

BOOK REVIEWS

Natural Perception: Environmental Images and Aesthetics in International Law.
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Introduction: The Frame

According to Errol Morris, “[p]hotographs attract false beliefs the way flypaper attracts flies. . . . We *imagine* that photographs provide a magic path to the truth.”¹ Morris drew this conclusion after a cross-examination of the infamous torture pictures taken at Abu Ghraib. Morris recalls how his editor got annoyed when he defended Sabrina Harman, who appeared in a photograph of a detainee who had just been tortured to death. Harman knelt near the corpse, in the cliché pose of someone who is aware that she is being photographed: smiling and thumbs up. The image seemed to speak for itself, the editor claimed. Smiling and thumb-raising near a killed detainee, how much more damaging can it get? “How do you get past that? The smile? Just look at it. Come on.”²

The problem, Morris argues, lay in what the photograph did *not* portray: a series of frames that enabled a straightforward conclusion in the blame-game. Seemingly, the picture offered a path to the truth: it showed the morally corrupt behavior of an individual, the bad apple who shows no respect for basic laws and humanity. However, just a cursory look beyond the frame of the photograph showed a more complex reality. Shortly after Harman’s picture was taken, for example, she took a series of detailed forensic photographs, showing what had been

done to the detainees. These images remained relatively unknown, but they offer a path to a different truth: the system established in Abu Ghraib, the implication of the government in torture programs, Harman’s intention to reveal what happened to the prisoners.³ The reception of the damaging thumbs-up photograph thus also illustrates the workings of frames. The picture itself occurs within a photographic frame, the photo itself *offers* a frame on the reality it depicts, and the photographic image is interpreted through cultural frames (just recall that a similar picture of a fellow male soldier kneeling near the same corpse became less world-infamous).

I was reminded of Morris’s observations while reading Alice Palmer’s book *Natural Perception*. Not because it deals with crime and torture. Quite the contrary: Palmer’s book deals with issues of protection and aesthetic experience. It studies the use of photographs in international environmental law, in particular in the context of the 1972 World Heritage Convention, the 1982 amendment to the Whaling Convention, and the 1992 Biodiversity Convention. The photographs are submitted in decision-making procedures to convince committees or judges of the aesthetic qualities of natural features that deserve special protection. In line with its main topic, the book starts and ends with the notion of the frame. The introduction is entitled “In the Frame,” and the conclusion “Beyond the Frame.” This reminded me of Morris’s interrogation of frames in the context of the torture pictures. To be sure, this is not because Palmer’s book would rest on naïve assumptions about the relationship between photographs and reality. The idea that photographs offer a “magic path to the truth” is explicitly rejected in the book. Instead, the book focuses on the representation of aesthetic value in photographs, using insights from eco-critical thinking and neo-

¹ ERROL MORRIS, BELIEVING IS SEEING (OBSERVATIONS ON THE MYSTERIES OF PHOTOGRAPHY) 92 (2011) (emphasis in original).

² *Id.* at 97.

³ *Id.* at 98–118.

Kantian approaches. And yet, Morris's discussion of framing kept haunting me. If photographs do not offer representations of fact, what do they do, especially in decision-making procedures? What is shown by all the pictures that populate the book, what do they allow us to see, what is obscured?

In this essay, I will break down these big and somewhat vague questions into two smaller and hopefully less undetermined ones: (1) what is represented by the photographs discussed and shown in the book?; and (2) what does it mean that these photographs are used in legally structured decision-making procedures? I make no promise to provide definite answers to these questions. Instead, I use them to discuss some of the core topics brought up in *Natural Perception*. They are, so to speak, my frame on the book. Of course, this also means I cut and crop, I leave out, highlight and obscure aspects of *Natural Perception*. Unfortunately, there are many interesting things about the book that escape my frame. Therefore, I hope my review also works as an invitation to read and engage with the book. It is certainly worth the effort, not only because of its rich content, but also because of the pleasure of experiencing all the intriguing photographs reproduced across the chapters.

Brief Overview

Let me start by giving a brief overview of the structure and line of argumentation of the book. The book's starting point is the observation that states submit photographic images in international (legal) decision-making proceedings, to illustrate the aesthetic value of a particular part of the environment. This leads Palmer to pose two main questions that run through the book as a whole: (1) how is aesthetic value represented in photographs?; and (2) what is the relationship between photographic images and international decision making on the environment's aesthetic value under a particular treaty?

Chapter Two introduces Palmer's main source of inspiration in aesthetic philosophy: Emily Brady's work on aesthetic appreciation of the environment. Brady's approach differs from

what have been called the "subjective" and "objective" approaches to aesthetic experience. According to the "subjective" (or: "non-cognitive") take, aesthetic experiences are subjective and personal. This is problematic, according to Brady, because this makes it impossible to have a meaningful discussion and to arbitrate between personal opinions. Especially when aesthetic value is used as a legal criterion, it requires a context of justification and communication. Objectivist (or "cognitive") approaches, on the other hand, search in vain for a rational, scientific basis for aesthetic value. They run the risk of prioritizing one form of knowledge (e.g., Western science) over other forms of knowledge. Brady's approach attempts to combine the individual aesthetic experience with the need to be able to articulate and justify aesthetic appreciation. Aesthetic experience is about the individual's emotions and imagination, but also about taking a disinterested position that opens up to the experiences and emotions of other participants in a community. In the next Section, I will return to the way in which Palmer takes up the aesthetic philosophy of Emily Brady.

Chapter Three connects aesthetic philosophy to international law. It starts by reiterating how the legal regimes on World Heritage, Whales, and Biodiversity all include references to aesthetic value as a ground for legal protection. Palmer argues that these references are part of treaties that should be considered "living instruments" (p. 77). This means, she holds, that the references should be interpreted dynamically, taking into account the "social needs of the international community" (p. 76). Brady's philosophy of aesthetic appreciation, she concludes, is best suited to satisfy these needs. In this way, a specific aesthetic approach is integrated into a proposal for the interpretation of treaty provisions. Whether this will happen in practice is still an open question of course. After all, Palmer invites the reader to take two leaps. First, to accept the evolutive approach, and secondly to accept that Brady's philosophy best fits the needs of the international community. Not surprisingly, therefore, she adds an important reservation to her analysis, warning that "it is far from certain that treaty interpreters

would be compelled to reach such a conclusion” (p. 78).

Chapter Four moves from aesthetic appreciation of the environment to the aesthetic appreciation of *images* of the environment. After all, the topic of the book is the interpretation of photographic images submitted by states. The concepts introduced in Chapter Two should therefore be extended to the appreciation of photos. This brings back the earlier problem of representation. What is the relationship between the photographic images and the environmental objects themselves? Palmer rejects the idea that photographs would mirror an external reality. Instead, she holds that photographs should be viewed as objects for aesthetic experience and justification themselves. Yet, she also holds that they can be used to obtain an appreciation of the aesthetic qualities of the environment that appears on canvas. I will return to these two accounts of photographic images in the last Section.

Chapter Five presents the first case, on photos used in the context of the World Heritage regime. Unfortunately, it is impossible for me to do justice to this case study (or the other two, for that matter), for a simple reason: they all contain reproductions of the photos that were submitted by states. The photographic images are core elements of the build-up of the argument, as they allow the reader to experience the aesthetic value of the images for herself. It also allows the reader to experiment a bit, to try out if and how it matters if one adopts one or the other aesthetic approach. This is at least how I went through the case studies. I started with the images and my own attempt to make sense of them. After that, I turned to the verbal analysis in the rest of the chapter. There I found a richer and more contextualized account of the images than I could have come up by myself. I found, for example, critiques of romantic and Western-biased aesthetic accounts, followed by Palmer’s own interpretation based on Brady’s philosophy. In this way, the book shows rather than tells: it shows to potential decisionmakers how they could make richer sense of photographic images and prevent pitfalls of false romanticism.

Chapter Six zooms in on the *Whaling in the Antarctic* case before the International Court of Justice (ICJ). This chapter taps into a broader stream of literature on the use of images in legal proceedings. Often, images are used to do more than provide evidence of facts. They also speak to the emotions of different audiences (including the media), and help to frame an issue in a particular way (see also the example I started out with). Palmer shows, quite literally, how images of whaling submitted by the parties in the *Whaling* case evoked emotions and sought to define the practice of whaling in terms such as cowardness and cruelty. Instead of dismissing such images as non-evidentiary, Palmer holds, courts should develop visual literacy to appreciate their rhetorical functions.

Chapter Seven presents the last case study, on the use of photographic images in the Biodiversity regime. While the regime encourages states to submit such images, there is no guidance how they should be weighed and interpreted in decision making. The chapter offers an example how this could be remedied. Based on Brady’s work and eco-critical perspectives, it shows how the images can be used to reveal the aesthetic values of biodiversity.

The final chapter of the book contains a recap of the main argument and some reflections on how to think beyond the frame of the analysis. After all, images are not just important in the field of environmental law. Across the board, (international) law is increasingly populated by (audio)visuals. In order to make sense of this, it is necessary to go beyond law as a text-based practice. This requires the development of visual literacy and visual eloquence. Palmer ends her book with a plea for the inclusion of images in legal interpretation, and a deeper engagement with aesthetics as a tool to make us see what happens in international law.

Aesthetic Value as Legal Category

Palmer’s book is not the first to examine the use of images in international law. There is an ever-growing stream of literature focusing on international law and the visual, including film,

architecture, painting, and material objects more generally.⁴ It is also not the first to study the use of (audio)visuals as evidence in decision-making proceedings. In her 2022 Grotius lecture, for example, Hilary Charlesworth discussed the use of photographs by Nauru in the *Certain Phosphor Lands* case before the International Court of Justice,⁵ as a way of “adding weight to its more arcane legal arguments.”⁶ In the field of international criminal law, to give another example, several authors have discussed the use of images as a matter of evidence of fact.⁷ Others have focused on the use of (moving) images in international criminal law, as a way to express what cannot be captured in words: the “unspeakable atrocities” that escape articulation in the language of the law.⁸ In short, “visual jurisprudence,” to use Richard Sherwin’s label, has made its way into international law.⁹

Natural Perception fits the broader tradition of studying the use of visuals as evidence in (legal) decision-making procedures. However, it is not just another study of the use of visual evidence

to corroborate or question matters of fact. Its focus is on a very different aspect of visual evidence: the aesthetic value represented by photographs, which are submitted by states. In that sense, her study is the positive counterpart of studies on the use of photographs that represent acts that “shock the conscience of mankind.”¹⁰ In both cases, images “have a transitive function: they must act on viewers in ways that bear directly on the judgments that viewers formulate about the world.”¹¹ In the case of images of atrocities, it is (somewhat paradoxically) the “shock” that is supposed to inform judgment and action. In the case of images in environmental protection, it is the aesthetic appreciation that is supposed to spur judgment and protective action.

Now why would decisionmakers bother to rely on aesthetic appreciation when deciding on the protection of the environment? The answer provided in the book is quite straightforward: because the law tells them to do so. Both the World Heritage Convention (WHC) and the Biodiversity Convention (BC) include aesthetic value as a legal criterion to identify environments that deserve special protection. The WHC speaks in Article 2 of natural features “which are of outstanding universal value from the aesthetic or scientific point of view” (p. 60). The BC’s preamble recognizes the “intrinsic value of . . . the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.”¹² These criteria are further specified in subsequent guidelines and targets, which I shall leave undiscussed here. In order to convince decisionmakers of the aesthetic value of natural features, states (also) submit photographs, typically accompanied by explanatory text. The two case studies of the WHC and the BC thus offer a good illustration of the intersection of law, photography,

⁴ To give just a few examples: CINEMATIC PERSPECTIVES ON INTERNATIONAL LAW (Olivier Corten, François Dubuisson & Martyna Fałkowska-Clarys eds., 2021); *International Criminal Justice and on Film*, 6 LONDON REV. INT’L L. (Special Issue, 2018); Immi Tallgren, *Come and See? The Power of Images and International Criminal Justice*, 17 INT’L CRIM. L. REV. 259 (2017); WOUTER WERNER, REPETITION AND INTERNATIONAL LAW, Ch. 6 (2022); Tanja Aalberts & Sofia Stolk, *The Peace Palace: Building (of) the International Community*, 114 AJIL UNBOUND 117 (2020); Kate Miles, *Painting International Law as Universal: Imperialism and the Co-opting of Image and Art*, 8 LONDON REV. INT’L L. 367 (2020); INTERNATIONAL LAW’S OBJECTS (Jesse Hohmann & Daniel Joyce eds., 2019).

⁵ *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 ICJ Rep. 240 (June 26).

⁶ Hilary Charlesworth, *The Art of International Law, 2022 Grotius Lecture*, 116 ASIL Proc. 7, 17 (2022).

⁷ See, e.g., JONATHAN W. HAK, IMAGE-BASED EVIDENCE IN INTERNATIONAL CRIMINAL PROSECUTIONS (2024).

⁸ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995).

⁹ Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y. L. SCH. L. REV. 11 (2013).

¹⁰ Aoife Duffy, *Bearing Witness to Atrocity Crimes: Photography and International Law*, 40 HUM. RTS. Q. 776 (2008).

¹¹ Judith Butler, *Photography, War, Outrage*, 120 PMLA 822, 823 (2005) (quoted in Duffy, *supra* note 10, at 785).

¹² Convention on Biological Diversity, pmb., June 5, 1992, 1760 UNTS 79, at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-00>.

and aesthetics. The third case study in the book, on photographs used in the *Whaling in the Antarctic* case is different though. The Whaling Convention does not include “aesthetic value,” although such values were mentioned in the run-up to the Convention. In the case studies on the WHC and the BC, the question is what “aesthetic value” means in terms of positive law. In the case study on the *Whaling* case before the ICJ, aesthetic methods are used “to illuminate a rhetorical function for the photographs.” (p. 175) While the result is an interesting chapter on visual rhetoric, it is also a chapter that is quite different in terms of the way in which aesthetic philosophy and international law are linked.

In the rest of this essay, I will therefore stick to the two case studies where aesthetic value is included as a legal criterion, the Biodiversity and World Heritage Conventions. In both cases, the question is how the concept “aesthetic value” should be interpreted and applied to photographs of natural features. This brings us to familiar ground for international lawyers: the methods of interpretation as laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. However, the application of these commonly accepted methods of interpretation, Palmer argues, “produce a variable account of the meanings of the environment’s aesthetic value” (p. 55). They are, to put it less diplomatically, of little use. Palmer therefore propagates a twofold move forward, as I already set out in the brief overview (above). In the first place, to embrace the so-called “evolutive interpretation” of international treaty law. This method allows decisionmakers to interpret treaty provisions in accordance with what they believe to be the “social needs of the international community.”¹³ Secondly, to argue that the social needs of the international community are served by a turn to the philosophy of environmental

aesthetics. Initially, this turn is introduced quite broadly, by suggesting that an evolutive interpretation would “take account of developments in the philosophy of environmental aesthetics” (p. 77). Later in the book, this suggestion is translated into the recommendation to rely on experts in aesthetic philosophy when applying the legal criterion of aesthetic value (p. 258).

At first sight, this seems to leave room for the inclusion of different and even opposing schools in aesthetic philosophy. However, this is not how the book proceeds. Instead, *Natural Perception* advocates one approach in particular as fitting for the interpretation of the term “aesthetic value” in the WHC and the BC. This approach is heavily influenced by Emily Brady’s philosophy of the aesthetic value of the natural environment. Brady advocates aesthetic appreciation that goes beyond the visual: “visual qualities, sounds, tactile qualities, olfactory and gustatory qualities, all may enable us to identify the aesthetic feel of a place.”¹⁴ In addition, knowledge, emotion, and imagination assist in the aesthetic appreciation of a natural environment. All of these elements should be used with a particular *attitude* that allows for intersubjectivity and communication. In this context, Brady relies on the Kantian concept of “disinterestedness.” According to Brady, “the feeling of pleasure or liking which grounds aesthetic judgments is *disinterested*.” Disinterestedness does not mean indifference, but rather identification of an object apart from any “interest.” It operates as the logical condition that distinguishes judgments of taste from both judgments of the agreeable and the good, both of which involve appreciating objects in relation to an “interest.”¹⁵ Disinterestedness is sometimes confused with dispassionate, abstract judgment. However, this is not what aesthetic appreciation is about, according to Brady. It requires an active subject, who uses her senses, imagination, and background knowledge to relate to the natural feature. Aesthetic appreciation, in other words, “does not require that we set aside

¹³ ALICE PALMER, *NATURAL PERCEPTION: ENVIRONMENTAL IMAGES AND AESTHETICS IN INTERNATIONAL LAW* 76 (2023) (quoting Georg Nolte, *Treaties Over Time in Particular: Subsequent Agreement and Practice in International Law Commission, Report of the International Law Commission on the Work of the Sixtieth Session*, para. 1, UN Doc. A/63/10 (2008).

¹⁴ EMILY BRADY, *AESTHETICS OF THE NATURAL ENVIRONMENT* 237 (2003) (quoted by PALMER, *supra* note 13, at 32).

¹⁵ BRADY, *supra* note 14, at 129 (referring to Kant’s *Critique of Judgment*) (emphasis in original).

who we are, it requires only that we set aside *what we want*.¹⁶

Palmer translates Brady's philosophy into a jurisprudential account of the term "aesthetic value" as (should be) used in international environmental law. Allow me to quote at length the core criterion developed by Palmer:

Ultimately, I understand Emily Brady to be describing an aesthetic value that I describe for this book as exquisite and profound. Exquisite in the sense that an environment's aesthetic value connotes a distinctive and, to some extent, ineffable effect in a person that is different from natural beauty conceived for the arts; profound in the sense that its apprehension is significant, meaningful, or important to a community of people—as opposed to merely trivial, hedonistic, empty or superficial. (P. 36)

For Palmer, what matters is that the aesthetic appreciation of the environment matters as such, not because it is grounded in science, not because it serves another end or because it is ethically required. Still, there is no abyss between aesthetic appreciation and ethical action. Following Brady, Palmer argues that aesthetic appreciation, while not ethical in and of itself, can spur a sense of responsibility. Aesthetic appreciation may lead to an ethics of care and protection for the environment (p. 35).

The net result of Palmer's dual move is somewhat paradoxical. The point is to introduce aesthetic appreciation as a non-instrumental, autonomous form of human judgment, rooted in the idea of "disinterestedness." However, this method is introduced in international law, because the treaties that are central to the book could be considered "living instruments." Therefore, Palmer argues, it is justified to rely on the evolutive method of interpretation that seeks to serve "the social needs of the international community." Foregrounding the "social needs," however, is an instrumental way of

thinking, quite different from what aesthetic appreciation is about.

Photographs of What?

It is time to return to my two leading questions. First, what is represented by the photographs submitted by states? Palmer offers two not completely identical answers to this question. One is the "photographic image as a static proxy for the environment that is valued on an aesthetic basis under the treaty" (p. 106). The other answer is that the photograph "represents an environmental sensibility—an aesthetic evocation in art of an aesthetic appreciation of the environment" (*id.*). This then turns the process of legal judgment into a "Babushka doll-style appreciation of the image, as an appreciation of the artwork, as an appreciation of the environment" (pp. 106–07).

So, what is it? Is it a proxy for the natural environment, or a representation of the aesthetic appreciation as produced by the photographer? If the idea of photographs as mirrors of an external reality is abandoned, the latter interpretation seems to be the strongest candidate. However, the photographs submitted in the decision-making procedures do and should have some kind of veracity claim as well. They differ from, for example, projects such as the "New Horizon Initiative," which uses AI to visualize how non-human life experiences the landscape.¹⁷ They would also differ from, for example, abstract paintings that represent the aesthetic experience of a natural feature.

Photographs used in WHC and BC procedures cannot completely give up their claim to truthfulness, although they cannot offer a magical path to the truth either. If they are like Babushka dolls, they are like dolls with a Janus-face. They represent the natural feature, and at the same time the representation of an aesthetic appreciation of that natural feature. Where Palmer speaks of a Babushka doll-style interpretation, Morris would probably invoke the notion

¹⁶ *Id.* at 132.

¹⁷ New Horizon Initiative, at newhorizoninitiative.com (thanks to Sofia Stolk for alerting me to this project).

of frames. Decisionmakers do not directly assess the aesthetic value of the natural environment, but rather work their way through a layer of frames: they interpret an image that is the product of framing and that offers a frame. This product does not arrive unmediated at their desks, but through a process of selection by states, who add text, context, and subtext to the image. They do so, not only to communicate aesthetic values for their own sake, but rather to convince decisionmakers to add their cherished natural feature to the special list.

In this context, it is interesting to go back to Brady's work, which is central to Palmer's analysis. As Brady argues, a disinterested attitude is easier when it comes to the appreciation of the natural environment, as it does not come with human intentions. Artworks have "messages," she holds, whereas nature acts more spontaneously:

Disinterestedness moves more easily in the space of natural aesthetics, where the concerns of politics and society are of less relevance than in the context of art. . . . In the case of artworks, a social aim is expressed through a creative artistic medium, so we attend to the artwork to discover its message. . . . Nature operates spontaneously, without such intentions, so that aesthetic appreciation is freed from such "responsibility." In other words, our encounters with nature lend themselves more easily to the concept of disinterestedness.¹⁸

This brings me to my second question: what does it mean that the photographs are used in legally structured decision-making procedures? After all, the core concept of Brady and Palmer in the aesthetic experience of the environment is disinterestedness, the bracketing of instrumental approaches. Aesthetic judgment is not meant to satisfy some desire or interest, not even lofty ones such as knowledge or justice. In the context of environmental bureaucratic decision-making procedures, however, aesthetic judgment is tied to exactly that: states submit photographs with a clear aim in mind, decisionmakers study them

in order to take a well-informed decision. Ideally, the normative stance follows after the aesthetic experience and wonder. This or that natural feature is so exquisite and profound that we want and ought to protect it. But what if the order is reversed? If we start with the institutional context, where we already know that the whole point is to decide which natural feature is worthy of special protection? The legal-formal context in which the photographs operate adds another frame, a frame that incorporates and simultaneously taints and transforms aesthetic judgment.

Some thirty years ago, Jack Balkin articulated the relationship between law and justice as follows: "Human law, culture, and convention are never perfectly just, but justice needs human law, culture, and convention to be articulated and enforced. There is a fundamental inadequation between our sense of justice and the products of culture, but we can only express this inadequation through the cultural means at our disposal."¹⁹ An analogous observation applies to aesthetic judgment and legal decision making. The very fact that aesthetic value is turned into a legal criterion for protection already comprises a purely disinterested attitude toward (representations of) the environment. And yet, it is the law itself that points at aesthetic value as a determining factor, thus inviting reflections on how one should arrive at aesthetic judgments. Aesthetic judgment and disinterestedness are not only part of positive law, they also point to something beyond the reach of law.

Palmer's book is important, because it offers critical insight into the impossible task of squaring the aesthetic circle. *Natural Perception* convincingly shows that current practice and existing doctrine fail to do justice to one of the legal criteria included in the Biodiversity and World Heritage Conventions. Too often, "aesthetic value" is conflated with other values (e.g., cultural value or natural beauty), or interpreted in a narrow way (e.g., as picturesque or romantic). Compared to existing interpretations of the legal criteria, the turn to disinterestedness is

¹⁹ Jack Balkin, *Being Just with Deconstruction*, 3 Soc. & LEGAL STUD. 393 (1994), at <https://jackbalkin.yale.edu/being-just-deconstruction>.

¹⁸ Brady, *supra* note 14, at 128–29.

way more convincing. As I have argued above, this is not because it offers some kind of unmediated path to what counts as aesthetically valuable. Quite the contrary, is it useful as a way to critically engage with the impossible task of aesthetic judgment based on framed representations that operate in a legal context of decision making.

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The policy domain of “trade *and* culture,” like other debates over the appropriate regulation of trade and non-trade issues,¹ has been commonly constructed as “trade *versus* culture” in the sphere of international rulemaking. At the heart of the “trade *versus* culture” quandary is the specific dual nature of the subject of regulation—namely, cultural goods and services. These are, on the one hand, commodities that can be traded and are therefore subject to international economic law. On the other hand, as the 2005 UNESCO Convention on Diversity of Cultural Expressions notes, cultural goods and services have a distinctive nature as “vehicles of identity, values and meaning.”² Accordingly, many states over the years have adopted packages of regulatory measures that, among other things, subsidize domestically produced cultural goods, restrict

cultural imports, or otherwise favor national over foreign content (e.g., through tax, licensing, and ownership rules). These measures often impede trade, pitting interests in open markets against efforts to use state policy to mitigate trade’s social repercussions. And although cultural policies may address certain market failures³ or fight against illicit practices in cultural heritage trade, in many cases their justification is predominantly political, and borders on economic protectionism, especially in situations of contemporary culture. The line between justified and unjustified interventions is hard to draw, particularly as “culture” is a broad concept that can be filled with different meanings in different contexts—ranging from ancient cultural artifacts through traditional knowledge to entertainment in music, films, or even online games.

The contentious nature of trade and culture has continued for many years, especially with the advancement of globalization and as in domestic contexts, trade has often come to be perceived as a peril to the protection and promotion of national cultures, and more broadly, as a channel of commodifying and homogenizing culture.⁴ The political economy of the interfaces between trade and culture has also been complex and led to divergences in approaches across jurisdictions⁵ and to various forms of international

³ For a great discussion, see, e.g., Pierre Sauvé & Karsten Steinfatt, *Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection*, in *ACHIEVING BETTER REGULATION OF SERVICES 323* (Productivity Commission & Australian National University eds., 2000).

⁴ See, e.g., Mira Burri, *The Trade Versus Culture Discourse: Tracing Its Evolution in Global Law*, in *CULTURE AND INTERNATIONAL ECONOMIC LAW 104* (Valentina Vadi & Bruno de Witte eds., 2015).

⁵ See, e.g., Lisa L. Garrett, *Commerce Versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT’L L. 553 (1994); Jonas M. Grant, “Jurassic” Trade Dispute: The Exclusion of the Audiovisual Sector from GATT, 70 IND. L.J. 1333 (1995); Mary E. Footer & Christoph B. Graber, *Trade Liberalisation and Cultural Policy*, 3 J. INT’L ECON. L. 115 (2000); Bruno de Witte, *Trade in Culture: International Legal Regimes and EU Constitutional Values*, in *THE EU AND THE WTO – LEGAL AND CONSTITUTIONAL ISSUES 237* (Gráinne de Búrca & Joanne Scott eds., 2003); Mira Burri, *The EU, the WTO and Cultural Diversity*, in

¹ Such pairs are often referred to as “trade and . . .” and include, for example, trade and development, trade and the environment, trade and labor. For a discussion of the formulation of these pairs, see Andrew T.F. Lang, *Reflecting on “Linkage”: Cognitive and Institutional Change in the International Trading System*, 70 MOD. L. REV. 523 (2007).

² UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Art. 1(g), adopted Oct. 20, 2005, entered into force Mar. 18, 2007, UNESCO, Records of the General Conference, 33rd Sess., Paris, Oct. 3–21, 2005, Vol. I, 83 [hereinafter *Convention on Diversity of Cultural Expressions*].