1. Introduction

An assessment of the legality of trade measures taken for human rights purposes requires consideration of the interaction of rules and principles of international law on the protection of human rights and the regulation of international trade. This interaction raises issues of potential conflict between rules and principles of international law. These issues include the operation of international rules designed to avoid conflict between rules of international law. They also include rules developed to resolve such conflicts. Interaction also raises issues of institutional competence and the potential for conflict between different international institutions exercising jurisdiction to apply these different rules and principles.

The human rights and trade rules and principles described in Chapters 2 and 3 have developed through different international institutional structures and pro-


2 In the context of law of treaties, see, for example, Articles 30 and 53 of the Vienna Convention on the Law of Treaties, 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 108 parties as at 27 April 2007. More generally, see, for example, ILC Study Group Report on Fragmentation, ibid, 30-206; and Pauwelyn, ibid, 275-486.

cesses. State representatives involved in negotiations leading to the adoption, and in the application, of international instruments in the human rights field and in the trade field have been expert in issues related to human rights and trade respectively, but rarely have the individual representatives been expert in both fields.\(^4\) This phenomenon increased the prospects of conflict between rules and principles developed in each field or “regime”.\(^5\)

Actual or potential conflicts between the different rules and principles of international law (and related procedures) that have developed within different functional areas of international legal regulation (for example, the international law of the sea, international trade regulation, international environmental regulation and international legal protection of human rights) have been the cause of concern for a number of years.\(^6\) In 2000 the International Law Commission added the topic of


\(^5\) As noted in Chapter 1 the International Law Commission’s Study Group on fragmentation of international law identified three senses in which international lawyers formally employ the word “regime” when referring to international legal rules, procedures and institutions – see, for example, International Law Commission, Report on the work of its fifty-eighth session, 1 May to 9 June and 3 July to 11 August 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, 411, para 251(12). None of these three senses appears to correspond to the use of the term by political scientists working within the field of “regime theory”. Contrast the approach of the Study Group of the International Law Commission with the assumptions of “regime theory” referred to by Laurence R Helfer, “Mediating Interactions in an Expanding International Intellectual Property Regime” in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), Human Rights and International Trade, Oxford University Press, Oxford, 2005, 180, 183. On possible links between “regime theory” in international relations scholarship and the work of one of the International Law Commission’s special rapporteurs on State responsibility (Riphagen), see Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law, 17 European Journal of International Law 483, 502-505 (2006).

\(^6\) Relevant scholarship extends back at least as far as the 1950s with the work of Jenks, note 1 above. More recent scholarship, in addition to work cited in Chapter 1 (see note 59 in Chapter 1 above), includes W Czapliński and G Danilenko, Conflicts of Norms in International Law, 21 Netherlands Yearbook of International Law 3 (1990); LANM Barnhoorn and KC Wellens (eds), Diversity in Secondary Rules and the Unity of International Law, Martinus Nijhoff, The Hague, 1995; and Anja Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis (2005) 74 Nordic Journal of International Law 27. For numerous other relevant works see those considered in the ILC Study Group Report on Fragmentation, note 1 above.