledged at the UNESCO-sponsored Intergovernmental Conference on Cultural Policies for Development, held in Stockholm in 1998.⁽²³⁾

(16) Kono (1), *id.* p. 72.

(17) Kono (1), *id.* p. 73.

(18) See Kono (2), *supra* note 15, p. 306ff.

(19) See Mira Burri, Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects, *Diversity*, Vol.2 (2010), pp.1059-1084, p. 1063, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585139>.

(20) World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development* (1995), available at <<https://unesdoc.unesco.org/ark:/48223/pf0000101651>>.

(21) *Id.* p. 15.

(22) *Id.* p. 54.

On the other hand, the states that advocated the protection of cultures against economic globalization had been searching for another forum to create an international instrument on cultural policies. For example, after the 1998 Stockholm Conference and other follow-up conferences, the International Network on Cultural Policy (INCP) was created as an informal forum where national cultural ministers can discuss cultural policy issues.⁽²⁴⁾ The INCP's agenda had been set by a small group of states composed of the cultural-exception proponents during the Uruguay Round.⁽²⁵⁾ In 2003, after several internal meetings and discussions, the working group on cultural diversity and globalization in the INCP contacted the director general of UNESCO to persuade the organization to draft an international convention on cultural diversity on its agenda.⁽²⁶⁾

This way, combined with UNESCO's notion of cultural pluralism, the trade and culture debate was intentionally reconceptualized as a more positive discourse of the protection and promotion of cultural diversity.⁽²⁷⁾ In the end, shortly after the adoption of the 2001 UNESCO Universal Declaration on Cultural Diversity,⁽²⁸⁾ the UNESCO General Conference made a resolution of drawing up an international convention on cultural diversity in 2003.⁽²⁹⁾ After only two years of drafting, the CDC was adopted by 148 states on October 20, 2005, at the 33rd session of the UNESCO

(23) *Intergovernmental Conference on Cultural Policies for Development, Stockholm, 1998, final report*, CLT.98/CONF.210/5, CLT.98/CONF.210/CLD.19, available at <<https://unesdoc.unesco.org/ark:/48223/pf0000113935>>. See also, Burri, *supra* note 19, p. 1063.

(24) See Kono (2), *supra* note 15, p. 306; Burri, *supra* note 19, p. 1063.

(25) They were Canada, Croatia, France, Greece, Mexico, Senegal, South Africa, Sweden and Switzerland. See Kono (2), *id.* p. 307; Burri, *id.* pp. 1063-1064.

(26) See Kono (2), *id.* p. 308.

(27) See Burri, *supra* note 19, p. 1063.

(28) See <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

General Conference, and entered into force on March 18, 2007.⁽³⁰⁾ As of September 2019, the parties to the convention include 145 states and the EU.⁽³¹⁾

B. Overview of the CDC

1. Basic Rules

First, the objective of the CDC is “to protect and promote the diversity of cultural expressions.”⁽³²⁾ The convention “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.”⁽³³⁾

The main article on the CDC’s substantive rules is Art. 6, prescribing that parties to the CDC, reaffirming “their sovereign rights”⁽³⁴⁾ to do so, “may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.”⁽³⁵⁾ Art. 6, para. 2, of the CDC enumerates, but is not limited to,

(29) Resolution 32 C/34 of the General Conference, 32nd session, Paris, on 17 October 2003, Desirability of Drawing up an International Standard-setting Instrument on Cultural Diversity, available at <<https://unesdoc.unesco.org/ark:/48223/pf0000133171.page=70>>.

(30) Burri, *supra* note 19, p. 1064.

(31) For a list of the parties, see <<https://en.unesco.org/creativity/convention>>. Japan as well as the US are not the parties to the convention.

(32) Art. 1(a) of the CDC. “Cultural expressions” are defined as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content” (Art. 4(3) of the CDC).

(33) Art. 3 of the CDC. “Cultural policies and measures” are defined as follows: “those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services” (Art. 4(6) of the CDC).

(34) Art. 5(1) of the CDC.

(35) Art. 6(1) of the CDC.

the measures that the CDC’s contracting parties may adopt. For example, these measures include “(b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution, and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services” ; “(d) measures aimed at providing public financial assistance” ; and others.

Meanwhile, CDC’s Art. 8 provides that, where “cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding,”⁽³⁶⁾ each party “may take all appropriate measures to protect and preserve cultural expressions.”⁽³⁷⁾

In relation to WTO law, certain cultural measures in accordance with Arts. 6 and 8 risk violating, for example, the national treatment obligation under WTO law.⁽³⁸⁾ Pulkowski⁽³⁹⁾ states that, where a CDC party takes preferential treatment for domestic cultural goods and services as opposed to foreign ones—such as subsidies, tax exemptions, market access restrictions, and local content requests—such treatment might be incompatible with the national treatment obligation in WTO law.⁽⁴⁰⁾ In addition to Art. 6, Pulkowski indicates that certain urgent local market restrictions in accordance with Art. 8 might also be contrary to the national treatment obligation.⁽⁴¹⁾

2. *A Conflict Clause: Article 20*

It should be noted that the CDC drafters were well aware of its close relations with

(36) Art. 8(1) of the CDC.

(37) Art. 8(2) of the CDC.

(38) See also, in *III.A.1*.

(39) For an overview on his argument, see, in *III.A*.

(40) Pulkowski, *infra* note 54, p. 162ff.

(41) *Ibid*.

other international instruments.⁽⁴²⁾ Therefore, the CDC is equipped with a provision that manages possible conflicts between its norms and those of other treaties at the levels of interpretation, the application of norms, and treaty-making. This so-called conflict clause⁽⁴³⁾ provides,

Art. 20 - Relationship to other treaties: mutual supportiveness, complementarity and non-subordination

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - a. they shall foster mutual supportiveness between this convention and the other treaties to which they are parties; and
 - b. when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Art. 20 employs two relatively new concepts related to its relation with other treaties: nonsubordination (Art. 20, para. 1, second sentence) and mutual

(42) For its drafting history, see Peter-Tobias Stoll, Article 20, in Sabine von Schorlemer & Peter-Tobias Stoll (eds.), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer, 2012), pp. 525-529.

(43) For a typology of conflict of clauses, see generally, Fragmentation Report, *supra* note 2, p. 135ff.

supportiveness (Art. 20, para. 1, lit. a).⁽⁴⁴⁾ These have appeared in the preambles of some environmental agreements.⁽⁴⁵⁾ Peter-Tobias Stoll concludes that, through the concept of nonsubordination, the CDC makes “a plea not to give any automatic preference to the norms of another international treaty vis-à-vis the norms of the CDC.”⁽⁴⁶⁾ Rather, by referring to the concept of mutual supportiveness, the CDC pursues “a state of affairs where the operation of the two different agreements is geared in a way that secures maximum attainment of the aims of both agreements.”⁽⁴⁷⁾

As a “counterbalance to para 1,”⁽⁴⁸⁾ however, the second paragraph of Art. 20 explicitly expresses the idea of not modifying the parties’ rights and obligations under other treaties. Stoll argues that, since such limits depend on “the textual limits of interpretation of rights and obligations of the other agreements,” “para. 2 allows the CDC and its interpretation to impact rights and obligations of other treaties within the proper limits of the latter’s interpretation.”⁽⁴⁹⁾

As we will discuss later,⁽⁵⁰⁾ the problem of Art. 20 lies in its ambiguity and indecisiveness as a conflict clause—it is not clear how the provision can be applied to concrete situations. Some commentators have criticized it for its ambivalent nature of mutual supportiveness (Art. 20(1)) and no modification (Art. 20(2)).⁽⁵¹⁾ In fact, as Joost Pauwelyn puts it, the provision “goes both ways.”⁽⁵²⁾

(44) Stoll, *supra* note 42, p.531.

(45) Examples cover the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (*adopted*, 10 September 1998); the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (*adopted*, 29 January 2000); the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) (*adopted*, 3 November 2001). See also, *infra* note 141.

(46) Stoll, *supra* note 42, p. 532.

(47) *Ibid.*

(48) See *id.* p. 540.

(49) *Id.* p. 542.

(50) See, in *III.2., IV.B.1.*

III. WTO-CDC Conflict Management

Indeed, there have been several arguments on the conflict management between WTO law and the CDC.⁽⁵³⁾ Recently, however, one scholar argued for a new perspective that the conflict of laws doctrine can help international law manage the WTO-CDC conflict. This section summarizes this argument.

A. Pulkowski's Analysis of the WTO-CDC Conflict

In his book *The Law and Politics of International Regime Conflict*, Dirk Pulkowski thoroughly investigates regime conflicts in public international law,⁽⁵⁴⁾ focusing on the conflict among WTO law, the CDC, and human rights law. After analyzing the nature or characteristics of regime conflicts⁽⁵⁵⁾ as well as reviewing the doctrinal debate on whether international law is unitary or plural,⁽⁵⁶⁾ Pulkowski argues that, while “‘strong’ conceptions of legal unity of the international legal order have failed,”⁽⁵⁷⁾ a certain degree of coordination between different regimes is made possible because of “the

(51) See, e.g., Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press, 2014), p. 172 (citing, Serge Regourd, Le projet de Convention UNESCO sur la diversité culturelle: vers une victoire à la Pyrrhus, *Légipress*, No. 226 (2005), p. 116).

(52) Joost Pauwelyn, The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making?, *ASIL Insights*, Vol. 9, Issue 35 (2005), available at <<https://www.asil.org/insights/volume/9/issue/35/unesco-convention-cultural-diversity-and-wto-diversity-international-law>>.

(53) See, e.g., Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007).

(54) Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press, 2014), p. 20.

(55) See Pulkowski, *id.* Chapters 2-4.

(56) See, *id.* Chapter 5.

(57) *Id.* p. 237.

shared discourse rules of international law.”⁽⁵⁸⁾

More specifically, Pulkowski claims that international law has two techniques to manage regime conflicts: interpretation (1.) and legal priority rules (2.). The conflict of laws doctrine is relied upon where conflict is unavoidable by either interpretation or priority rule (3.).

1. Harmonizing Interpretation⁽⁵⁹⁾

Pulkowski argues that certain rule conflicts between different regimes can be prevented through techniques of interpretation.⁽⁶⁰⁾ First, he examines some rules in both regimes that are amenable to harmonizing interpretation. Second, he seeks to identify the extent to which such interpretation is possible from a value perspective.

a) Rules Amenable to Harmonizing Interpretation

In relation to the WTO regime, Pulkowski suggests a possible expansive

(58) *Id.* p. 20, 238-239. According to Pulkowski, such rules are shared among various international regimes, and thus function as “a grammar for communicative regimes, which is shared by all treaty-based international regimes” (p. 238). In particular, rather than presenting the grammar in a systematic way, he focuses on three relevant elements of that grammar: 1) doctrinal borrowing of legal concepts; 2) recourse to general international law; 3) common rules of treaty interpretation (pp. 244-250).

(59) According to Pulkowski, the idea of harmonizing interpretation in international law, means “the notion that one legal rule must be interpreted ‘in the light of’ another rule.” *Id.* pp. 273.

(60) *Id.* p. 20, 237. He raises four key techniques of interpretation provided by international law: *i*) interpretation of terms “in accordance with the ordinary meaning given to the terms” (Article 31(1) of the Vienna Convention on the Law of Treaties [VCLT]); *ii*) taking into account of “any relevant rules of international law” (Article 31(3)(c) of the VCLT); *iii*) general principles of harmonizing interpretation, such as the rules developed by international courts and tribunals; *iv*) principle of default deference, which means “international adjudicators should approach case law from other regimes with an attitude of ‘default deference’” (p. 296). *Id.* p. 273, pp. 284-297.

interpretation of Art. XX(f) of the GATT.⁽⁶¹⁾ While the provision was originally drafted to cover tangible cultural property, he argues that an evolutionary interpretation⁽⁶²⁾ could include other intangible cultural creations.⁽⁶³⁾ Another suggestion is a culture-conscious interpretation of the concept of “like product” (Art. III:2 and Art. III:4), which is related to the national treatment obligation.⁽⁶⁴⁾ Here, Pulkowski claims that the sameness of physical properties is not decisive for the determination of likeness between domestic and foreign cultural goods.⁽⁶⁵⁾ Rather, he states that certain legal measures favorable to films, books, and magazines on local history or cultural life may not constitute a breach of the national treatment obligation because such cultural goods present unique characteristics due to their local nature.⁽⁶⁶⁾

In relation to the CDC, Pulkowski argues that the convention in fact limits itself with respect to its scope of application. For example, as Art. 4(6) of the CDC⁽⁶⁷⁾ defines “cultural policies and measures” as those “*designed to have a direct effect on cultural expressions,*” he suspects that “measures that have an accidental or indirect impact” on cultural expressions would not be covered by the CDC.⁽⁶⁸⁾ Pulkowski thus

(61) Art. XX of the GATT provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:……(f) imposed for the protection of national treasures of artistic, historic or archaeological value.”

(62) With this respect, he refers to the interpretation of “natural resources” under Art. XX(g) by the Appellate Body, which construed the word as covering not only oil, gas, coal or minerals, but also living organisms such as fish and sea turtles (See *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998: VII, 2755, para. 130). *Id.* p. 299.

(63) *Ibid.*

(64) *Id.* pp. 300-301.

(65) *Id.* p. 301.

(66) *Ibid.* Pulkowski also examines possible interpretations under the GATS and the SMG Agreement. See *id.* pp. 301-303.

(67) See *supra* note 33.

emphasizes that the CDC, with such a “built-in limitation,” intends to “cover only measures whose primary purpose is to produce direct effects on opportunities for cultural expression.”⁽⁶⁹⁾

b) Searching for a Shared Goal among the Regimes

After his rule-by-rule analysis, Pulkowski attempts to find the condition of such coordination between WTO law and the CDC at the interpretation level. He states that harmonizing interpretation is likely to succeed in practice only if an interpretation is consistent with the common goals of both regimes.⁽⁷⁰⁾ With this regard, he proposes the concept of “individual cultural liberty”⁽⁷¹⁾ as the CDC’s key goal, which is consistent with the WTO’s liberal trade regime.⁽⁷²⁾ Pulkowski argues that the concept of cultural individual liberty is compatible with international trade law for two reasons. First, the free choice of cultural expression that people like is consistent with trade law’s emphasis on consumer preferences.⁽⁷³⁾ Second, promoting individual cultural liberty is less likely to rely on group-based or country-based distinctions, which are problematic under WTO law.⁽⁷⁴⁾

2. Priority Rules

Pulkowski claims that, while it is possible to prevent certain rule conflicts at the level

(68) Pulkowski, *supra* note 54, p. 304.

(69) *Ibid.*

(70) *Id.* p. 305.

(71) More specifically, it seems that Pulkowski refers to the concept as meaning not impeding “the individual freedom of individuals to choose their cultural affiliations and express their cultural identities” (p. 311).

(72) *Id.* pp. 305-316.

(73) *Id.* p. 315.

(74) *Id.* p. 316.

of interpretation, occasionally, no rational interpretation may be conceivable to reconcile the rules of different regimes.⁽⁷⁵⁾ Yet even in such a situation, some priority rules provided by international law could help the interpreter and decision-maker to manage conflict among treaties. Here, Pulkowski argues that the nonsubordination clause of the CDC, Art. 20, can solve rule conflicts to a considerable extent.⁽⁷⁶⁾

Indeed, Pulkowski admits that Art. 20 appears to be “an ‘agreement to disagree’, rather than an operational priority rule.”⁽⁷⁷⁾ However, he proposes another interpretation, which, according to him, can confer “the meaning of, and preserves a meaningful scope of application for, all paragraphs of Article 20”⁽⁷⁸⁾: while Art. 20(2) subordinates the CDC to preexisting treaty obligations, Art. 20(1), concerned with future treaty obligations, stipulates that the CDC shall not be subordinated to future international treaties.⁽⁷⁹⁾

In other words, the CDC is inferior to any treaty to which a state is already a party when the CDC was ratified pursuant to Art. 20(2).⁽⁸⁰⁾ By contrast, “states that accede to the WTO . . . after they become parties to the CDC could find themselves in a conflict situation which is not resolved by the priority rule of Article 20(2) of the CDC.”⁽⁸¹⁾ These states⁽⁸²⁾ need to search for another solution to manage the rule conflicts that are not reconciled by either interpretation or the priority rule (Art. 20 of

(75) *Id.* p. 317.

(76) *Id.* pp. 319-322.

(77) *Id.* p. 336.

(78) *Id.* p. 337. To reach that interpretation, he refers to a proposed amendment to (now) Art. 20 of the CDC submitted by the European Broadcasting Union (EBU). See European Broadcasting Union, *EBU position Paper on Draft UNESCO Convention on Cultural Diversity*, 18 May 2005, DAJ/MW/jev/jmc, available at <<https://www.ebu.ch/publications/position-papers/2005/unesco-convention-on-cultural-di>>.

(79) *Id.* pp. 337-338.

(80) *Id.* p. 341.

(81) *Ibid.*

the CDC).

3. *Recourse to Conflict of Laws Doctrine*

In cases where priority rules do not clearly address rule conflict, Pulkowski argues that the transposition of the principles in conflict of laws is more promising than relying on the general and traditional priority rules—the *lex specialis* and *lex posterior* maxims. As WTO law and the CDC cannot be considered as pertaining to the same subject matter, these maxims will not be available for managing rule conflicts among different regimes.⁽⁸³⁾ Referring to the analyses by Pauwelyn and Michaels,⁽⁸⁴⁾ Pulkowski states that “regime conflicts have much in common with traditional jurisdictional conflicts between national legal orders.”⁽⁸⁵⁾ In short, by borrowing Michaels and Pauwelyn’s concept of “intra-systemic/inter-systemic conflicts,”⁽⁸⁶⁾ he characterizes regime conflicts as similar with “‘inter-systemic conflicts’ more than ‘intra-systemic conflicts.’”⁽⁸⁷⁾

Here, Pulkowski turns to the conflict of laws doctrine and examines several

(82) As of the end of September 2019, there seems to be five states that ratified the CDC before acceding to the WTO (Afghanistan, Lao People’s Democratic Republic, Montenegro, Seychelles and Tajikistan) and some contracting parties to the CDC are currently in the process of accession to the WTO. For a list of the parties to the CDC, see <<https://en.unesco.org/creativity/convention/parties>>, and for the WTO, see <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

(83) Pulkowski, *supra* note 54, p. 329.

(84) See Ralf Michaels & Joost Pauwelyn, Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law, *Duke Journal of Comparative & International Law*, Vol. 22, No. 3 (2012), p. 349, available at <<https://scholarship.law.duke.edu/djcil/vol22/iss3/3>>. For an earlier extensive analysis on this issue by one of the authors, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003).

(85) Pulkowski, *supra* note 54, p. 329.

choice-of-law approaches,⁽⁸⁸⁾ most of which have been proposed by academic writers in the United States in the course of the so-called American choice-of-law revolution.⁽⁸⁹⁾ In particular, he cites Brainerd Currie’s “governmental interest approach,”⁽⁹⁰⁾ which can be deemed the most influential approach in this context.⁽⁹¹⁾ In essence, on the basic premise that “states have an interest in the outcome of multiple state disputes between private persons”⁽⁹²⁾ and in the rejection of the traditional continental style of preestablished choice-of-law rules (antirulism), Currie’s approach requires the judge to weigh conflicting state interests in each case to choose the applicable law to the dispute at hand.⁽⁹³⁾

Pulkowski, however, acknowledges the criticisms to Currie’s approach, especially its preference for parochialism or forum law (*lex fori*),⁽⁹⁴⁾ which leads to frequent applications of forum law in practice. He thus relies on another but slightly modified version of the interest analysis approach, called the “comparative impairment” test formulated by William Baxter.⁽⁹⁵⁾ Rejecting Currie’s *lex forism*,

(86) According to Michales and Pauwelyn, the former refers to the conflict of different norms within a system of international law, while the latter means the conflict between different systems of international law. See Michaels and Pauwelyn, *supra* note 84, pp. 350-351.

(87) Pulkowski, *supra* note 54,

(88) *Id.* pp. 331-334.

(89) In general, this refers to a movement in the US in which academic authors criticized the rigidity and value-neutrality of the traditional choice-of-law system which is originated in the nineteenth century, and proposed more flexible choice-of-law approaches that pay much attention to the policies or state interests behind private laws. For an overview of the theories proposed in the choice-of-law revolution, see generally, Symeon C. Symeonides, *Choice of Laws* (Oxford University Press, 2016), p. 93ff.

(90) Pulkowski, *supra* note 54, p. 332.

(91) For his influence, see Symeonides, *supra* note 89, pp. 103-104.

(92) *Id.* p. 105.

(93) In more detail, see *id.* pp. 97-103.

(94) Pulkowski, *supra* note 54, pp. 332-333.

Baxter suggests that the judge should not weigh the interests but rather compare “the loss that would result from subordinating the interests of one state [with] those of another state.”⁽⁹⁶⁾ In short, under Baxter’s comparative impairment test, “the judge would apply the law of the state whose interests would be most impaired if its law were not applied.”⁽⁹⁷⁾

Pulkowski thus finds Baxter’s approach as an appropriate tool for managing regime conflicts.⁽⁹⁸⁾ For Pulkowski, the approach can help identify “the particular regime whose authority would suffer most severely,” thus serving the purpose of regime conflict management: “to avoid as much as possible sacrifices of legal authority among the regimes involved.”⁽⁹⁹⁾ He argues that, while it may be sometimes difficult to detect which regime’s interests are most impaired, the comparative impairment test remains more promising than other alternatives. For example, as he mentions, “the resolution of the conflict could be left to the unfettered policy judgment of the interpreter,” but it “would likely result in resolution in favour of the *lex fori* in all but the most exceptional case.”⁽¹⁰⁰⁾

In his final analysis, Pulkowski examines how a legal interpreter would rely on the comparative impairment test to choose one of the two regimes—the WTO or the CDC.⁽¹⁰¹⁾ He raises two hypothetical cultural measures and examines which regime would prevail in each situation:

(95) William F. Baxter, Choice of Law and the Federal System, *Stanford Law Review*, Vol. 16, No. 1 (1963), p. 1.

(96) Symeonides, *supra* note 89, pp. 106.

(97) *Ibid.*

(98) Pulkowski, *supra* note 54, p. 334.

(99) *Ibid.*

(100) *Id.* pp. 334-335.

(101) *Id.* p. 341.

- *Case 1*: “[A] start-up tax-break for young producers in a developing country which is reserved to nationals and contingent upon telling ‘local stories.’”⁽¹⁰²⁾ He claims that, while such subsidy is “potentially prohibited under Article III:2 and 4 of the GATT,” preference would be given to the CDC. On the one hand, such limited subsidy would not likely damage “trade flows and market access opportunities for foreign-produced in any significant way.”⁽¹⁰³⁾ On the other hand, such measure could be greatly helpful in achieving the CDC’s goal to foster “wide and balanced cultural exchanges” (Art. 1(c)) by strengthening the cultural industries in developing countries (Art. 14(a)(a)).
- *Case 2*: “[A] large-scale tax shelter for publishing companies which commit to print all books and magazines ‘at home.’”⁽¹⁰⁴⁾ Pulkowski argues that such tax privilege based on the mere location of the country of publication does not “create any positive impetus for the diversity of cultural expressions available in that country.”⁽¹⁰⁵⁾ Rather, such measure would be “a blatant contravention of the national treatment obligation”⁽¹⁰⁶⁾ under Arts. III:2 and 4 of the GATT. As the WTO’s objectives would be severely impaired if its rules were not applied, the WTO should prevail over the CDC in this situation.

B. Summary

As we have observed, Pulkowski argues that, after contending that rule conflicts can

(102) *Ibid.* (emphasis added)

(103) *Ibid.*

(104) *Ibid.* (emphasis added)

(105) *Id.* p. 342.

(106) *Id.* pp. 341-342.

be avoided to some extent at the level of interpretation, Art. 20 of the CDC could work well as a priority rule depending on the time factor. Only where the priority rule cannot work—that is, in relation to a state that became party to the CDC before WTO accession—Pulkowski refers to the conflict of laws doctrine. More specifically, he relies on the balancing interest approach, that is, Baxter’s comparative impairment test in the context of the American choice-of-law revolution. Yet several questions remain:

- i) General questions:* Would conflict of norms in different regimes truly resemble conflict of domestic private laws? Why did Pulkowski refer only to American theories and ignored the traditional, rule-based, and value-neutral European or continental conflict of laws system?⁽¹⁰⁷⁾ As to the method, would the comparative impairment test be appropriate? Is there any other notion or technique we can borrow from the conflict of laws doctrine?⁽¹⁰⁸⁾
- ii) Questions specific to the WTO–CDC conflict:* Could Art. 20 of the CDC be interpreted in the way that Pulkowski proposed?⁽¹⁰⁹⁾

With these questions in mind, we will analyze the WTO–CDC conflict from a conflict of laws perspective in the last section of the paper.

IV. An Analysis from the Conflict-of-law Perspective

This section examines how the conflict of laws doctrine could contribute to the management of the regime conflict between the WTO and the CDC. There are two steps in this examination: the first is to analyze the nature of the WTO–CDC conflict

(107) See, in *IV.A.*

(108) See, in *IV.A.*

(109) See, in *IV.B.1.*

from a conflict of law perspective (A.), and the second is to consider issues specific to the WTO–CDC conflict (B.).

A. The Nature of the WTO–CDC Conflict

1. *The WTO–CDC Conflict as an Inter-systemic Conflict*

As we have mentioned, Pulkowski identifies the nature of the WTO–CDC conflict as inter-systemic. In the research cited by Pulkowski, Michaels and Pauwelyn argue that conflicts between branches of international law would be seen as inter-systemic.⁽¹¹⁰⁾ They raise two reasons: First, in conflicts between sub-branches of international law, there is no uniform legislative intent on which a resolution could be based.⁽¹¹¹⁾ Second, there is no neutral or mutually accepted standard that could balance different values between different systems of international law.⁽¹¹²⁾

This analysis holds true with respect to the relation between the WTO and the CDC. Indeed, as illustrated in the history of the CDC,⁽¹¹³⁾ the convention was created as a tactical and political project against—yet with a view to influence—the liberal trade regime such as the WTO system. This inherent political tension between the WTO and the CDC indicates that their conflict cannot avoid being classified as inter-systemic.⁽¹¹⁴⁾

2. *Inter-systemic Conflict as Analogous to Regulatory Law Conflict*

As we have observed,⁽¹¹⁵⁾ Pulkowski claims that inter-systemic conflict resembles

(110) Michaels and Pauwelyn, *supra* note 84, p. 367.

(111) *Ibid.*

(112) *Id.* pp. 367-368.

(113) See, in *II.A.*

(114) For an analysis on regime interaction as political contestation, see Martti Koskenniemi, Hegemonic Regimes, in Margaret A. Yong (ed.), *Regime Interaction in International Law* (Cambridge University Press, 2012), p. 305.

domestic law conflict. Here, the nature of domestic laws must be further clarified.

In the traditional continental system of conflict of laws, private law is regarded as being apolitical in nature,⁽¹¹⁶⁾ and its spatial scope of application is determined by another body of law, that is, conflict of laws (its choice-of-law rules). By contrast, public law or regulatory law (e.g., competition law) has its own purpose and policy to realize in a public sphere, and thus, its spatial scope of application is considered to be decided by itself. In this respect, norms in international treaty seem to be closer to regulatory law than to private law since international treaties should have their own purpose and policy to serve in a certain realm of international society.

This resemblance with regulatory conflicts suggests that Pulkowski's focus on the American choice-of-law revolution is accurate,⁽¹¹⁷⁾ as the interest analysis approaches proposed in the United States share the premise that states have interests even in their private laws.⁽¹¹⁸⁾ This is an acknowledgment of the regulatory effect of private law,⁽¹¹⁹⁾ which is not necessarily shared in the traditional continental system of conflict of laws. As we have noted, Pulkowski further relies on the comparative impairment approach. However, two comments on this point seem appropriate.

First, while it is true that the comparative impairment test may be an attractive

(115) See, in *III.A.3*.

(116) For a more detailed and historical explanation, see, e.g., Ralf Michaels, *Towards A Private International Law for Regulatory Conflicts?* 59 *Japanese Yearbook of International Law* 175 (2016), p. 179.

(117) In fact, the existing literature indicates that the American choice of laws doctrine could offer useful tools to the management of regulatory law. See, e.g., Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, *Cornell International Law Journal*, Vol. 47 (2014), p. 63, available at <<https://ssrn.com/abstract=2335338>>. (proposing a conflict of laws approach to managing financial regulations with a detailed analysis on mainly the American conflict laws doctrine).

(118) See Symeonides, *supra* note 89, p. 105.

(119) Michaels, *supra* note 116, p. 183.

approach for regulatory conflicts,⁽¹²⁰⁾ the American conflict-of-laws doctrine has another analytically important input: the distinction between “false” and “true” conflicts. This distinction, formulated by Currie, has been accepted beyond the interest analysis approaches in the United States.⁽¹²¹⁾ The false-conflict pattern indicates that only one of the involved states has interests in the application of its law to the case,⁽¹²²⁾ in contrast, true conflict means that more than one state is interested.⁽¹²³⁾

Currie’s solution to a false approach demands that the judge apply only the law of the interested state.⁽¹²⁴⁾ As Symeonides puts it, this solution to a false conflict could “effectuate the policies of an interested state without scarifying any policies of an uninterested state.”⁽¹²⁵⁾ This evaluation suggests that the false/true distinction may be regarded as a legal “technique”⁽¹²⁶⁾ in the conflict of laws doctrine that helps the judge and decision-maker solve regulatory conflicts. As Michaels argues, “technique is in fact necessary in order to deal with political questions precisely because the law cannot solve them in political way.”⁽¹²⁷⁾ Given the inherent political tension between

(120) See, e.g., Michaels & Pauwelyn, *supra* note 84, p. 359; Riles, *supra* note 117, p. 114.

(121) Symeonides, *supra* note 89, p. 101. Yet in addition to these, Currie proposed another pattern, called no-interest pattern or un-provided-for pattern, where no state is interested. See *id.* p. 100.

(122) *Ibid.*

(123) *Ibid.*

(124) *Id.* p. 101.

(125) *Ibid.*

(126) For an argument on the importance of technicality in conflict of laws, see Ralf Michaels, Private International Law and the Question of Universal Values, in Franco Ferrari & Diego P. Fernández Arroyo (eds.), *The Continuing Relevance of Private International Law* (Edward Elgar, 2019 forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384877>.

(127) Michaels, *supra* note 116, p. 192. See also, Ralf Michaels, Post-critical Private International Law: From Politics to Technique, in Horatia Muir Watt & Diego P. Fernández Arroyo (eds.), *Private International Law and Global Governance* (Oxford University Press, 2014), p. 54.

the WTO and the CDC, the analysis here would be insightful. To prevent the intensive and excessive politicization of conflict management, the first step must be to identify false conflicts at the level of interpretation. While Pulkowski himself argues for the avoidance of rule conflicts at this level, the distinction of false/true conflicts can offer an additional basis to his idea of harmonizing interpretation.

Second, while Pulkowski relies on the balancing of interests⁽¹²⁸⁾ to solve irreconcilable or true conflicts, this approach would depend on who the interpreter is and always involves the possibility of reaching different results.⁽¹²⁹⁾ For example, as Michaels and Pauwelyn discuss, “when the WTO balances trade against environmental protection under GATT Article XX, the environment is set up as an exception,” and “environmental measures may only trump trade liberalization rules in case they are ‘necessary’ and there is no ‘less trade restrictive alternative’ available.”⁽¹³⁰⁾ On the other hand, they continue, “[b]efore an environmental tribunal, the opposite would likely to be true.”⁽¹³¹⁾ By contrast, Pulkowski seems to propose the comparative impairment approach as a universal conflict rule for true conflicts in international law. However, it appears inevitable that, in an inter-systemic conflict, different values or perspectives inherent in each regime would individually affect the manner in which interests are weighted as well as the results. As Vadi puts it, citing a relatively recent WTO case, *China-Publication and Audiovisual Entertainment Products*,⁽¹³²⁾ the case

(128) It should be noted that even the less problematic comparative impairment test involves balancing. See Symeonides, *supra* note 89, p. 106 (stating: “inasmuch as the gravity of the loss depends on the strength and importance of each state’s interest, one cannot avoid the conclusion that comparative impairment does weigh the interests”).

(129) It seems that this structural bias could affect interpretation and application not only during the dispute resolution before tribunals of regimes, but also in an everyday operation of the treaties by national decision-makers.

(130) See Michaels & Pauwelyn, *supra* note 84, p. 368.

(131) *Ibid.*

“albeit adjudicated after the inception the CDC, does not significantly change the argumentative framework of both Panel and AB In sum ‘economic factors drive the WTO analysis.’”⁽¹³³⁾

Unfortunately, in this respect, even the most promising comparative impairment approach itself does not provide a neutral and objective guideline for balancing interests.⁽¹³⁴⁾ Solving true conflicts seems to need a more sophisticated balancing method. This can be achieved by reevaluating the existing conflict-of-laws techniques,⁽¹³⁵⁾ or perhaps it needs to be explored outside the conflict of laws doctrine, such as proportionality.⁽¹³⁶⁾ In short, it must be necessary to develop a more sophisticated conflict-of-laws approach to regulatory conflicts.⁽¹³⁷⁾

B. Specific Issues to the WTO–CDC Conflict

1. Art. 20 of the CDC

With respect to management methods, we need to first address the managing ability of Art. 20 of the CDC, the convention’s internal conflict management mechanism.

(132) WTO Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 12 August 2009; WTO Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363?AB/R, adopted 21 December 2009.

(133) Vadi, *supra* note 51, p. 195.

(134) See Symeonides, *supra* note 89, p. 106 (stating in relation to the comparative impairment approach: “[t]he question is not whether courts can or should weigh state interests, but rather how to weigh them, and how to resolve the resulting conflicts”).

(135) See Michaels, *supra* note 126.

(136) See Vadi, *supra* note 51, p. 187 (citing Rachael Craufurd Smith, *The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?*, *International Journal of Communication*, Vol. 1 (2007), p. 40-41).

(137) See Michaels, *supra* note 126, p. 191.

As we have observed, there is controversy surrounding the interpretation of Art. 20. While most commentators acknowledge its ambivalent nature, Pulkowski interprets the provision as an operational conflict rule, which focuses on the time difference between the CDC ratification and the WTO accession. Indeed, Pulkowski's reading of Art. 20 could certainly clarify the article's meaning as a conflict rule. However, his interpretation cannot be accepted for two reasons.

First, such reading would render the mutual supportiveness and nonsubordination principles (Art. 20(1)) as nonsense. As we have argued, these principles explicitly represent the CDC's inter-systemic relation with other treaties, especially WTO law. Despite his acknowledgment of the WTO–CDC conflict as inter-systemic, Pulkowski seems to commit himself to a traditional, intra-systemic view of the WTO–CDC relation with respect to the interpretation of Art. 20.

Second, his reading seems incompatible with the background of the CDC's establishment as a sort of antithesis to the WTO.⁽¹³⁸⁾ If the article provided preference to preexisting treaties, including the GATT, in a situation where many states had already become members of the WTO and the strong proponents for the CDC had found a more culturally conscious legal framework, it would be difficult to understand why the drafters formulated such a practically trade-favorable conflict clause under the CDC.

Therefore, Art. 20 of the CDC itself does not seem to function as Pulkowski expects. Two further observations should be made here.

On the one hand, as Pulkowski and others emphasize, it is true that an interpreter should not ignore the provision as a mere agreement to disagree.⁽¹³⁹⁾ The article is a text representative of an aspiration for a more coherent development of

(138) See, in *II.A.*

(139) See, e.g., Vadi, *supra* note 51, p. 172.

international law in the denial of hierarchical coordination. It is also undeniable that the clause can provide the interpreter and decision-maker with a positive law foundation to interpret, apply, and formulate rules under or relevant to the CDC. In fact, some scholars expect that the mutual supportiveness principle in international environmental treaties functions as a new principle of interpretation and rulemaking in the face of international law fragmentation.⁽¹⁴⁰⁾

On the other hand, it would be necessary to develop a more sophisticated conflict rule based on the principle to manage inter-systemic conflicts. In this respect, Michaels and Pauwelyn's analysis of the Preamble of the Cartagena Protocol on Biosafety should be cited here.⁽¹⁴¹⁾ As with Art. 20 of the CDC, this preamble also explicitly adopts the mutual supportiveness and nonsubordination principles. Michaels and Pauwelyn observe that the preamble not only shows its desire to keep intra-systemic coherence, as expressed by the mutual supportiveness principle, but also admits the limitation of such desire, as proved by the nonsubordination principle.⁽¹⁴²⁾ However, they mention that this ambivalence "tend[s] towards circularity" as a conflicts rule.⁽¹⁴³⁾ The authors thus hope for the development of "the

(140) For an analysis of the concept of mutual supportiveness under international environmental agreements, see Tomoaki Nishimura, *Tasukokukan Kankō Kyōtei to "Tano Kokusai Bunsho" tonō Sōgo Renkan: Nagoya Gitesho wo Sozai to shite [Interplay between Multilateral Environmental Agreement and other International Instruments: Analyzing Nagoya Protocol], Kokusaihō Gaikō Zasshi [The Journal of International Law and Diplomacy]*, Vol. 113, No. 4 (2015), p. 525, p. 539ff.

(141) Recitals 8–10 of the Preamble read: "Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development" ; "Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements" ; "Understanding that the above recital is not intended to subordinate this Protocol to other international agreements."

(142) Michaels & Pauwelyn, *supra* note 84, p. 371.

(143) *Ibid.*

fine-grained conflict-of-laws rules and approaches for the relationship between trade and environment.”⁽¹⁴⁴⁾

In sum, while it is true that Art. 20 of the CDC could provide an important reference point for conflict management, it does not work as a sufficient conflict rule by itself and further development beyond the text of the provision should be necessary.

2. *Some Remarks*

As the last discussions in this paper, we provide two sets of remarks on Pulkowski’s analysis and proposal on the WTO–CDC conflict based on (a) interpretation and (b) examples of true conflicts.

a) Interpretation

As discussed above, the first step is to identify false conflicts and confer a preference to the rules of the only interested regime. In fact, identifying false conflicts means ascertaining whether the WTO or the CDC are interested in the application of their rules to the concrete case at hand. Since this is a matter of interpretation, such decisions should be made in reference with the rules of interpretation in international law, such as Art. 31(1) of the Vienna Convention on the Law of Treaties.⁽¹⁴⁵⁾ As Pulkowski investigates, there seems to be non-negligible room for conflict avoidance at the level of interpretation.⁽¹⁴⁶⁾

Instead of dwelling on possible interpretations on a rule-by-rule basis, we provide short comments on Pulkowski’s search for a shared goal among the regimes. As noted above,⁽¹⁴⁷⁾ Pulkowski claims that individual cultural liberty can be seen as the

(144) *Ibid.*

(145) See *supra* note 58.

(146) See, in *III.1.a*).

shared goal among the WTO, the CDC, as well as human rights regimes. Somewhat similarly, some authors focus on the concept of sustainable development as a unifying idea for the fields of environment, social development, and economic development to manage different regimes.⁽¹⁴⁸⁾ Arguably, such a basic and shared goal or idea should be necessary to indicate the future direction of interpretation, which must be done in the face of regime conflicts.⁽¹⁴⁹⁾ Thus, further research is necessary to examine whether and how we can set shared goals among the regimes concerned.⁽¹⁵⁰⁾

b) Examples of True Conflicts

Pulkowski provides *case 1* and *case 2* as examples⁽¹⁵¹⁾ of possible rule conflicts that cannot be reconciled through interpretation, which may be called true conflicts from this study's perspective. On the one hand, as shown above, it seems that *case 2* properly demonstrates the most likely situation where trade-restrictive cultural measures, which can be permitted under the CDC's rights-conferring rules, would violate trade principles under WTO law.

On the other hand, a closer look at *case 1* may cast some doubt on whether it precisely shows a true-conflict pattern. With respect to *case 1*, Pulkowski states that the subsidy for a developing country's young nationals who produce cultural products related to local stories would be potentially prohibited under Arts. III:2 and 4 of the GATT. If the phrase "potentially prohibited" indicates a possibility that such subsidy may be interpreted as permissible under the WTO,⁽¹⁵²⁾ the case might fall under the

(147) See, in *III.1.b*).

(148) See, e.g., Nishimura, *supra* note 140, p. 543.

(149) Yet, it is equally true that the "common good" or the "harmony of interests" approach to conflict management would be doubtful as well. See Koskennemi, *supra* note 114, pp. 306-308.

(150) In particular, on value conflicts among universal values, see Michales, *supra* note 126.

(151) See, in *III.A.3*.

false-conflict pattern, where only the CDC has interests; thus, CDC rules would apply.

While his examples are limited to these, Vadi demonstrates, though in relation to foreign direct investment, some hypothetical scenarios with respect to food cultural practices, indigenous intangible heritage, and music and language.⁽¹⁵³⁾ One of them involves measures to restrict the use of wine labels, such as the term *château*, to foreign imported wines.⁽¹⁵⁴⁾ In fact, Vadi mentions the European Commission's consideration of the United States's request to end the ban on the European importation of American wines labeled *château*.⁽¹⁵⁵⁾ Another example is the case where some measures to protect languages at risk of extinction, such as local language content requirements,⁽¹⁵⁶⁾ would be treated as violation of the national treatment obligation under WTO law.⁽¹⁵⁷⁾ All these measures would fall under the CDC's scope of application and risk being in conflict with trade principles under WTO law.

V. Conclusion

Focusing the relation between WTO law and the CDC, this paper has analyzed the conflict management methods of different international treaties from a conflict of laws perspective. The author's core argument is that a conflict of laws perspective would be useful in analyzing the nature of regime conflicts and detecting possible problems inherent in inter-systemic or regulatory conflicts. In particular, the basic

(152) See, in *III.A.3*.

(153) Vadi, *supra* note 51, pp. 177-183.

(154) *Id.* pp. 179-180.

(155) *Id.* p. 179.

(156) See *Lemire v. Ukraine, Decision on Jurisdiction and Liability*, ICSID Case No. ARB/06/18. *Id.* pp. 188-189.

(157) *Id.* pp. 182-183.

framework for analyzing regulatory conflicts, that is, the false/true distinction, could help the interpreter deal with seemingly irreconcilable rule conflicts as false ones. In short, conflict of laws could contribute to the conflict management of different international law branches more as an analytical perspective rather than a specific solution. If this contribution as an analytical perspective seems trivial, it is because the conflict of law doctrine itself is yet to develop a set of methods to properly manage regulatory conflicts. This necessitates further research on how to cultivate the conflict of law doctrine to cope with a variety of norm conflicts, including regulatory conflicts, in the global society.⁽¹⁵⁸⁾

(158) See Dai Yokomizo, *Gurōbal Hō-Tagenshugi no motodeno Teishoku-Hō* [Conflict of laws in Global Legal Pluralism], *Ronkyū Juristo* [*Quarterly Jurist*], no. 23 (2017), p. 79.