

# Cultural Heritage in International Economic Law

*Valentina Vadi*

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*by*

Valentina Vadi



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Investigating how international economic law governs the interplay between economic phenomena and the protection of cultural heritage is particularly important, timely, and topical, as only by acknowledging their common humanity and cultural diversity, may peoples overcome common challenges. Economic globalization – the increasing economic integration and interdependence of economies across the globe – has not produced a universal civilization and ‘the end of history’;<sup>1</sup> rather, through trade, foreign investment flows, and increased interconnection, civilizations ‘have influenced each other and have transformed themselves through these mutual influences’ while preserving their uniqueness.<sup>2</sup> In order to prevent trade disputes, conflicts, and even wars, each civilization should accept that it is simply one among many and should dialogue with others.<sup>3</sup> International law should reflect its intercivilizational dimension—the idea that it governs the interplay between different cultures. In this regard, acknowledging the plurality of the cultures that compose the international community is key to maintaining just, peaceful, and prosperous relations among nations.<sup>4</sup> Such a perspective pays attention not only to economic factors, but also to cultural ones. This is particularly apposite in times of crisis, when the structure of international law is under pressure and needs some fluidity, flexibility, and resilience.

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1 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press 1992).

2 Onuma Yasuaki, ‘An Intercivilizational Perspective on International Law’, in *VVAA, Alberico Gentili—L’Ordine Internazionale in un Mondo a più Civiltà. Atti del Convegno Decima Giornata Gentiliana* (Milano: Giuffrè 2004) 65–87.

3 Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Simon & Schuster 1996).

4 Onuma Yasuaki, *International Law in Transcivilizational World* (Cambridge: CUP 2017).

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V.V.

Florence, 14 July 2022

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5 William Shakespeare, *Sonnets* (London: G. Eld 1609), Sonnet no. 18 ('Shall I compare thee to a summer's day?')

# Abbreviations

AB	Appellate Body
ACHPR	African Commission on Human and Peoples' Rights
AJIL	American Journal of International Law
BIT	Bilateral Investment Treaty
CAFTA	Central America Free Trade Agreement
CCD	Convention on Cultural Diversity
CJEU	Court of Justice of the European Union
CSICH	Convention for the Safeguarding of the Intangible Cultural Heritage
CPUCH	Convention on the Protection of the Underwater Cultural Heritage
CUP	Cambridge University Press
CUSFTA	Canada–United States Free Trade Agreement
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECTHR	European Court of Human Rights
EE	Edward Elgar
EIS	Environmental Impact Study
EJIL	European Journal of International Law
ESIL	European Society of International Law
EU	European Union
FAO	Food and Agriculture Organization
FCTC	Framework Convention on Tobacco Control
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPIC	Free, Prior, and Informed Consent
FTA	Free Trade Agreement
GA	General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIS	Geographical Indications
GMOS	Genetically Modified Organisms
IACtHR	Inter-American Court of Human Rights

IC	Indigenous Communities
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICH	Intangible Cultural Heritage
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Center for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement Of Investment Disputes between States and Nationals of Other States
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIAS	International Investment Agreements
IIPFWH	International Indigenous Peoples' Forum on World Heritage
ILC	International Law Commission
ILJ	International Law Journal
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IP	Intellectual Property
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
JIL	Journal of International Law
JWIT	Journal of World Investment and Trade
JWT	Journal of World Trade
LR	Law Review
MEA	Multilateral Environmental Agreement
MFN	Most Favored Nation
MIGA	Multilateral Investment Guarantee Agency
MoU	Memorandum of Understanding
MPIA	Multi-Party Interim Arrangement
NAFTA	North America Free Trade Agreement
NCD	Non-communicable disease
NT	National Treatment
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

PPM	Process and Production Method
SADC	Southern Africa Development Community
SCC	Stockholm Chamber of Commerce
SIEL	Society of International Economic Law
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TDM	Transnational Dispute Management
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-related Investment Measures
TRIPS	Trade-related Aspects of Intellectual Property Rights
UCH	Underwater Cultural Heritage
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Commission on Trade and Development
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
US	United States of America
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
VVAA	Various Authors
WHC	World Heritage Convention
WHO	World Health Organization
WTO	World Trade Organization
WWI	World War I
WWII	World War II
YIL	Yearbook of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – Heidelberg Journal of International Law

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# Introduction

Cultural diversity is a central theme in the history and theory of international law. Commercial exchanges, migratory fluxes, and cultural connections have always occurred, and these interactions have always raised the question of how diverse communities can live together and engage in just, peaceful, and prosperous relations while retaining and enjoying their cultural differences. People seem naturally disposed to wander, travel, explore new regions, and engage in commerce. At least in some cases, movement is driven by necessity, that is, the need to respond to vicissitudes, such as war, famine, and drought. Whatever the historical and contemporary reasons for human interactions, the challenge of governing ‘a heterogeneous world while simultaneously accommodating deep cultural, social, and religious differences’ remains a key ‘feature of international law,’<sup>1</sup> and has become a particularly pressing issue today due to globalization, intensified commercial exchanges, and cultural interactions.

By creating the conditions for ongoing dialogue among civilizations,<sup>2</sup> respect for cultural diversity and nations’ rich and diverse cultural heritage can foster just, peaceful, and prosperous relations among nations.<sup>3</sup> Cultural heritage is a multifaceted concept which includes both tangible (such as monuments, sites, and cultural landscapes) and intangible cultural resources (such as music, traditional knowledge, and cultural practices). While ‘culture’ represents inherited values, ideas, and traditions, which characterize social groups and their behavior, ‘heritage’ indicates something people cherish and hand down from one generation to another. There is no single definition of cultural heritage at the international law level; rather, different legal instruments provide various definitions often focusing on distinct categories of cultural heritage – e.g. cultural diversity, intangible cultural heritage, and underwater cultural heritage – rather than approaching it holistically.<sup>4</sup> Certainly, the protection of cultural heritage is a fundamental public interest that is closely connected to cultural identity and is deemed to be among the best guarantees of international justice and peace.

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- 1 Benedict Kingsbury, ‘Confronting Difference: Alberico Gentili’s *De Iure Belli* (1598) and the Enduring Combination of Pragmatic Pluralism and Normative Judgment’, (1998) 92 *AJIL* 713–723, 713.
  - 2 UNESCO, Universal Declaration on Cultural Diversity, 2 November 2001, 41 *ILM* 57, preamble.
  - 3 Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), adopted 16 November 1945, in force 1946, 4 *UNTS* 275 (1945), preamble.
  - 4 Manlio Frigo, ‘Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?’ (2004) 86 *International Review Red Cross* 367–378, 367.

Can the safeguarding of cultural heritage and the promotion of economic development be reconciled in international law? Culture plays a fundamental role in the knowledge-based economy and has increasingly been perceived as a strategic resource of sustainable development, that is, development that meets the needs of the present and future generations.<sup>5</sup> Culture can be an engine of economic growth and welfare, being central in people's lives, empowering them, and enriching their existence in both a material and an immaterial sense.<sup>6</sup> In turn, international trade and foreign direct investments can facilitate cross cultural exchanges, thus contributing to not only economic development, but also conflict prevention and international peace.

Economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations – potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage. The expansion of trade and foreign direct investment (FDI) facilitates the interaction between different cultures and may be conceived as a process for expanding cultural freedom.<sup>7</sup> As a result, there can be mutual supportiveness between the promotion of trade and FDI on the one hand, and the protection of cultural heritage on the other.

However, economic globalization and international economic governance can also jeopardize the safeguarding of cultural heritage. Asymmetry in flows and exchanges of cultural goods can lead to cultural homogenization and the predominance of a given dominant culture. The commodification of culture, that is, the transformation of cultural practices or items into commodities or objects of trade, can dilute their cultural value unless it is conducted in a culturally appropriate way. Such cultural objects and practices risk becoming mere market items regardless of their cultural value for their traditional stakeholders. In parallel, investments in the extractive industries have the ultimate capacity of changing cultural landscapes and the ways of life of local communities.

At the same time, the increase in global trade, economic integration, and FDI has led to the creation of legally binding and highly effective regimes that require states to promote and facilitate trade and FDI. The regime created by international economic law within the boundaries of the host state has increasingly determined a tension between the promotion of economic

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5 See generally David Throsby, *The Economics of Cultural Policy* (Cambridge: CUP 2010).

6 Amartya Sen, 'How Does Culture Matter?' in V. Rao and M. Walton (eds), *Culture and Public Action* (Palo Alto, CA: Stanford University Press 2004) 37–58.

7 See generally Amartya Sen, *Development as Freedom* (New York: Knopf 1999).

development and cultural sovereignty, meant as the regulatory autonomy of the host state in the cultural field.

International disputes relating to the interplay between the protection of cultural heritage and economic integration are characterized by the need to balance the interests of a state to adopt cultural policies on the one hand, and the economic interests of investors and traders on the other. Trading nations and investors have increasingly claimed that cultural policies breach international economic law provisions. In particular, they have alleged discrimination and other breaches of international treaties' provisions. They have brought claims before two separate international dispute resolution systems: the World Trade Organization (WTO) Dispute Settlement Mechanism (DSM) and investment treaty arbitral tribunals respectively.<sup>8</sup>

The book examines whether, and if so how, international economic law deals with cultural heritage. Although significant historical and structural differences exist between international trade law and international investment law and their respective dispute settlement mechanisms—the WTO DSM on the one hand, and investment treaty arbitration on the other—, some similarities in the subject matter—namely global economic governance—make these fields worthy of comparison.<sup>9</sup>

Historically, rules governing international trade and investment relations have been interconnected. Arbitral tribunals and the WTO DSM essentially do share the same functions by settling international disputes in accordance with parallel subsets of international economic law. WTO panels and arbitral tribunals are asked to strike a balance between economic and noneconomic concerns. Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, there is some coincidence in the subject matter of investment treaties and the Agreement on Trade-Related Investment Measures (TRIMs Agreement).<sup>10</sup> There are thus opportunities for cross-fertilization and mutual learning across international regimes. Moreover, the rise of mega-regional free trade agreements (FTAs) with investment chapters indicates a further move toward regime convergence.

However, this does not mean that these two systems should be treated as the same; rather, their differences ought to be recognized. In the post-war

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8 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154.

9 See generally Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016).

10 Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1868 UNTS 186.

period, international trade law and international investment law developed on divergent paths. While the governance of international trade relations culminated in a multilateral regime with a permanent dispute settlement mechanism, the international governance of investment relations remains governed by bilateral and regional investment treaties providing for a variety of arbitral tribunals. Only recently has the international community started discussing the idea of establishing a multilateral investment court.<sup>11</sup> Salient differences exist in the appointment and selection of adjudicators in investment arbitration and the WTO panels and Appellate Body (AB). While only states can file claims before the WTO panels, foreign investors can pursue investor–state arbitration directly without any intervention of the home state. Furthermore, arbitral tribunals can authorize damages to foreign investors, while remedies at the WTO have prospective character and involve states only.

Do international economic ‘courts’ take national cultural policies into account? Are there differences or similarities in how trade and investment tribunals deal with cultural concerns? Can there be mutual supportiveness between the protection of cultural heritage and the promotion of trade and investment in international law? This book demonstrates that the trade and investment regimes deal with cultural concerns in diverging ways. While arbitral tribunals are open to considering cultural concerns in the adjudication of investment disputes, trade courts have shown some resistance to such influx. This monograph discusses, compares, and critically assesses such diverging approaches, investigating the eventual judicial dialogue and cross-fertilization of ideas and practices between international economic courts and other international tribunals. The book concludes that there can be mutual supportiveness between the promotion of economic development and the safeguarding of cultural heritage, by offering some analytical arguments and legal tools for fostering such linkage.

## 1 Aims and Objectives of the Book

The book aims to investigate how international economic law governs cultural phenomena and responds to the challenges posed by globalization. It has three key objectives. First, it aims to explore the relevant legal framework. Second, it aims to examine the cultural heritage-related disputes adjudicated before international economic courts and tribunals (namely, the WTO adjudicative

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<sup>11</sup> Marc Bungenberg and August Reinisch (eds), *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Heidelberg: Springer 2020).

bodies and investment treaty arbitral tribunals respectively). There are several reasons for focusing on these jurisdictions. Although the cultural heritage-related jurisprudence of these jurisdictions has been underexplored, it offers significant food for thought on the tension between the protection of cultural heritage and the promotion of economic development. In parallel, while some scholars have focused on the interplay between cultural diversity and international trade law or investment law, a comprehensive analysis is missing. Yet, the comparison of international investment law and international trade law is useful to ascertain whether, and if so how, economic interests have been balanced with cultural interests and whether common approaches have emerged demanding the protection of cultural heritage in international law. Third, the book proposes legal methods to reconcile economic and cultural interests both *de lege lata* (that is, interpreting the existing legal instruments) and *de lege ferenda* (amending the existing law or proposing the adoption of different legal provisions).

Such scrutiny offers three distinct albeit related contributions to the existing literature on international law. First, it contributes to ongoing debates on the unity and fragmentation of international law. Traditionally studied as distinct branches of international law, international economic law and international cultural heritage law have increasingly interacted. The book shows that while there is scope for mutual supportiveness among different treaty regimes,<sup>12</sup> much remains to be done to build a harmonious international legal order. In negotiating new treaties, states should be aware of their existing rights and obligations under international law. In parallel, in interpreting and applying international law, international courts and tribunals should contribute to its harmonious development. When pursuing their objectives, non-state actors should also consider pertinent developments of international law.

Second, the book contributes to the debate on the legitimacy of international economic law and its courts. As is known, the current international economic law architecture, which was established at the end of World War II (WWII) to promote free trade and foreign investment, is currently under pressure. Critics contend that the international legal system has gone too far, by 'expand[ing] its scope, loosen[ing] its link to state consent, and strengthen[ing] compulsory adjudication and enforcement mechanisms'.<sup>13</sup> They argue that international economic governance risks jeopardizing the protection of noneconomic

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12 Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?' (2010) 21 EJIL 649–679.

13 Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907–931.

values by prioritizing economic interests over other concerns and imposing undue constraints on state sovereignty.<sup>14</sup> The question as to whether, and if so how, international economic law interacts with, and is informed by, other fields of international law has been at the heart of the debate.<sup>15</sup> Concerns have arisen about the way international economic courts have dealt with noneconomic concerns.

By focusing on how international economic courts have dealt with cultural heritage, the book zooms in and contributes to this debate. Such jurisprudence epitomizes the debate on the linkage issue and constitutes the front line of such a battle of ideas. This is a battle for the soul of international law. Not only does it lie at the heart of the relationship between domestic and international law, but it also relates to the very idea of the international community, that is, the prime unit of international law. A diverse, multicultural, and inclusive international community requires understanding, respect, and even appreciation of cultural difference, while pulling together for the common good. If a state overly prioritized its own economic interests over the cultural concerns of another, it would certainly alter broader dynamics, disrupt mutual trust, and undermine sustainable development on the one hand and international justice and peace on the other.

Third, the interaction between international economic law and international cultural heritage law not only illuminates the institutional, structural, and legal differences between the two fields, but also highlights and contrasts their promises and pitfalls. The book examines the challenges and prospects that the linkage between trade and investment on the one hand and cultural heritage on the other poses for the specific branches of international law involved: international trade law, international investment law, and international cultural heritage law.

Let us consider some examples. Indigenous hunting practices constitute a form of intangible cultural heritage deemed essential to preserve Indigenous way of life. As Europeans perceive the hunting of seals to be morally objectionable because of the modalities through which the seals are hunted, the European Union (EU) banned the trade of seal products except those derived from hunts traditionally conducted by the Inuit and other Indigenous communities for cultural and subsistence reasons.<sup>16</sup> The Canadian government

14 Andreas Follesdal, 'The Legitimacy of International Courts', (2020) *Journal of Political Philosophy* 1–24.

15 José E. Alvarez, 'The WTO as a Linkage Machine' (2002) 96 *AJIL* 146–158.

16 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, Reports of the Panel, 25 November 2013, and WT/DS400/AB/R and WT/DS401/AB/R, Reports of the Appellate Body, 22 May 2014.

challenged the said ban before the WTO, contending that the ban violated relevant trade obligations. The panel report held, *inter alia*, that the exception provided for Indigenous communities under the EU Seal Regime violated Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>17</sup> because it accorded more favorable treatment to seal products produced by Indigenous communities than that accorded to like domestic and foreign products.<sup>18</sup> The panel concluded that the same exception also violated Article I of the General Agreement on Tariffs and Trade 1994 (GATT 1994)<sup>19</sup> because an advantage granted by the EU to seal products derived from hunts traditionally conducted by the Inuit was not accorded immediately and unconditionally to like products originating in Canada.<sup>20</sup> The panel also found that such an exception would not be justified under Article XX(a) of the GATT 1994 allowing Member States to adopt measures ‘necessary to protect public morals’ because it failed to meet the non-discrimination requirement under the introductory requirements (*chapeau*) of Article XX.<sup>21</sup>

The AB confirmed that the EU Seal Regime discriminated against like products under Articles I (Most Favored Nation) and III:4 (National Treatment) of the GATT 1994. The AB also determined that the ban on seal products could be justified on moral grounds under GATT Article XX(a). However, it held the regime did not meet the requirements of the *chapeau* of Article XX of the GATT 1994, criticizing the way the exception for Inuit hunts had been designed and implemented.<sup>22</sup> The AB noted, among other things, that the exception contained no anti-circumvention clause,<sup>23</sup> and pointed out that ‘seal products derived from ... commercial hunts could potentially enter the EU market under the ... exception.’<sup>24</sup> The AB concluded that the EU Seal Regime was not justified under Article XX(a) of the GATT 1994.<sup>25</sup>

A survey of this and analogous cases shows that international trade law, a conspicuous branch of international economic law, has developed only limited

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17 Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 33 ILM 1125 (1994).

18 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, para. 8(2).

19 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

20 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, para. 8(3)(a).

21 *Id.* para. 8(3)(d).

22 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, para. 5:339.

23 *Id.* para. 5:327.

24 *Id.* para. 5:328.

25 *Id.* para. 6.1(d)(III).

institutional machinery for the protection of cultural heritage through dispute settlement. Article XX of the GATT 1994—entitled general exceptions—may be seen as an example of such an institutional machinery. Yet, this mechanism – which can be interpreted and applied in different ways – has thus far perhaps been interpreted too narrowly: namely, in a way that encroaches upon state sovereignty more than one would expect and to the detriment of cultural values.

In parallel, this and similar cases show that notwithstanding a growing regulation of the field, international cultural heritage law—that is, the subset of international law governing cultural heritage—remains underdeveloped *vis-à-vis* other fields of law. In fact, the evolution of international cultural heritage law has not been matched by a corresponding development of enforcement procedures:<sup>26</sup> not only does international cultural heritage law lack a centralized and permanent court, but most of its instruments lack any reference to binding dispute settlement mechanisms.

In another dispute, a US company filed an investment treaty arbitration against Ukraine because the latter, *inter alia*, required that 50 percent of the general broadcasting of each radio company in Ukraine should be Ukrainian music. The claimant argued that the local music requirement breached the investment treaty provision prohibiting the state from forcing foreign companies to buy local goods. The claimant also contended that ‘We should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market-economy, it should not introduce Ukrainian culture by force.’<sup>27</sup> Is the local music requirement a breach of the ban on performance requirements? Is it justified on public policy grounds as part of the state’s legitimate right to preserve cultural heritage? The Arbitral Tribunal held that the condition of the bidding process ‘was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media’, arguably contributing to the diffusion of Ukrainian culture.<sup>28</sup>

This case confirms the indeterminacy of both international investment law and international cultural heritage law. International investment law does not rely on a multilateral investment treaty – rather, it is made up of hundreds of bilateral investment treaties (BITs) and chapters of regional trade agreements

26 See generally Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford: OUP 2013).

27 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, para. 406.

28 *Id.* para. 407.

(RTAs). All of these instruments basically provide for similar if not identical standards of treatment. Because of such analogies, scholars have highlighted the emergence of a relatively consistent body of law. At the same time, these standards are relatively open-ended and vague; arbitral tribunals have gradually contributed to better defining such standards – but their interpretations and the resulting awards may vary. In parallel, international cultural heritage law is made up of a variety of multilateral conventions characterized by a certain vagueness. For instance, the Convention on Cultural Diversity (CCD) requires the protection of cultural diversity, but it does not offer detailed rules.<sup>29</sup> Therefore, the measures adopted by the States Parties to comply with the Convention can be contradictory. Would cultural diversity be better promoted by allowing the foreign company to transmit foreign songs or by requiring the compulsory broadcasting of national music? The *Lemire* Tribunal upheld the Respondent's argument that the broadcasting of music in a national language was an important element of cultural sovereignty. The indefinite fluidity of international cultural heritage law allows states to calibrate their cultural policies according to their specific needs. It can also assist the achievement of a suitable balance between the protection of cultural heritage and the promotion of economic interests in international law.

Yet, the particular fluidity of international cultural heritage law can make it difficult for adjudicators to ascertain the legitimacy of such measures. Concerns remain that cultural policies can disguise discrimination and protectionism. Because there is no 'World Heritage Court', cultural heritage-related disputes have been attracted and settled by international economic 'courts'. Such courts scrutinise cultural policies to determine whether the latter promote the public interest and, if so, whether the state has struck a proper balance between the means employed and the aim sought to be realized. Given the significant and consistently increasing number of international economic disputes that present cultural elements due to globalization, the interaction between the protection of cultural heritage and international economic governance deserves further scrutiny.<sup>30</sup>

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29 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), Paris, 20 October 2005, in force 18 March 2007, 2440 UNTS 311.

30 For seminal studies, see Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014), Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: CUP 2011), and Peter Van den Bossche, *Free Trade and Culture* (Amsterdam: Boekmanstudies 2007).

## 2 The Centrality of the Economics-and-Culture Debate in International Law

The interplay between the protection of cultural heritage and the promotion of economic activities relates to the very architecture of international law. The rationale is twofold: on the one hand, international law governs the relations among different civilizations both in times of peace and in times of war. In its current form, international law is the result of a slow but steady ratification of treaties among different nations, and the crystallization of customs and general principles of law that have gradually emerged through century-old interactions among diverse civilizations. On the other hand, economic factors have long contributed to growing interactions among civilizations and the coalescence of international law since antiquity. Trade and foreign investments have not only driven a closer connection among different cultures, but also determined the need to govern such interactions. Economic exchanges can also promote, and have promoted, the free flow of ideas, cultural diversity, and equality of opportunities, as well as social and economic welfare.<sup>31</sup> In sum, both culture and economic factors have played a significant role in shaping international relations and contributing to the emergence of international law.

The economics-and-culture debate also reflects the fundamental dialectics between the particular and the general, the domestic and the global, and the national and the international. The clash between the protection of cultural heritage and economic globalization constitutes a special case of the more general tug-of-war between the state regulatory autonomy and international law.<sup>32</sup> At their core, cultural heritage-related disputes involve a state's cultural sovereignty and society's most cherished values that are definitive of national identity. Therefore, the protection of cultural heritage can be thought of as a public interest of the state. However, such safeguarding also reflects the common interest of humankind, thus transcending the interests of individual

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31 David Collins, *An Introduction to International Investment Law* (Cambridge: CUP 2017) 6 (noting that the Phoenician civilization that flourished from 1500 BC in what is now Israel and Palestine 'establish[ed] commercial settlements in foreign states on the shores of the Mediterranean Sea' and this 'also led to the diffusion of the Phoenician alphabet which is the ancestor of all modern Western alphabets.');

Vadime Elisseeff, *The Silk Roads: Highways of Culture and Commerce* (New York: UNESCO 1998) VIII (noting that 'The fabled Silk Roads, far from being mere trade routes, were also cultural highways that had played a pivotal role in linking the East and West.').

32 Catharine Titi, *The Right to Regulate in International Investment Law* (Oxford: Hart Publishing 2014); Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law', (2014) 36 *University of Pennsylvania JIL* 1–87.

states and requiring them to act as ‘trustees of humanity.’<sup>33</sup> Therefore, international law should enable states to retain some flexibility while implementing their international law obligations.

The tension between the protection of cultural heritage and the promotion of economic exchanges is similar to, but also differs from, other dynamics, such as those between economic globalization on the one hand, and public health and environmental protection on the other.<sup>34</sup> It is similar to other tensions, because it conceptually belongs to the wider debate on the linkage issue—namely, how international economic law relates to noneconomic values. It is distinct, because potentially ‘every product, such as meat, spaghetti, cheese, alcoholic drinks including beer, wine, and shochu ... bears some cultural traits’ in consideration of factors such as origin, way of manufacture, and mode of consumption.<sup>35</sup> Given the breadth of the concept of cultural heritage, addressing the connection between the protection of cultural heritage and the promotion of economic development is vital for successfully addressing all the other linkages.

The linkage between economic interests and cultural concerns can be, and has been, approached from different perspectives. For instance, in 2020, architects, engineers, and economists signed a manifesto for the cultural renaissance of the economy in response to the ongoing pandemic. The open letter highlighted the importance of culture for global prosperity and sustainable development, noting that ‘territories that successfully preserve and promote the different aspects of their original identities will enjoy a real competitive advantage’ on the global plane.<sup>36</sup> In fact, cultural diversity is a sign of resilience, vitality, and renaissance. In this interdisciplinary statement, scholars endorsed the idea of the purple economy – that is, an economy that takes into account cultural aspects, adapts to, and benefits from, cultural diversity.

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33 Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 AJIL 295–333.

34 See e.g. Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: CUP 2012); Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge: London 2012); James Watson, *The WTO and the Environment* (London: Routledge 2013); Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge: CUP 2011).

35 Rostam Neuwirth, “United in Divergency”: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions’, (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 819–862, 823–4.

36 ‘Per Un Rinascimento Culturale dell’Economia’, *Corriere della Sera*, 7 June 2020.

This book aims to investigate the interplay between the protection of cultural heritage and the promotion of trade and investment in international economic law. To do so, it briefly examines how international law governs cultural phenomena and economic globalization, and then scrutinizes whether international economic courts and tribunals consider cultural policies. It then identifies legal tools to foster mutual supportiveness between the protection of cultural heritage and the promotion of trade and investment in international law. Its key objectives are: (1) to map in a systematic and complete fashion the relevant legal framework; (2) to critically assess the relevant disputes concerning cultural elements adjudicated before international economic ‘courts’—namely the WTO adjudicative bodies and investment treaty arbitral tribunals; and (3) to propose legal methods to reconcile the protection of cultural heritage and the promotion of trade and investment in international economic law. The book argues that these objectives should be understood and applied as reinforcing each other, and proposes legal tools to foster their mutual supportiveness both *de lege lata* (interpreting the existing legal instruments) and *de lege ferenda* (amending the existing law or proposing the adoption of different legal provisions).

In particular, this book investigates whether and how cultural heritage can be mainstreamed into international economic law. At the same time, it cautions against an indiscriminate merger and acquisition of cultural entitlements in international economic law: it is submitted that while states must comply with international economic law obligations, certain cultural entitlements are linked to human dignity and to other human rights and may possess a higher status.

This analysis contributes to the current discourse on global governance and strengthens the growing cognizance of the importance of effective protection of cultural heritage for just, peaceful, and prosperous relations among nations. As cultural entitlements are deeply linked to other human rights, they have a high societal relevance. As a result, this study will be of interest to a vast audience, including but not limited to international law scholars and practitioners, political and social scientists, and state governments, as well as cultural heritage experts and other interested audiences. Although the language is necessarily technical, deliberate efforts are taken to achieve clarity and cohesion.

### 3 The State of the Art

This book aims to fill a significant gap in the current literature: to date there is no comprehensive study covering the interplay between culture and economic

activities in international economic law. The linkage between the protection of cultural heritage and the promotion of free trade and FDI is an emerging field of study and has not been approached in a comprehensive fashion by either international law scholars or cultural heritage experts. Traditionally, international economic law and cultural heritage law have been considered as two separate branches of public international law. Therefore, this book brings new inquiry to the fore, to the benefit of scholars, practitioners, and policymakers.

At the same time, the book presents some lines of continuity with the available literature that can be placed in five broad categories examining: (1) the interplay between international law and state regulatory autonomy;<sup>37</sup> (2) the interaction between international economic law and general international law;<sup>38</sup> (3) the linkage between international trade law and cultural policies;<sup>39</sup> (4) the relationship between international investment law and cultural policies;<sup>40</sup> and (5) international cultural heritage law.<sup>41</sup>

Therefore, the book complements the existing literature in several ways. First, the examination of the interaction between the protection of cultural heritage and the promotion of free trade and FDI constitutes a paradigmatic case study of the broader interplay between state sovereignty and international law; it offers useful insights into clarifying the interaction between local and global levels of governance. Therefore, the book deepens the discussion

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37 See, for instance, Surya Subedi, *International Investment Law: Reconciling Policy and Principle*, III ed. (Oxford: Hart Publishing 2016); Giorgio Sacerdoti, Pia Acconci, Mara Valenti, and Anna De Luca (eds), *General Interests of Host States in International Investment Law* (Cambridge: CUP 2014); Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: OUP 2013); Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge: CUP 2010).

38 See, for instance, Freya Baetens (ed.), *Investment Law Within International Law—Integrationist Perspectives* (Cambridge: CUP 2013); Ronnie R.F. Yearwood, *The Interaction Between WTO Law and External International Law* (London: Routledge 2012).

39 See e.g. Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Oxford: Hart 2013); Lilian Richieri-Hanania, *Diversité Culturelle et Droit International du Commerce* (La Documentation Française 2009); Tania Voon, *Cultural Products and the World Trade Organization* (New York: CUP 2007).

40 See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014).

41 See e.g. Janet Blake, *International Cultural Heritage Law* (Oxford: OUP 2015); Nina Bandelj and Frederick F. Wherry (eds), *The Cultural Wealth of Nations* (Stanford CA: Stanford University Press 2011); James A.R. Nafziger, Robert K. Paterson, and Alison Dundes Renteln (eds), *Cultural Law—International Comparative and Indigenous* (Cambridge: CUP 2010); Craig Forrest, *International Law and the Protection of Cultural Heritage* (Abingdon: Routledge 2010).

on the interplay between international law and state regulatory autonomy by focusing on the linkage between international economic law and domestic cultural policies.

Second, the interaction between the protection of cultural heritage and the promotion of free trade and FDI also constitutes a case study of the interplay between general international law and its subfields. The relationship among different fields of international law poses a range of questions including whether, and if so how, the content of one field can inform that of another.<sup>42</sup> In the past few decades, the scope of international law has increased remarkably, expanding quickly to govern the most varied types of phenomena, from trade to cultural heritage protection. Multilateral institutions have been set up in the fields of commerce, culture, and development. However, this expansion has taken place in an uncoordinated fashion, and questions arise as to whether the different fields of international law can be considered as self-contained regimes, or as parts of a whole.<sup>43</sup> The interplay between international cultural heritage law and international economic law challenges the existence of unity within international law and calls into question whether international law is a system or not. It highlights the role that international law plays within its subfields and the distinct contribution that the latter can bring to the former. Although international cultural heritage law and international economic law are treated as separate fields with their own norms and institutions, they do not exist in a state of isolation; in fact, they are increasingly connected. This book hopes to assist in contributing to a greater understanding of these linkages.

Third, the book contributes to the existing literature by examining the tension between international cultural heritage law and international economic law. The book complements the existing literature on 'trade and culture' and 'investment and culture' by examining these fields together in order to ascertain the emergence of general principles of law requiring the protection of cultural heritage in time of peace. Not only does the book provide extensive coverage of recent cultural heritage-related trade and investment disputes, but it also offers an analytical framework to critically assess such disputes.

Only in the past decades have culture and economic development been envisioned as connected worlds that intermingle in various ways, and international

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42 For a seminal study, see Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law', (1998) 1 *Yale Human Rights and Development Law Journal* 85–105, 85.

43 See ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, A/CN.4/L.682.

law scholars have begun exploring the complex tension between global economic governance and cultural policies.<sup>44</sup> While the tension between trade and cultural diversity in international trade law has received increased attention,<sup>45</sup> only recently have authors begun investigating the parallel linkage between FDI and the protection of cultural heritage in international investment law and arbitration.<sup>46</sup> More recently, an attempt has been made to link these threads and to examine the complex interplay between global economic governance and cultural policies.<sup>47</sup> Scholars have acknowledged that while economic liberalization may have positive effects on public well-being, it may also negatively affect some cultural policies.

Yet, a comprehensive scrutiny of the protection of cultural heritage in international economic law is needed because international investment law complements the existing international trade regime in many ways. Both trade and investment disputes may jeopardize the cultural policies of the host state if read in ‘clinical isolation’ from international law.<sup>48</sup> Moreover, questions arise as to whether the approaches adopted by the WTO ‘courts’ on the one hand and those adopted by arbitral tribunals on the other are converging or diverging to any significant extent, and what implications these converging divergences may have on the development of international economic law, international cultural heritage law, and international law more generally.

Finally, the book complements the existing literature on international cultural heritage law. Cultural heritage law scholars have focused on the emergence of international cultural heritage law as a distinct field of law<sup>49</sup> and have analyzed its multifaceted aspects, often highlighting the lack of effective

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44 Fiona Macmillan, ‘Development, Cultural Self-Determination, and the World Trade Organization’, in Amanda Perry-Kessaris (ed.), *Law in Pursuit of Development: Principles into Practice?* (Abingdon: Routledge 2009); Annette Froehlich, ‘L’Enjeu de la Culture dans son Contexte Économique International’, in Paul Meerts (ed.), *Culture and International Law* (The Hague: Hague Academic Press 2008) 83–95.

45 Tania Voon, *Cultural Products and the World Trade Organization* (New York: CUP 2007); Peter Van den Bossche, *Free Trade and Culture* (Amsterdam: Boekmanstudies 2007).

46 Federico Lenzerini, ‘Property Protection and Protection of Cultural Heritage’, in Stephan Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: OUP 2010); Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014).

47 Valentina Vadi and Bruno De Witte (eds), *Culture and International Economic Law* (London: Routledge 2015) (focusing on the interplay between culture and international economic law, international intellectual property law, and EU law).

48 Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, at 16.

49 Janet Blake, *International Cultural Heritage Law* (Oxford: OUP 2015); James A.R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln (eds), *Cultural Law—International,*

dispute settlement mechanisms.<sup>50</sup> Other scholars have explored the interplay between cultural heritage law and other fields of law, such as humanitarian law.<sup>51</sup> Nonetheless, limited attention has been paid to the interplay between the protection of cultural heritage and the promotion of economic activities.

What are the strengths and limitations of the current state of the art? Certainly, there is a growing interest in cultural heritage governance at both national and international levels, and the literature is expanding fast. Nonetheless, most studies have approached the interplay between cultural policies and economic development from an institutional perspective,<sup>52</sup> and few have focused on the jurisprudence of the relevant international economic tribunals. In other words, the current state of the art ends where the important work should start: namely, once the institutional and legal features of the protection of cultural heritage have been examined, the scrutiny of the relevant cases assumes paramount importance to evaluate whether cultural values are adequately protected.

Often, cultural heritage-related disputes have been examined from a mere economic law standpoint, leaving cultural concerns aside and/or failing to adequately identify some core cultural issues.<sup>53</sup> As adjudication plays a fundamental, bottom-up role in the implementation of a given legal regime, this book analyzes the adjudicative patterns of cultural heritage-related disputes to map the interplay between the protection of cultural heritage and economic interests in international economic law.

This book fills a significant gap in contemporary legal studies, shedding light on the interplay between the protection of cultural heritage and the

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*Comparative and Indigenous* (Cambridge: CUP 2010); Craig Forrest, *International Law and the Protection of Cultural Heritage* (London: Routledge 2010).

50 Sabine Von Schorlemer, 'UNESCO Dispute Settlement' in Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO*, Vol. 1, (Boston/Leiden: Martinus Nijhoff Publishers 2007) 73–103; Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford: OUP 2013).

51 Berenika Drazewska, *Military Necessity in International Cultural Heritage Law* (Leiden: Brill 2022); Noelle Higgins, *The Protection of Cultural Heritage During Armed Conflict—The Changing Paradigms* (London: Routledge 2021); Roger O'Keefe, 'Cultural Heritage in International Humanitarian Law' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 43–74; Roger O' Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: CUP 2011).

52 Catharine Titi, 'International Dispute Settlement in Cultural Heritage Law and in the Protection of Foreign Investment: Is Cross-Fertilization Possible?' (2017) 8 *JIDS* 535–556.

53 But see Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford: OUP 2014).

promotion of economic development in international economic law. As a systematic analysis of the linkage between the protection of cultural heritage and the pursuit of economic interests in international economic law has not yet been carried out, the time is ripe for a comprehensive investigation of the burgeoning jurisprudence in the field. In particular, this book goes beyond the existing state of the art, exploring the tension between the protection of cultural heritage and economic interests in international economic law, mapping the legal framework and jurisprudence, providing the reader with a complete analytical framework and taking into account both economic and cultural arguments. Therefore, such a comprehensive framework may be of help to both practitioners and scholars alike.

The book is timely given the pressing need to protect cultural heritage and to promote economic activities in international law. Given the increasing global economic interdependence and the growing tension between the protection of cultural heritage and the promotion of trade and investment, it is of crucial importance to examine how this interaction takes place in practice. In this regard, the jurisprudence of the WTO adjudicative bodies and arbitral tribunals offers a fertile field of analysis. The recent proliferation of cultural heritage-related cases has brought the tension between economic globalization and cultural governance to the forefront of scholarly and public debates, due to their salient public policy implications. Research needs to be done in order to verify whether international adjudicators take cultural concerns into account; whether such concerns are not disguising protectionist aims; and more generally, what impact the interplay between the protection of cultural heritage and the promotion of economic activities may have on the structure of international law.

The underlying hypothesis of this book is that reconciliation of economic and cultural interests is possible, and that such interests may further reinforce each other. Development should be conceived as a broad concept inclusive not only of mere economic growth, but also of human flourishing and well-being to which cultural elements are crucial. The book thus aims to build a coherent analytical framework for investigating the existing legal framework and the relevant jurisprudence to critically assess recent legal developments and to shed light on crucial issues of international law. The book can not only provide guidance to policymakers, including international organizations and national governments, in order to reconcile the protection of cultural heritage and the promotion of economic development, but also contribute to current theoretical debates on the future of international law. Moreover, mapping the existing cases offers the adjudicators some guidance for the settling of analogous disputes. Finally, this book offers legal

mechanisms to better accommodate international investment, free trade, and cultural matters.

#### 4 Methodology

This book crosses traditional boundaries between academic disciplines to explore an area of inquiry at the crossroads between culture, economics, and law. Because of the interdisciplinary character of the research topic, methods and insights of different disciplines and traditional fields of study are taken into account. In particular, reference is made to studies elaborated under the aegis of UNESCO in international relations literature and in cognate disciplines such as anthropology and cultural studies. These studies help us understand the content and proper contours of cultural heritage.

The analysis maintains a primarily legal character and rests on sound methodological grounds. The project rests on a firm theoretical standpoint, elaborated by Hart.<sup>54</sup> The author adopts a 'moderate external point of view'<sup>55</sup> that combines 'explanation' (which implies the commitment of the researcher to objectivity) with 'comprehension' (understanding the inner logic of the object of study), and provides the rational structure on which the scientific nature of her approach is based. This approach does not follow a mere descriptive stance but considers the legal norms as the results of balance of interests. This is very appropriate to the study of international law, which is the outcome of intense negotiations.

Given the aforementioned theoretical standpoint, the project proceeds as follows. *First*, it explores the relevant legal framework governing the five different but related categories of cultural heritage: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous heritage. This taxonomy reflects the best practice in the field. Reference is made to the relevant UNESCO Conventions and declarations as well as human rights instruments which variously govern the protection of cultural heritage under international law. As a wide range of norms can have a direct or indirect significant impact on cultural matters, reference is made to other international legal instruments where appropriate.

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54 Herbert L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961).

55 Id. 86–88; François Ost and Michel Van de Kerchove, *De la Pyramide au Réseau, Pour une Théorie Dialectique du Droit* (Bruxelles: Publication des Facultés Universitaires St-Louis 2002) 458.

Both primary—for example, treaties and other relevant legal instruments—and secondary sources—that is, scholarly writings and commentaries—are examined.

*Second*, the research identifies and examines the cultural heritage-related jurisprudence before international economic courts and tribunals. The relevant cases are identified by ascertaining whether disputes brought before these courts and tribunals involved any of the different typologies of cultural heritage: that is, world heritage, underwater cultural heritage, cultural diversity, intangible cultural heritage, and Indigenous heritage. Cases are considered as relevant when an inherent interest is identified, or when the circumstances surrounding them are of relevance to the interplay between the protection of cultural heritage and the promotion of free trade and FDI.<sup>56</sup> In this scrutiny, the institutional differences among the various courts and tribunals are taken into account. The research compares the cultural heritage-related jurisprudence developed by international courts which form part of legal regimes designed to achieve various nonidentical institutional goals. Among other things, the actors who may file claims before these different courts and tribunals are not identical either. Whereas only states are (formally) involved in cases before the WTO, private actors do enjoy access to investment treaty arbitration. These and other factors are taken into account in the comparative analysis.

The book has a strong exploratory element and adopts a multiplicity of techniques to detect relevant cases in order to obtain a deeper knowledge of the research object. One such tool is the use of some very large databases – for instance, the jurisprudence of the International Center for the Settlement of Investment Disputes – that are already in digital form, so that keywords have been used to identify the relevant cases. Another port of entry has been the reading of select academic literature.<sup>57</sup>

Much more difficult is detecting those cases that despite not making formal reference to cultural concerns, still reflect fundamental cultural choices.

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56 National disputes presenting an international interest are out of the scope of the book, albeit they may be considered by way of reference. Disputes that have not made it to formal adjudication because they have been settled are also out of the scope of the book, but may be considered by way of reference when the balance struck in such mutual settlements can be meaningfully compared to the outcomes produced through formal adjudication. Outlier cases (that is, those that are atypical) may also be scrutinised, given that they may reveal additional information.

57 For a similar approach, see Eva Brems, 'Accommodating Diversity in International Human Rights: Legal Techniques' in Paul Meerts (ed.), *Culture and International Law* (The Hague: Hague Academic Press 2008).

Take, for instance, cultural differences in attitudes toward risk arising from food. As noted by Voon, although ‘disputes in this field are not typically framed in terms of culture’, consumers’ choices in connection with food safety ‘often ha[ve] cultural foundations.’<sup>58</sup> A cultural understanding of such disputes is also demanded by parallel developments at the UNESCO level, where certain types of food have been recognized to be intangible cultural heritage.<sup>59</sup> The difficulty in identifying these cases is not unsurmountable, however; the obstacles in finding the relevant cases can be overcome through reading qualified newsletters, newspapers, and academic literature.

The challenge, however, is not simply to identify the relevant jurisprudence in this way, but also to examine such cases displaying the tension between the protection of cultural heritage and economic interests. Examining cultural heritage-related cases requires acknowledging their complexity and multidimensional nature and thus adopting a pluralistic set of approaching perspectives. Almost invariably cultural heritage-related disputes involve a mixture of cultural and economic interests. In some circumstances, the arguments for protecting cultural heritage go hand-in-hand with and support economic interests; in other cases, there can be a clash between the protection of cultural heritage and the promotion of economic exchanges. Traditionally, scholars have adopted a single track – that is, they have focused on cultural heritage law or on economic law using the traditional categories of each field. Yet, the complexity and multidimensional nature of the cultural phenomena require the adoption of different albeit complementary perspectives.

This book thus adopts a double track. On the one hand, the cases are scrutinised discerning the facts of the controversy, the pertinent legal issue, and the reasoning of the tribunal. On the other hand, each case is assessed in the light of both economic and cultural standards (as detailed in international law) to determine whether such a case takes cultural concerns into account, and/or whether policies allegedly aimed to protect cultural heritage have amounted to disguised restriction on trade and/or foreign investment. By adopting a double track, the methodological differences between the legal systems regulating transnational economic transactions and cultural heritage, respectively, are acknowledged. The adoption of a double track enables

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58 Tania Voon, ‘Culture, Human Rights, and the WTO’, in Ana Filipa Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (Oxford: OUP 2013).

59 Tomer Broude, ‘Mapping the Potential Interactions between UNESCO’s Intangible Cultural Heritage Regime and World Trade Law’, (2018) 25 *International Journal of Cultural Property* 419–448.

a better understanding of the cultural elements within, and of the realities which underlie, these cases.

The book is also uniquely placed to assess the eventual convergence or divergence between international trade and investment law. Discovering common traits in these fields can help in identifying the emergence of general principles of international law or even customary law demanding the protection of cultural heritage in international law. While scholars have already ascertained the existence of customary law and general principles of law requiring the protection of cultural heritage in time of war, the existence of analogous principles and customs requiring the protection of cultural heritage in time of peace requires further investigation. The book thus seeks to bridge the gap between academic analysis and judicial practice, ideally contributing important insights on the existence of customary law or general principles of law requiring the protection of cultural heritage in time of peace. Ascertaining the emergence of such norms is particularly important because both general principles of law and customs are sources of international law and are thus binding on states, irrespective of their consent.

Finally, the study proposes ways to reconcile the existing tension between cultural governance and economic interests in international law both *de lege lata* (interpreting the existing legal instruments) and *de lege ferenda* (proposing the adoption of amendments or different legal provisions). In particular, the study investigates the question as to whether the mainstreaming of cultural heritage in international economic law can bring together the protection of cultural heritage and the promotion of trade and FDI. Integrating cultural considerations in the treaty text, in the form of textual reference in preambles, cultural exceptions, and exemptions can allow for mainstreaming cultural values in the fabric of international law.

## 5 Chapter Plan

The book proceeds as follows. The first part of the book aims at defining and connecting the fields of international cultural heritage law and international economic law. Chapter 1 analyzes the concept of cultural heritage and explores the main features of international law governing the same. In particular, it briefly examines the five different but related categories of cultural heritage: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous heritage. Given their variety, cultural phenomena may well fall within several of these categories; by way of

illustration, a cultural landscape can simultaneously be a world heritage site and a sacred place for Indigenous Peoples. While this classification helps the reader and the public at large to identify the main types of cultural heritage, it is rather flexible as it accommodates cross-cutting themes. Reference is made to the relevant Conventions and declarations adopted by UNESCO – the specialized agency of the United Nations which aims to contribute to peace and security by promoting international collaboration through education, science, and culture – as well as other international legal instruments that variously govern cultural heritage.

Chapter 2 briefly sketches out the main features of international economic law and its sophisticated dispute settlement mechanisms focusing on WTO law and international investment law. After briefly exploring the rationale behind the promotion of international trade and foreign investment, the chapter examines the elements of trade and investment rules that are of particular importance when considering their impact on cultural policies. It then discusses the relevant dispute settlement mechanisms, namely the WTO DSM and investor–state arbitration. Finally, it examines the so-called ‘legitimacy crisis’ of international economic law, including the recent crisis of the WTO AB, and ongoing proposals for the establishment of a multilateral investment court.

Chapter 3 connects the different fields. It discusses the so-called ‘linkage issue’ and its relevance for broader debates about the unity or fragmentation of international law.<sup>60</sup> International economic law recognizes the importance of a sovereign state’s ability to pursue certain noneconomic goals.<sup>61</sup> Nonetheless, whereas linkages between international economic law and noneconomic policies are acknowledged at least in theory, such interplay remains unsettled in practice. Several important linkages have emerged in the past decades such as the linkage between trade and investment on the one hand, and issues

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60 Barnali Choudhuri, ‘International Investment Law and Noneconomic Issues’, (2020) 53 *Vanderbilt Journal of Transnational Law* 1–77. For seminal studies, see Sol Picciotto, ‘Linkages in International Investment Regulation’, (1998) 19 *University of Pennsylvania JIL* 731–768; José E. Alvarez, ‘The WTO as Linkage Machine’, 96 *AJIL* (2002) 146–158.

61 See e.g. GATT Article XX.

such as labor rights,<sup>62</sup> human rights,<sup>63</sup> environmental protection,<sup>64</sup> climate change,<sup>65</sup> culture,<sup>66</sup> and gender<sup>67</sup> on the other.

The book focuses on the interplay between cultural sovereignty and international economic law. Conflicts may arise particularly when cultural policies are perceived as arbitrary, unreasonable, or protectionist. Measures allegedly aimed to protect cultural heritage may constitute a disguised restriction to trade or a breach of an investment treaty provision. The scrutiny by international economic courts of cultural policies may contribute to good cultural governance by promoting the adoption of fair and transparent policies. At the same time, there is a risk that international economic courts dilute or neglect significant cultural aspects, eventually prioritizing economic interests over cultural concerns.

The second part of the book investigates the interplay between international economic law and cultural policies in practice, providing a systematic

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- 62 Henner Gött, *Labour Standards in International Economic Law* (Heidelberg: Springer 2018); Claire Gammage, '(Re)Imagining the Trade–Labour Linkage—The Capabilities Approach', in Brian Langille (ed.), *The Capability Approach to Labour Law* (Oxford: OUP 2019) Chapter 14.
- 63 Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (Cheltenham: EE 2018); Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009); Sarah Joseph, David Kinley, and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, UK: Edward Elgar 2009); Frederick Abbott, Christine Breining-Kaufmann, and Thomas Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press 2006).
- 64 Barbara Cooreman, *Global Environmental Protection through Trade—A Systematic Approach to Extraterritoriality* (Cheltenham: EE 2017); Emily Reid, *Balancing Human Rights, Environmental Protection, and International Trade* (Oxford and Portland: Hart Publishing 2015); Saverio Di Benedetto, *International Investment Law and the Environment* (Cheltenham: EE 2013).
- 65 Leila Chennoufi et al., 'Model Green Investment Treaty: International Investment and Climate Change' (2019) 36 *Journal of International Arbitration* 95–134; Panagiotis Delimatis (ed.), *Research Handbook on Climate Change and Trade Law* (Cheltenham: EE 2016).
- 66 See e.g. Patricia M. Goff, *Trade and Culture—The Ongoing Debate* (London: Routledge 2021); Kerry A. Chase, 'Trade and Culture' in William R. Thompson (ed.), *Oxford Research Encyclopaedia of Politics* (Oxford: OUP 2019).
- 67 Jane Korinek, Evdokia Moisé, and Jakob Tange, *Trade and Gender: A Framework of Analysis* (Paris: OECD 2021); Sangwani Patrick Ng'ambi and Kangwa-Musole George Chisanga, *International Investment Law and Gender Equality—Stabilization Clauses and Foreign Investment* (London: Routledge 2020); Amit Kumar Sinha and Pushkar Anand, 'Feminist Overview of International Investment Law—A Preliminary Inquiry' (2021) 24 *JIEL* 99–125.

study of the jurisprudence on the interplay between the protection of cultural heritage and economic interests. Chapter 4 investigates some paradigmatic cases concerning the interplay between economic interests and cultural matters before arbitral tribunals. Chapter 5 examines cultural heritage-related cases adjudicated by WTO panels and the AB. Chapter 6 discusses the converging divergences between the two jurisprudential sets. While taking into account the institutional differences between these dispute settlement mechanisms, the chapter demonstrates that international economic law does not strike an appropriate balance between the different interests concerned, and that international law has developed limited machinery for the protection of cultural heritage through trade and investment dispute settlement. Nonetheless, arbitrators have increasingly taken cultural concerns into account.

Finally, the third part of this study addresses the question as to whether the protection of cultural heritage and the promotion of economic activities can be reconciled. While arguably perfect solutions do not exist to completely reconcile the inevitable tension between the protection of cultural heritage and the promotion of economic development, this book aims to suggest legal tools for addressing such tension. It analyzes the legal means for promoting the consideration of cultural heritage in international economic law and suggests new methods and approaches both interpreting the existing legal instruments and renegotiating or amending treaties. The conclusions then sum up the key findings of the study.

**PART 1**

*Cultural Heritage, Trade and Foreign Direct  
Investment: Defining and Connecting the Fields*



# Cultural Heritage in International Law

A thing of beauty is a joy for ever:  
Its loveliness increases; it will never  
Pass into nothingness.<sup>1</sup>



## 1 Introduction

Culture lies at the heart of international law. The international community is made up of culturally diverse countries, and international law governs relations among different civilizations. Therefore, just, peaceful, and prosperous relations among nations depends on respect for cultural diversity and the self-determination of peoples, the latter including their capacity to determine their destiny and model of development. One of the very goals of the United Nations (UN) is to foster international cultural cooperation ‘with a view to the conditions of stability and well-being necessary for peaceful and friendly relations among nations’ and to settle international conflicts of a cultural character.<sup>2</sup>

Since the aftermath of WWII, UNESCO has highlighted the close linkage between culture and peace:<sup>3</sup> ‘since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.’<sup>4</sup> Only by knowing each other’s ways of life and respecting cultural diversity, can mutual trust and peace be built among peoples. In fact, in order to last, peace should not be ‘based exclusively on the political and economic arrangements of governments’; rather, peace should be founded upon ‘the intellectual and

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1 John Keats, *Endymion* [1818] Ernest De Sélincourt (ed.), *The Poems of John Keats* (New York: Dodd, Mead & Company 1905) 53.

2 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 55 and Article 1, para. 3.

3 Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 November 1945.

4 *Id.*

moral solidarity of [hu]mankind' to secure 'the unanimous, lasting, and sincere support of the peoples of the world'.<sup>5</sup>

The duty to protect cultural heritage is an *erga omnes* obligation, that is, a duty that is 'the concern of all states'; all states have a legal interest in its protection because of 'the importance of the rights involved'.<sup>6</sup> The protection of cultural heritage has been considered to be an *erga omnes* obligation because the protection of cultural heritage is a commonly shared interest.<sup>7</sup> If the protection of cultural heritage was customary international law, this would entail that any State would have the right—whether individually or in concert with other States—to compel a State's performance. Certainly, the safeguarding of cultural heritage is no longer an exclusively domestic concern.<sup>8</sup>

This chapter analyzes the concept of cultural heritage and explores the main features of international law governing the same. In particular, it briefly examines the five different but related categories of cultural heritage: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous heritage. Given their variety, cultural phenomena may well fall within several of these categories; for instance, a cultural landscape may well be a World Heritage Site and include elements of both Indigenous and intangible cultural heritage. While this classification helps the reader and the public at large to identify the main types of cultural heritage, it is rather flexible as it can accommodate cross-cutting themes. Reference is made to the relevant Conventions and declarations adopted by UNESCO as well as other international legal instruments that variously govern cultural heritage. Both primary—for example, treaties and other relevant legal instruments—and secondary sources—that is, scholarly writings and commentaries—are examined.

The chapter highlights the fact that the field of cultural governance is evolving fast, and discusses several recent trends. First, it scrutinizes the move from the static concept of cultural property to the more dynamic concept of cultural heritage, including both tangible and intangible heritage. Second, it examines the gradual democratization and adoption of bottom-up mechanisms in cultural heritage governance. Third, it underlines the perennial dichotomy between some idealism and pragmatism in debates on cultural heritage governance.

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5 Id.

6 *Barcelona Traction, Light and Power Company, Limited case (Belgium v. Spain)*, Judgment, 5 February 1970, (1970) ICJ Reports 3.

7 Roger O'Keefe, 'World Cultural Heritage: Obligations To The International Community As A Whole?' (2004) 53 ICLQ 189–209.

8 Joseph P. Fishman, 'Locating the International Interest in Intranational Cultural Property Disputes' (2010) 35 *Yale JIL* 347–404, at 369.

Fourth, the chapter shows that while international cultural heritage law has to a large extent been codified, it mostly lacks compulsory dispute settlement mechanisms, thus demonstrating some substantive overreach and procedural underachievement. Finally, the chapter investigates the move away from heritagization (that is, protecting heritage because it is heritage) toward the humanization of cultural heritage protection (that is, protecting cultural heritage because of its importance to humankind). In particular, contemporary cultural heritage governance emphasizes the human dimension of cultural heritage protection and stresses the human values associated with its use. This discussion paves the way for the contemporary acknowledgment by relevant international bodies that the protection of cultural heritage is a human rights issue.

## 2 Defining Cultural Heritage

Although cultural heritage is a commonly used term, its content remains elusive.<sup>9</sup> Due to the fact that ‘legal norms cannot define [it] without referring to other disciplines,’<sup>10</sup> any definition of cultural heritage remains liminal, placed betwixt and between law and culture. Moreover, several international law instruments provide their own definition of the concept. In order to illuminate the meaning of cultural heritage, this section briefly examines its main components—culture and heritage—before approaching it holistically.

### 2.1 Culture

The term ‘culture’ derives from the Latin word *cultura* meaning ‘cultivation and care.’ The Latin verb *colere* means to till and cultivate crops and plants, as well as to inhabit, protect, and nurture, as well as to honour and worship.<sup>11</sup> Therefore, the noun *cultura* originally signified the cultivation and care of the land and complex methods to manage diverse sets of plants: what we now call agriculture.<sup>12</sup> Certainly, while agriculture was a driving force behind the growth of civilizations, it remains a cultural phenomenon.<sup>13</sup>

9 Craig Forrest, *International Law and the Protection of Cultural Heritage* (Oxford: Routledge 2010) 1.

10 Lorenzo Casini, ‘The Future of (International) Cultural Heritage Law’, (2018) 16 *International Journal of Constitutional Law* 1–10.

11 Johan Josefsson and Inga-Lill Aronsson, ‘Heritage as Life-Values: A Study of the Cultural Heritage Concept’, (2016) 110 *Current Science* 2091–98.

12 Gyorgy Markus, *Culture, Science, Society: the Constitution of Cultural Modernity* (Leiden/Boston: Brill 2011) 309.

13 Antonio Saltini, *I Semi delle Civiltà. Frumento, Riso, e Mais nella Storia della Società Umana* (Bologna: Nuova Terra Antica 2009); Marcel Mazoyer and Laurence Roudart, *A History of*

The figurative sense of culture as the cultivation of the soul (*cultura animi*) through education already appeared in antiquity. In the *Tusculan Disputations* (*Tusculanae Disputationes*), the Roman lawyer, politician, and philosopher, Cicero (106–43 BCE) considered philosophy to be the culture of the soul (*cultura autem animi philosophia est*).<sup>14</sup> After the untimely death of his daughter Tullia following childbirth, in mourning Cicero abandoned all public business and retired to his villa in Tusculum in the Roman countryside, devoting himself to philosophical studies. For Cicero, misfortunes are the common lot of humanity; human beings can bear and overcome pain by cultivating their soul (*excolere animum*).<sup>15</sup> According to Cicero, culture indicates the capability to overcome grief, select one's own companions—be they people, objects, or thoughts—and choose one's own way.<sup>16</sup> According to Cicero, culture is a consoling, empowering, and liberating force, enabling individuals to exercise freedom of choice by gathering the tools to shape their destiny.

This metaphorical use of culture as a symbol of the human condition and cultivation of the mind became common in the sixteenth century among Renaissance humanists. The lawyer, statesman, and noted humanist Thomas More (1478–1535) associated culture with personal growth and refinement to the profit of one's own mind.<sup>17</sup> The philosophers Michel de Montaigne (1533–1592) and Erasmus of Rotterdam (1466–1536) also used the notion of culture as an intellectual endeavor.<sup>18</sup>

By the beginning of the seventeenth century, the notion of culture acquired the meaning of education in its common usage. In fact, the philosopher and statesman Francis Bacon (1561–1626) used the word culture without explicitly indicating the object (that is, the mind) that was to be cultivated. In the 1605 *Advancement of Learning*, Bacon assimilated culture to education noting that 'the culture and [training of the mind] in youth ha[s] such a [powerful] though unseen, operation, as hardly any length of time or [effort] can countervail it

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*Agriculture* (New York: Monthly Review Press 2006); Mark Tauger, *Agriculture in World History* (New York: Routledge 2011).

14 Cicero, *Tusculan Disputations* [45 BCE], J.E. King (trans.) (Cambridge, MA: Harvard University Press 1927) Book II, 13.

15 Id. Book III.

16 Hannah Arendt, 'La Crisi della Cultura nella Società e nella Politica', in Hannah Arendt, *Tra Passato e Futuro* [1961] T. Gargiulo (trans.) (Milano: Garzanti 1991) 273.

17 Thomas More, 'Life of John Picus', in *The English Works of Sir Thomas More* (London: Eyre and Spottiswoode 1931) 369.

18 Michel de Montaigne, *Essais* [1580] (Paris: Garnier-Flammarion 1969) Book I, Chapter 26 (writing about 'exquisite culture' in the sense of excellent education); Pamela Sticht, *Culture Européenne ou Europe des Cultures?—Les Enjeux Actuels de la Politique Culturelle en Europe* (Paris: L'Harmattan 2000) 16.

afterwards.<sup>19</sup> For Bacon, humanity would be better if access to education was provided to all; hence, he considered access to arts, letters, and science as a public interest.

Nowadays, culture does not merely include ‘the life of the mind’; rather, it is ‘a broad and inclusive concept encompassing all manifestations of human existence’ such as the beliefs, values, habits, arts, customs, and ways of life that characterize particular groups and are passed from one generation to the next.<sup>20</sup> Culture does not encompass the mere sum of individual practices; rather, it indicates a complex whole through which individuals and communities ‘express their humanity’, give meaning to their existence, and build their world view.<sup>21</sup> Culture thus has a collective dimension and requires a holistic understanding, presupposing an interaction between individuals and communities. Nowadays, scholars distinguish three components of culture: (1) material culture, such as monuments and artifacts; (2) culture as a process of intellectual and artistic creation; and (3) culture in an anthropological sense, that is, culture as a way of life.<sup>22</sup> While the monumental concept of culture prevailed in the past, nowadays a more comprehensive concept prevails. The concept has been extended beyond high culture (that is, the traditional canons of literature, music, and art) to include popular or mass culture (such as cinema, sports events, and traditional arts and crafts).<sup>23</sup>

## 2.2 *Heritage*

The noun ‘heritage’ derives from the Latin word *hereditas* indicating ‘something [that] is left behind,’ that is ‘filled with meanings,’ and ‘that convey[s] values for the next generation.’<sup>24</sup> The concept has a dynamic character, indicating something ‘handed down; something to be cared for,’ and to be transmitted

19 Francis Bacon, *The Advancement of Learning* [*De Dignitate et Augmentis Scientiarum*, 1605] Book 6, Chapter 4, G.W. Kitchin (ed.) (London: Dent 1973), cited by Adam Muller, ‘Introduction—Unity in Diversity’ in Adam Muller (ed.), *Concepts of Culture: Art, Politics, and Society* (Calgary: University of Calgary Press 2005) 2–40, 2.

20 UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life, Article 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/21, 21 December 2009, para. 11.

21 Id. para. 13.

22 Julie Ringelheim, ‘Cultural Rights’, in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP 2018) 278–295, 279; Elsa Stamatopoulou, *Cultural Rights in International Law* (Leiden: Brill 2008) 109.

23 Ringelheim, ‘Cultural Rights’, 281.

24 Josefsson and Aronsson, ‘Heritage as Life-Values’, at 2092.

to future generations.<sup>25</sup> It ‘links the past, the present, and the future as it encompasses things inherited from the past that are considered to be of such value or significance today, that individuals and communities want to transmit them to future generations.’<sup>26</sup>

Since antiquity, heritage has traditionally indicated something—mostly land—that has been inherited. However, it has also had a broader, figurative, and spiritual sense evoking a nostalgia for the past, a sense of history, something reserved for some people and the object of their special care.<sup>27</sup> Heritage includes both tangible objects (such as buildings, land, and places) and intangible practices (such as language, music, and literature). Both tangible and intangible forms of heritage are important in forming people’s identity, building their collective memory, and shaping their ideas about their past, present, and future.

### 2.3 *Cultural Heritage*

The term ‘cultural heritage’ is more than the sum of its parts. It expresses the customs, practices, and places, as well as artistic expressions and ways of life developed by a community and passed on from generation to generation. It also refers to ‘a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge, and traditions.’<sup>28</sup> Any definition of cultural heritage constantly evolves because of changing contexts and societal perceptions.

The term ‘cultural heritage’ is gradually superseding that of ‘cultural property’ in international law.<sup>29</sup> While cultural property and cultural heritage ‘sometimes are used interchangeably’, ‘strictly speaking, however, the term property connotes ownership’, emphasizes the economic value of cultural

25 Lyndel V. Prott and Patrick J. O’Keefe, ‘Cultural Heritage or Cultural Property?’ (1992) 1 *International Journal of Cultural Property* 307, 309.

26 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 5.

27 F. Dreyfus, ‘Le Thème de l’Héritage dans l’Ancien Testament’, (1958) 42 *Revue des Sciences Philosophiques et Théologiques* 3–49.

28 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) 27 October 2005, in force on 1 June 2011, CETS No. 199, Article 2a.

29 Prott and O’Keefe, ‘Cultural Heritage or Cultural Property?’ 309.

assets, and grants owners the right to prevent others from use and the right to transfer property to others.<sup>30</sup>

Instead, cultural heritage refers to ‘the history, traditions, and qualities that a ... society has had for many years’, that are considered an important part of its identity and worthy of transmission from a generation to another irrespective of their economic value.<sup>31</sup> The term cultural heritage reflects collective identity and intergenerational equity, indicating something that is unique and irreplaceable for individuals, groups, and communities and is worth transmitting to future generations.<sup>32</sup> Its holders can be considered to be trustees of humankind rather than mere property holders. Cultural heritage can thus be read in terms of ‘stewardship, which recognizes a broader range of rights and responsibilities’ for all. Accordingly, cultural heritage ‘does not really belong to anyone’; instead, communities have a duty to preserve it in a sort of ‘inter-generational social contract.’<sup>33</sup>

There is no single definition of cultural heritage in international law; rather, various international law instruments provide specific definitions depending on their scope.<sup>34</sup> While traditionally the concept of cultural heritage mainly referred to sites, monuments, and other types of tangible heritage,<sup>35</sup> in the past decades there has been a reconceptualization of heritage as including both tangible and intangible elements.<sup>36</sup> Cultural heritage is seen not only as including tangible artifacts (such as buildings, monuments, and sites) but also intangible

30 James A.R. Nafziger, ‘The Present State of Research Carried Out by the English Speaking Section of the Centre for Studies and Research’, in James A.R. Nafziger and Tullio Scovazzi (eds), *The Cultural Heritage of Mankind* (Leiden: Brill 2008) 179–236, 180.

31 Makoto Hagino, ‘The Legal Concept of “Heritage” in the World Heritage Convention: The Case of Yakushima, Island’, (2016) 5 *Journal of Marine and Island Cultures* 11–13, 12.

32 UNESCO Declaration on the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003, preamble (highlighting that ‘cultural heritage is an important component of the cultural identity of communities, groups, and individuals.’)

33 Erich Hatala Matthes, ‘The Ethics of Cultural Heritage’, Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford: Stanford University 2018).

34 See e.g. UNESCO Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151, Article 1; Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1, Article 2; Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, in force 2 January 2009, 41 ILM 37 (2002) Article 1.

35 See e.g. World Heritage Convention, Article 1.

36 See e.g. Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) 27 October 2005, in force on 1 June 2011, CETS No. 199, Article 2(a).

components (such as folklore, cultural practices, and traditional knowledge).<sup>37</sup> Moreover, because the identification of cultural heritage is based on a process of attributing values and meanings, a process that is inherently intangible, all heritage has intangible features.<sup>38</sup>

More importantly, the concept of cultural heritage is not limited to world heritage, namely, heritage that is considered to be of outstanding value to humanity as a whole; rather, it also ‘encompasses what is of significance for particular individuals and communities.’<sup>39</sup> In the past decades, there has been a shift from the conservation of cultural heritage based on its outstanding and universal value as well as its monumental character to ‘the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity.’<sup>40</sup>

The notion of cultural heritage is necessarily selective—not every cultural practice is worth protecting. On the contrary, the protection of cultural heritage is qualified, being subject to both internal and external limits. Internal limits require preventing an overprotection of cultural heritage (heritagization), rather considering culture as a fluid concept to be safeguarded, not to be frozen in time. External limits to the protection of cultural heritage are posed by the respect of human rights. Only cultural policies and practices that are respectful of human rights are protected under international law.<sup>41</sup> International instruments clearly state that ‘practices contrary to human rights cannot be justified with a plea for the preservation/safeguard of cultural heritage, cultural diversity or cultural rights.’<sup>42</sup> Arguably, such cultural practices do not constitute cultural heritage in the first place, because they are not something to cherish; they may be cultural *practices* but they are not *heritage*.

In contemporary heritage debates, difficult questions have arisen as to whether it is appropriate to safeguard artifacts or sites that, albeit reflective of past history, are perceived to be in conflict with contemporary international

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37 Kristin Kuutma, ‘Concepts and Contingencies in the Shaping of Heritage Regimes’, in Regina Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 21–36, 24.

38 Laurajane Smith, *Uses of Heritage* (New York: Routledge 2006) 54.

39 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 7.

40 Id. para. 20.

41 See e.g. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions Paris, 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. 1, at 83, Article 2.1.

42 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 74.

human rights law.<sup>43</sup> In post-conflict societies, heritage conservation can be contested<sup>44</sup> as society strives to address historical injustices.<sup>45</sup> Therefore, the identification of what is heritage worth of being protected can be difficult.<sup>46</sup>

In conclusion, the notion of cultural heritage is complex, multifaceted, and perhaps ultimately irreducible to a single definition. Its intrinsic fuzziness presents both promises and pitfalls. On the one hand, the indeterminacy of the notion of cultural heritage confers on the law the flexibility to change, evolve, and adapt to new needs.<sup>47</sup> On the other hand, such vagueness leaves the field subject to possible abuses. There may be a temptation to opportunistically broaden (or narrow) the scope of the notion of cultural heritage for political aims.<sup>48</sup> An overly inclusive definition of cultural heritage risks diluting the concept itself and weakening international cultural heritage law by jeopardizing its effectiveness. In this regard, some critics argue that the notion of cultural heritage adopted in international instruments is so broad that it is very difficult to identify specific individual entitlements and state obligations.<sup>49</sup> In turn, a too narrow definition of cultural heritage might leave some cultural phenomena outside the scope of protection of international law even though they may be worthy of safeguarding.

### 3 The Various Categories of Heritage

As cultural heritage is a multifaceted concept, there is no single definition of cultural heritage in international law. Rather, several international law instruments protect various categories of cultural heritage, providing *ad hoc* definitions. In order to provide a nuanced understanding of cultural heritage,

43 E. Perot V Bissell, 'Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law' (2019) 128 *Yale LJ* 1130–1172, 1130.

44 See e.g. Helaine Silverman (ed.) *Contested Cultural Heritage* (London: Routledge 2011).

45 Karen Knop and Annelise Riles, 'Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the Comfort Women Agreement', (2017) 102 *Cornell LR* 853–927.

46 Lucas Lixinski, *Legalized Identities—Cultural Heritage Law and the Shaping of Transitional Justice* (Cambridge: CUP 2021) and Sharon Macdonald, *Difficult Heritage—Negotiating the Nazi Past in Nuremberg and Beyond* (London: Routledge 2009).

47 Marina Lostal, 'The Role of Specific Discipline Principles in International Law: A Parallel Analysis between Environmental and Cultural Heritage Law', (2013) 82 *Nordic JIL* 391–415, 397.

48 Frank Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 *International Journal of Cultural Property* 376–394, 377.

49 Céline Romainville, *Le Droit à la Culture, une Réalité Juridique: Le Droit de Participer à la Vie Culturelle en Droit Constitutionnel et International* (Bruxelles: Bruylant 2014) 355–70.

this section briefly explores these categories of the same: (1) world heritage; (2) underwater cultural heritage; (3) intangible cultural heritage; (4) cultural diversity; and (5) Indigenous cultural heritage.

### 3.1 *World Heritage*

World Heritage refers to both natural and cultural sites of outstanding and universal value that are included in special lists and safeguarded under the UNESCO's 1972 World Heritage Convention (WHC).<sup>50</sup> World Heritage sites include ancient ruins, historical monuments, buildings, and cities, as well as deserts, glaciers, islands, forests, lakes, mountains, or wilderness areas.<sup>51</sup> Their significance is so special as to 'transcend national boundaries and to be of common importance for present and future generations of all humanity.'<sup>52</sup>

Under the WHC, 'the duty of ensuring the identification, protection, ... and transmission to future generations' of world heritage 'belongs primarily to th[e] State' on which territory a site is situated.<sup>53</sup> Therefore, the WHC does not replace a state's cultural sovereignty; on the contrary, it aims to support the state's safeguarding of that part of its heritage that is so important to matter to humankind as a whole. The WHC thus establishes a system of international cooperation and assistance that supports States Parties to the Convention in their efforts to conserve that heritage.<sup>54</sup>

The complementarity between state cultural sovereignty and the regime established under the WHC is particularly evident in the process of identifying and selecting world heritage. After states nominate given sites for inscription on the World Heritage List, the International Council on Monuments and Sites and the World Conservation Union evaluate the nominations and make their recommendations to the World Heritage Committee. The Committee meets once a year to determine whether or not to inscribe each nominated property on the World Heritage List. In the process, the state's nomination of a

50 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151. As of June 2022, it has been ratified by 194 states parties.

51 WHC, Articles 1 and 2. As of June 2022, a total of 1,154 World Heritage Sites (897 cultural, 218 natural, and 39 mixed properties) exist across 167 states parties. The List is available at <<https://whc.unesco.org/en/list/>> (last visited on 1 June 2022)

52 Lynn Meskell, 'UNESCO's World Heritage Convention at 40: Challenging the Economic and Political Order of International Heritage Conservation', (2013) 54 *Current Anthropology* 483–494, 483.

53 WHC, Article 4.

54 WHC, preamble and Article 7.

given site is a precondition for their getting the status of world heritage. At the same time, any nomination is subject to international scrutiny and approval.

States are eager to list sites for inscription in the List; a listed site gains international recognition, prestige, and legal protection, and can obtain financial assistance from the World Heritage Fund to facilitate its conservation under certain conditions.<sup>55</sup> Additionally, the local communities living around a site may benefit from heightened public awareness, significantly increased tourism, and economic development.<sup>56</sup>

Anthropologists have cautioned that the notion of world heritage expresses a 'top-down definition of culture' thus 'fail[ing] to address nationalist repressions and neocolonial endeavors', while creating a 'cultural map of the world.'<sup>57</sup> In fact, because it is up to states to propose the nomination of sites on the World Heritage List, the WHC maintains a 'statist power structure'. Non-state actors like Indigenous groups and minorities have historically been marginalized in world heritage listing with severe consequences for the protection of their cultural and natural sites.<sup>58</sup> Moreover, the traditional overrepresentation of *cultural* sites over *natural* sites of outstanding and universal value on the List reflects the early adoption of a monumental vision of heritage that typically characterizes the Western world. UNESCO is now trying to re-balance this disparity and create a more representative inventory by adopting more comprehensive and holistic approaches to sites that are of particular importance to other civilizations.<sup>59</sup>

### 3.2 *Underwater Cultural Heritage*

In recent times, the advancement of technology has made it possible to find, visit, and remove artifacts from shipwrecks that have remained in the abyss for centuries. The increasing capability to reach these archaeological treasures has intensified the debate on management issues. While private actors have filed admiralty claims for establishing their title to sunken vessels, in turn, states have claimed public property and sovereign immunity on the same wrecks.<sup>60</sup> While private actors generally sell the artifacts to recover expenses and make a

55 WHC, Articles 15–18.

56 Meskell, 'UNESCO's World Heritage Convention at 40', 483.

57 Id. 484.

58 Id. 485; Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution and Enforcement* (Leiden: Brill 2018) 109–125.

59 Meskell, 'UNESCO's World Heritage Convention at 40', 485.

60 See e.g. Valentina Vadi, 'Underwater Cultural Heritage and the Market: The Uncertain Fate of Historic Sunken Warships under International Law', in Valentina Vadi and

profit, the scientific community and the public at large demand the preservation of such underwater cultural heritage (UCH). At the same time, states lack the resources to locate and recover this type of heritage, and input from non-state actors seems necessary in order to find these artifacts in the first place.

In order to address some of the issues raised by the recovery and management of UCH and given the short provisions of, and the legal gaps left open by, the United Nations Convention on the Law of the Sea (UNCLOS),<sup>61</sup> UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage (CPUCH) in 2001.<sup>62</sup> The CPUCH considers UCH to be an ‘integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.’<sup>63</sup> While the concept of the common heritage of humanity ‘symbolizes the unity of mankind’, it does not establish a form of collective property; rather, it affirms the objective of protecting UCH because of its importance to humankind as a whole.<sup>64</sup>

While the UNCLOS does not refer to UCH, and only two of its provisions govern cultural objects found at sea,<sup>65</sup> the CPUCH introduces an apposite definition of UCH and a comprehensive and detailed regime of protection. The CPUCH defines UCH as: ‘[A]ll traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as ... vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.’<sup>66</sup>

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Hildegard Schneider (eds), *Art, Cultural Heritage, and the Market: Ethical and Legal Issues* (Heidelberg: Springer 2014) 221–256.

61 United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 397, in force 1 November 1994.

62 Convention on the Protection of the Underwater Cultural Heritage (CPUCH), 2 November 2001, in force 2 January 2009, 2562 UNTS 3.

63 CPUCH, preamble.

64 Valentina Vadi, ‘War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships under International Law’, (2012–2013) 37 *Tulane Maritime Law Journal* 333–378, 352.

65 UNCLOS Articles 149 and 303 provide a basic legal framework for protecting underwater cultural heritage. Article 149 provides that ‘[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.’ Article 303 directs States Parties to ‘protect objects of an archaeological and historical nature found at sea and cooperate for this purpose’.

66 UCH Convention, Article 1(a)–(a)(II).

This definition is simultaneously broad and narrow. On the one hand, it constitutes a kind of blanket protection for all traces of human existence. This modern and proactive approach goes beyond the listing approach adopted under other UNESCO conventions. On the other hand, such a definition confines the notion of cultural heritage to a certain timeframe. In fact, the CPUCH only governs those artifacts that have been underwater for more than 100 years. The 100-year cut-off point 'has no logic from a scientific viewpoint but was inserted purely for administrative convenience.'<sup>67</sup> This leaves artifacts that have been underwater for less than 100 years outside the scope of the Convention. This gap has been criticized because artifacts from the Second World War are excluded from legal protection under the CPUCH, notwithstanding their significant historical and cultural value.

Substantively, the CPUCH requires States Parties to preserve UCH and take action according to their capabilities. They should consider the preservation of UCH in its original location on the seafloor (*in situ*) as the first option before allowing or engaging in any further activities. The recovery of objects may, however, be authorized for the purpose of making a significant contribution to the protection or knowledge of UCH. The CPUCH provides that UCH should not be commercially exploited for profit, and that it should not be irretrievably dispersed.

### 3.3 *Intangible Cultural Heritage*

The concept of Intangible Cultural Heritage (ICH) refers to the wealth of cultural traditions, practices, expressions, knowledge, and skills – as well as the instruments, objects, artifacts, and cultural spaces associated therewith – that communities, groups and, in some cases, individuals, recognize as part of their cultural heritage and pass on from one generation to another.<sup>68</sup> ICH is a type of living heritage, which is created, developed, and maintained by given communities, often in response to given environmental conditions and political, economic, and social changes. Being inextricably connected with people's lives, ICH constitutes 'an essential element of the identity of its creators and bearers'<sup>69</sup> and provides them with a sense of identity, belonging, and continuity.<sup>70</sup>

67 Vadi, 'War, Memory, and Culture', 362.

68 CSICH Article 2.

69 Federico Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples' (2011) 22 EJIL 101–120, 101.

70 Cristina Amescua, 'Anthropology of Intangible Cultural Heritage', in Lourdes Arizpe and Cristina Amescua (eds), *Anthropological Perspectives on Intangible Cultural Heritage* (Heidelberg: Springer 2013) 107.

Since ICH reflects communities' response to contemporary challenges, the safeguarding of ICH can foster cultural resilience, that is, the capability to adapt quickly to new circumstances using one's own tradition and cultural background. Cultural resilience empowers individuals not only to overcome adversity, but also to evolve and even thrive after stressful events.<sup>71</sup>

Despite the importance of ICH as a key element of the cultural identity of peoples, its protection has long been neglected by international law. Early expressions of such protection were incorporated in peace treaties and—albeit sparingly—surfaced in the jurisprudence of the Permanent Court of International Justice (PCIJ).<sup>72</sup> In the aftermath of WWII, aspects of intangible heritage have been governed and/or touched upon by a number of international law instruments.<sup>73</sup> Nevertheless, most international legal instruments focused on the protection of tangible heritage only.<sup>74</sup> For decades, any safeguarding of ICH has had a merely oblique character. For instance, human rights treaties have indirectly governed aspects of ICH by requiring the protection of human dignity and cultural rights.<sup>75</sup> Cases adjudicated before the International Court of Justice (ICJ) have touched upon the cultural practices of local communities while settling several disputes.<sup>76</sup>

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71 Caroline Clauss-Ehlers, 'Cultural Resilience', in Caroline Clauss-Ehlers (ed.) *Encyclopedia of Cross-Cultural School Psychology* (Heidelberg: Springer 2015) 324–6.

72 See generally Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Leiden: Martinus Nijhoff Publishers 2009).

73 Ana F. Vrdoljak, 'Minorities, Cultural Rights, and the Protection of Intangible Heritage', paper presented at the ESIL Research Forum on International Law Contemporary Issues, held at the Graduate Institute of International Studies in Geneva on 26–28 May 2005, 1.

74 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954, in force 7 August 1956, 249 UNTS 240; Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

75 See, *inter alia*, International Covenant on Civil and Political Rights (ICCPR) 16 December 1966, in force 23 March 1976, 999 UNTS 171; 6 ILM 368 (1967), Article 27; International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, 993 UNTS 3, 6 ILM 368 (1967), Article 15.

76 See e.g. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, 21 April 2022 (2022) ICJ Reports para. 15 (examining whether Colombian fishermen had traditional and historic fishing rights); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 54, para. 134 (holding that 'the construction of the wall and its associated régime ... impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social, and Cultural Rights and in the United Nations Convention on the Rights of the Child.'). *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 21 October 2010, ICJ Reports 2010, p. 100, para. 100 (holding that 'the construction of the pulp mill and its associated activities ... impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social, and Cultural Rights and in the United Nations Convention on the Rights of the Child.').

States did not adopt specific international instruments for safeguarding ICH since they believed that local communities would appropriately maintain and develop their cultural practices.<sup>77</sup> They assumed that ‘the depositaries of ICH’ would ‘transmi[t] to future generations the necessary knowledge to preserve and perpetuate their own immaterial heritage’, and that there was no need for any international instrument in that respect.<sup>78</sup>

In recent decades, however, it has become evident that ICH demands safeguarding at the international level. Globalization has intensified commerce and intercultural contacts, potentially promoting cultural exchange but also jeopardizing local cultural practices and contributing to the predominance of certain cultural models over others.<sup>79</sup> The diffusion of a global mass culture has raised the fundamental question of whether ‘valuable traditions, practices, and forms of knowledge rooted in diverse societies would survive the next generation.’<sup>80</sup>

In response to such trends, UNESCO has adopted specific instruments for safeguarding ICH. In 1989, UNESCO issued a Recommendation on the Safeguarding of Traditional Culture and Folklore, illustrating policies that countries could implement to preserve their ICH.<sup>81</sup> However, the recommendation was a ‘soft’ international instrument and had little impact due to its ‘top-down’ and ‘state-oriented’ approach.<sup>82</sup> Very few states took action in this regard. In 2001, the launch of the Masterpieces of the Oral and Intangible Heritage program—which established three rounds of proclamations of given traditions as representative ‘Masterpieces’ to raise awareness about intangible heritage—was very well received and paved the way for the elaboration of the Convention on the Safeguarding of the Intangible Cultural Heritage (CSICH).<sup>83</sup>

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*tina v. Uruguay*), Judgment, 20 April 2010, ICJ Reports 2010, p. 14, para. 171 (referring to ‘pre-existing uses of the river’); *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* Judgment, 14 June 1993, ICJ Reports 1993, p. 38, para. 73 (referring to the local fishing practices of migratory stocks).

77 Lenzerini, ‘Intangible Cultural Heritage: The Living Culture of Peoples’, 102.

78 Id.

79 Marilena Alivizatou, ‘Intangible Heritage and Erasure: Rethinking Cultural Preservation and Contemporary Museum Practice’ (2011) 18 *International Journal of Cultural Property* 37–54.

80 Richard Kurin, ‘Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal’ (2004) *Museum International* 66, 68.

81 Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989, in UNESCO, *Standard-Setting at UNESCO—Conventions, Recommendations, Declarations and Charters Adopted by UNESCO* (1948–2006), Volume II, 605–609.

82 Kurin, ‘Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention’, 68.

83 See generally Noriko Aikawa-Faure, ‘From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage’, in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Abingdon: Routledge 2009) 13–44.

The CSICH constitutes the principal instrument governing ICH at the international level and has been very successful since its inception.<sup>84</sup> No state voted against its adoption; it rapidly entered into force, and today it boasts an almost universal adhesion.<sup>85</sup> The CSICH considers solely ‘such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups, and individuals, and of sustainable development.’<sup>86</sup>

The CSICH requires States Parties to draw inventories of their ICH and to collaborate with local communities on various appropriate means of safeguarding those traditions.<sup>87</sup> The UNESCO Committee established under the CSICH oversees two international lists: (1) the list of ‘representative’ intangible cultural heritage (‘Representative List of the Intangible Cultural Heritage of Humanity’)<sup>88</sup> and (2) the list of endangered cultural heritage (‘List of Intangible Cultural Heritage in Need of Urgent Safeguarding’).<sup>89</sup> The former includes, *inter alia*, the items already designated as Masterpieces of Oral and Intangible Heritage by UNESCO and is comparable to the World Heritage List. The latter is comparable to the List of World Heritage in danger.

The CSICH aims to remedy two structural imbalances within international law. First, it aims to counterbalance the regulation of cultural resources by international economic law. In this regard, the CSICH can counter both the perceived commodification of culture, that is, its reduction to a good or merchandise to be bartered or traded, and the hegemonic tendencies of dominant cultures. To do so, the 2003 Convention conceptualizes oral traditions and expressions—including music, dance, and theater—and knowledge and practices concerning nature and the universe—such as traditional medicine and artisanship—as forms of ICH, rather than mere cultural commodities.<sup>90</sup> This different conceptualization of cultural processes and phenomena determines a paradigm shift in the way these valuable assets are to be governed. Moreover,

84 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), 17 October 2003, 2368 UNTS.

85 List of States Parties to the 2003 Convention, <<http://www.unesco.org/eri/la/convention.asp?language=E&KO=17116>> (accessed on 18 January 2022).

86 CSICH Article 2.1.

87 See generally Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention. A Commentary* (Oxford: OUP 2020).

88 CSICH Article 16.

89 CSICH Article 17.

90 See, for example, Valentina Vadi, ‘Intangible Heritage, Traditional Medicine, and Knowledge Governance’ (2007) 10 *Journal of Intellectual Property Law and Practice* 682; Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property—Genetic Resources, Traditional Knowledge and Folklore* (Wolters Kluwer 2008) 510.

since the CSICH identifies local communities as ICH creators and guardians, it consequently requires the involvement of such communities for safeguarding ICH. The CSICH is more participatory than any other international cultural heritage law instrument to date. The adoption of a participatory regime of implementation oriented toward cultural bearers can counter patterns of cultural hegemony and empower local communities.

Second, the CSICH aims to remedy a gap in global cultural governance, which has traditionally favored the protection of tangible heritage over the protection of intangible heritage. For example, while the 1972 WHC focuses on the conservation of static and tangible monuments and sites,<sup>91</sup> the CSICH safeguards dynamic and intangible heritage. As such, the CSICH does ‘not envision cultural heritage as a ... relic of the past,’ but as living heritage that is constantly evolving.<sup>92</sup> Whereas the WHC requires outstanding universal value for items to be inscribed on its list, the CSICH has a representative list. The shift from ‘outstanding’ to ‘representative’ heritage fosters comprehensiveness and inclusion. It also enables historically marginalized countries to bring their heritage to the fore.<sup>93</sup> Furthermore, while the WHC allows only for limited participation of non-state actors, the ICH regime places communities at the center of its operation.<sup>94</sup> The ICH regime acknowledges that ‘there is no folklore without the folk’ and that communities shape their ICH as much as ICH shapes their identity.<sup>95</sup> Therefore, the CSICH highlights the importance of involving communities in all processes related to their ICH.<sup>96</sup>

Despite its achievements, the CSICH has been criticized because of its ‘substantive overreach’ and procedural underachievement.<sup>97</sup> On the substantive level, the definition of ICH is too broad and descriptive, risking an unwelcome politicization of culture.<sup>98</sup> States often list ICH in the pursuit of

91 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

92 Alivizatou, ‘Contextualising Intangible Cultural Heritage’, 48.

93 Lenzerini, ‘Intangible Cultural Heritage: The Living Culture of Peoples’, 104.

94 Britta Rudloff and Susanne Raymond, ‘A Community Convention? An Analysis of Free, Prior, and Informed Consent given under the 2003 Convention’ (2013) 8 *International Journal of Intangible Heritage* 154.

95 Alivizatou, ‘Contextualising Intangible Cultural Heritage’, 47.

96 CSICH, Article 15.

97 Tomer Broude, ‘A Diet too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices’ in Irene Calboli and Srividhya Radavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law* (Cambridge: CUP 2015) 3.

98 See generally Tullio Scovazzi, Benedetta Ubertazzi, and Lauso Zagato (eds), *Il Patrimonio Culturale Intangibile nelle sue Diverse Dimensioni* (Milan: Giuffrè 2012) 93–126; Tullio Scovazzi, ‘La Notion de Patrimoine Culturel de l’Humanité dans les Instruments

cultural, political, and economic goals. However, an excessive politicization of the listing process – namely, using the listing process for predominantly, if not exclusively, purposes beyond cultural goals – risks affecting the functioning of international cultural instruments, and endangering, rather than safeguarding, heritage.

Meanwhile, on the procedural level, critics of the ICH regime have also questioned the effectiveness of the listing mechanism, as it is up to states, not local communities, to nominate items for inscription.<sup>99</sup> Moreover, inventories do not do justice to ICH as a living phenomenon; rather, they risk creating cultural islands that are separated from the progression of time and the vitality of culture. In this sense, critics fear that measures for the protection of ICH ‘may possibly hinder their further development and make them less relevant to contemporary communities’.<sup>100</sup> Furthermore, the very effectiveness of such a listing is controversial, as mere inventories will hardly save ICH.<sup>101</sup>

Conflicts between the CSICH and other international norms—whether customary or conventional—have demonstrated additional procedural shortcomings of the Convention. The CSICH intersects with several instruments of international trade law, which have different aims and objectives. While the CSICH aims to safeguard ICH, international trade law instruments aim to promote free trade. Furthermore, while the CSICH does not provide a binding dispute resolution mechanism, the WTO is characterized by the compulsory, highly effective, and sophisticated DSM. As such, when a substantive clash between the promotion of free trade and the safeguarding of ICH has arisen, such disputes have been brought before the WTO DSM.<sup>102</sup>

### 3.4 Cultural Diversity

The concept of cultural diversity is ‘multifaceted, multilevel, [and] almost as complex as the concept of culture itself.’<sup>103</sup> It ‘refers to the existence of a

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Internationaux’ in James A.R. Nafziger and Tullio Scovazzi (eds), *Le Patrimoine Culturel de l’Humanité/ The Cultural Heritage of Mankind* (Leiden: Brill 2008) 3–144.

99 Michelle Stefano, ‘Reconfiguring the Framework: Adopting an Ecomuseological Approach for Safeguarding Intangible Cultural Heritage’, in Michelle Stefano, Peter Davis, and Gerard Corsane (eds), *On the Ground: Safeguarding the Intangible* (Cambridge: CUP 2013) 223–238.

100 Alivizatou, ‘Contextualising Intangible Cultural Heritage’, 47.

101 Kurin, ‘Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention’, 74.

102 See Chapter 5 below.

103 Céline Romainville, ‘Cultural Diversity as a Multilevel and Multifaceted Legal Notion Operating in the Law on Cultural Policies’ (2016) 22 *International Journal of Cultural Policy* (2016) 273–290, 273.

multiplicity of cultures ... in the same vein as biodiversity refers to the variety of living forms through the ecosystems.<sup>104</sup> Not only does cultural diversity constitute a fundamental aspect of the human condition, but it also constitutes a core element of international law that governs the interaction between different civilizations since time immemorial.

Globalization is having a profound effect on all civilizations and ways of life. As an economist pointed out, '[i]t has affected what we eat and the ways we prepare our foods, what we wear and the materials from which our clothing is made; it has affected the music we hear, the books we read, even the language we use to communicate with each others.'<sup>105</sup> Some argue that globalization can exert strong homogenizing tendencies thus weakening or even erasing existing cultures and leading to a sort of cultural imperialism. By facilitating the export of cultural products such as television programs, music, and other entertainment from given countries to others, economic globalization could pave the way to the emergence of an overarching world culture.<sup>106</sup> The resulting cultural globalization would gradually lead to cultural losses, the end of cultural diversity, and a diffusion of uniform beliefs across time and space.

For example, economic globalization has enabled Hollywood studios to market their movies on a global level at a scale unprecedented before. The rise of 'the jewel in America's trade crown'<sup>107</sup> has entailed the relative decline of other national cinemas in the global film market.<sup>108</sup> In order to counter this hegemonic process, states have adopted a range of cultural policies to assist domestic film production, not simply because of economic considerations but also for sustaining diverse forms of cultural expression.<sup>109</sup> Since the early 2000, several countries such as Canada have adopted policies such as quotas, tax incentives, and subsidies to reduce the showing of foreign films and to instead feature more domestic programming. Within the EU, common cultural policies have been adopted.<sup>110</sup> Such policies express the pursuit of

104 Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion', 273.

105 Keith Griffin, 'Globalization and Culture', in Stephen Cullenberg and Prasanta Pattanaik (eds), *Globalization, Culture, and the Limits of the Market: Essays on Economics and Philosophy* (New Delhi: OUP 2004) 241–263, 252.

106 John Hill and Nobuko Kawashima, 'Introduction: Film Policy in a Globalised Cultural Economy' (2016) 22 *International Journal of Cultural Policy* 667–672, 669.

107 Christopher Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products' (2008) 40 *New York University Journal of International Law and Politics* 351–434, 356.

108 Xu Song, 'Hollywood Movies and China' (2018) 3 *Global Media and China* 177–194, 179.

109 Hill and Kawashima, 'Film Policy in a Globalised Cultural Economy', 668.

110 *Id.* 670.

economic objectives (such as full employment in the cultural industries and positive cascading effects on other industries) and cultural ones (such as the safeguarding of domestic culture and the promotion of cultural diversity) in film policies.<sup>111</sup> This has determined a tension between countries that are net exporters of audiovisual products (that consider such cultural policies as a disguised protectionism) and countries that are importers of such products (that desire to maintain some space for domestic cultural products and processes). The former consider such cultural products as mere goods. The latter conceptualize cultural goods not only as merchandise but also as vectors of cultural meaning, value, and identity.

Analogously, economic globalization has deeply changed domestic food cultures. As is known, food has cultural value and its preparation can be considered an expression of cultural diversity. While trade in food has undeniably facilitated access to food in many countries by increasing the availability of food as well as decreasing the prices of the same, globalization has also greatly changed local food cultures.<sup>112</sup> In parallel, FDI in the agribusiness sector has entailed a shift toward overspecialization, agriculture intensification, and long chain models where food is traded long distances.<sup>113</sup> Such overspecialization and intensification of agricultural production can disrupt traditional lifestyle, reduce biodiversity, and affect soil fertility, thus reducing communities' resilience in times of crisis.<sup>114</sup> Moreover, in long food chains, raw ingredients are usually transformed into processed products with considerable sugar, salt, and fat content.<sup>115</sup> For example, fast food companies have become popular across different continents, often making highly processed foods cheaper and more available than healthy alternatives. This has led to a shift in dietary habits worldwide as people increasingly consume food that is rich in sugar, salt, and fat. Therefore, the new global diet has increased the risk of obesity, type

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111 Hill and Kawashima, 'Film Policy in a Globalised Cultural Economy', 668.

112 See, for instance, Sarah E. Clark, Corinna Hawkes, Sophia M.E. Murphy, Karen Hansen-Kuhn, and David Wallinga, 'Exporting Obesity: US Farm and Trade Policy and the Transformation of the Mexican Consumer Food Environment' (2012) 18 *International Journal of Occupational and Environmental Health* 53–64 (noting that, facilitated by the North American Free Trade Agreement (NAFTA), the United States's agriculture and trade policy has influenced Mexico's food system.)

113 Anna Lartey, Günter Hemrich, and Leslie Amoroso, 'Influencing Food Environments for Healthy Diets', in FAO, *Influencing Food Environments for Healthy Diets* (Rome: FAO 2016) 1–14, 5.

114 Olivier De Schutter, 'International Trade in Agriculture and the Right to Food' in Olivier De Schutter and Kaitlin Cordes (eds), *Accounting for Hunger* (Oxford: Hart 2011) 137–191, 141.

115 Corinna Hawkes, 'The Role of Foreign Direct Investment in the Nutrition Transition' (2005) 8 *Public Health Nutrition* 357–365.

2 diabetes, and other noncommunicable diseases (NCDs), thus constituting a global health threat in both industrialized and developing countries alike. It can also lead to the gradual abandonment of traditional food cultures with the resulting loss of cultural diversity.<sup>116</sup>

Food has always been a driving force for globalization, especially in the early modern period when the world's appetite for spices opened new trade routes, redrew the world's map, and shaped the structure of the then global economy. Nowadays, economic globalization has led to the convergence if not homogenization of food, eating habits, and cuisines.<sup>117</sup> Food cultures are on the move and some cultures have become dominant on the global plane. Whether one global fusion cuisine will emerge—that combines elements of different culinary traditions that originate from different countries, into a melting pot of culinary influences from all across the globe—or whether a plurality of culinary cultures can flourish remains a matter of debate. Nonetheless, different aspects of international economic law can enable or constrain governments' ability to adopt or maintain cultural policies.

The 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted to counter concerns of cultural imperialism.<sup>118</sup> Through this agreement, the international community acknowledged the dual nature, both cultural and economic, of contemporary cultural expressions. The CCD recognizes the sovereign right of states to adopt policies to protect and promote cultural diversity.

Because the legal notion of cultural diversity is characterized by fundamental indeterminacy, it permits different interpretations and legitimizes different cultural policies.<sup>119</sup> In a diverse society such as the international community, cultural diversity constitutes a safety valve (or an agreement to disagree) that enables states to fruitfully maintain their divergences of opinion while maintaining international peace. Such inherently vague and flexible concept

116 Sam-ang Seubsman, Matthew Kelly, Pataraporn Yuthapornpinit, and Adrian Sleigh, 'Cultural Resistance to Fast-Food Consumption?', (2009) 33 *International Journal of Consumer Studies* 669–675.

117 Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227 [1988] (holding that Germany cannot limit the use of the word *Bier* to beverages manufactured in accordance with German standards); Case 120/78, *Rewe Central AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 [1979] (holding that Germany cannot prohibit import of liqueur legally manufactured in France because it fails to meet minimum alcohol content under German law).

118 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. 1, at 83.

119 Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion', 274 and 276.

works as an ‘incompletely theorized agreement’ precisely because ‘it reflects divergences about culture, cultural policies, and their relationships with markets, societies, and States.’<sup>120</sup> Consequently, the measures adopted by the States Parties to comply with the Convention can be contradictory. Whether cultural diversity can be better promoted by allowing the broadcasting of foreign movies or by requiring the compulsory broadcasting of domestic movies remains an open question. Whether the globalization of food industries contributes to eradicating hunger by bringing cultures together or contributes to malnutrition bringing an excessive food uniformity remains to be seen.

The indefinite fluidity of international cultural heritage law allows states to calibrate their cultural policies according to their specific needs. It can also assist the achievement of a suitable balance between the protection of cultural heritage and the promotion of economic interests in international law. Yet, concerns remain that cultural policies can disguise discrimination and protectionism. The particular fluidity of international cultural heritage law can make it difficult for adjudicators to ascertain the legitimacy of such measures. Because there is no World Heritage Court, cultural diversity-related disputes have been attracted and settled by international economic courts.<sup>121</sup>

### 3.5 *Indigenous Cultural Heritage*

Indigenous cultural heritage plays an essential role in the building of the identity of Indigenous peoples. Indigenous peoples are culturally distinct ethnic groups who are native to a place which has been colonized and settled by another ethnic group.<sup>122</sup> They are geographically rooted in given places but historically and legally situated between the national and the international arenas. Geographically, they are ‘*Indigenous*’ (from the Latin term *indigena* indicating native people who are born in a place) because ‘their ancestral roots are embedded in the lands on which they live.’<sup>123</sup> They have been living in a

120 Romainville, ‘Cultural Diversity as a Multilevel and Multifaceted Legal Notion’, 278.

121 See Chapter 3 below.

122 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 ILM 1382, Art. 1 (defining ‘Indigenous peoples’ ‘on account of their descent from the populations which inhabited the country ... at the time of conquest or colonization or the establishment of present state boundaries and who ... retain some or all of their own social, economic, cultural, and political institutions.’)

123 James Anaya, *Indigenous Peoples in International Law*, 11 ed. (Oxford: OUP 2004) 3.

given territory long before the establishment of the nation state under whose sovereignty they live today.

Nonetheless, historically and legally, Indigenous nations have played a role in international relations, signed treaties, and used to be recognized as sovereign nations. Before the coming of Europeans to Indigenous lands, Indigenous peoples were 'sovereign political communities.'<sup>124</sup> Nonetheless, for centuries, states tended to view and govern Indigenous peoples as units of domestic law rather than as legal subjects under international law.<sup>125</sup> In parallel, international law largely forgot them.<sup>126</sup>

Nowadays, there has been 'a paradigm shift in international law,'<sup>127</sup> and Indigenous peoples have been increasingly considered to be 'legal subjects' under the same.<sup>128</sup> Indigenous peoples are directly influencing and contributing to international law making; new international instruments have specifically recognized the rights of Indigenous peoples in the past five decades; and a growing jurisprudence of various UN and regional bodies has firmly reaffirmed their rights.<sup>129</sup> If the 'claims and aspirations' of Indigenous peoples 'are diverse,' they present a common thread: the quest for safeguarding their cultural heritage.<sup>130</sup>

Indigenous cultural heritage comprises 'all objects, sites, and knowledge' that have been 'transmitted from generation to generation' and that pertain to Indigenous peoples.<sup>131</sup> It includes both 'tangible and intangible manifestations of their ways of life, worldviews, achievements, and creativity.'<sup>132</sup> Indigenous peoples see culture and nature as deeply interconnected and do not differentiate

124 *United States v. Wheeler*, 435 U.S. 313, 322–323 (1978).

125 *Cayuga Indians (Great Britain) v. United States*, 6 *Review of International Arbitral Awards* 173, 176 (1926) (stating that an Indian tribe 'is not a legal unit of international law.')

126 J. Kleinfeld, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard LR* 1755–1778, at 1758.

127 Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford: OUP 2016) 149.

128 Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, II revised edition (Leiden: Brill 2016) XIII.

129 Kleinfeld, 'The Double Life of International Law', at 1758.

130 Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 *EJIL* 121–140, 121.

131 UN Special Rapporteur Daes, Protection of the Heritage of Indigenous Peoples, E/CN.4/Sub.2/1995/26, Annex.

132 Human Rights Council, 'Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage', Study by the Expert Mechanism on the Rights of Indigenous Peoples', A/HRC/30/53, 19 August 2015, para. 6.

between cultural heritage on the one hand and natural heritage on the other. Rather, their cultural traditions are inseparable from their lands.

For Indigenous peoples, land is the basis not only of economic livelihood, but also the source of spiritual and cultural identity.<sup>133</sup> Indigenous peoples maintain cultural and spiritual ties with the territory they have traditionally occupied,<sup>134</sup> not only due to the presence of sacred sites but also because of the intrinsic sacred value of the territory itself.<sup>135</sup> They ‘see the land and the sea, all of the sites they contain, and the knowledge and the laws associated with those sites, as a single entity that must be protected as a whole.’<sup>136</sup> Although Indigenous cultures vary across continents, ‘there is a common thread that runs through these diverse Indigenous groups—a deep cultural and spiritual connection to the land.’<sup>137</sup>

For Indigenous peoples, preserving their cultural heritage is particularly important because its safeguarding contributes to building both individual and collective identity, resilience, and a sense of common destiny.<sup>138</sup> For them, cultural heritage transforms the past into a tool to address present needs and future challenges. Therefore, the safeguarding of Indigenous cultural heritage is not only complementary but also necessary to respect, protect, and fulfill their human rights.<sup>139</sup> The protection of Indigenous cultural heritage ‘ensure[s] the survival and continued development of the cultural, religious, and social identity of the [Indigenous peoples] concerned, thus enriching the fabric of society as a whole.’<sup>140</sup>

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133 Jérémie Gilbert, ‘Custodians of the Land—Indigenous Peoples, Human Rights, and Cultural Integrity’ in Michele Langfield, William Logan, and Máiréad Craith (eds), *Cultural Diversity, Heritage, and Human Rights* (Oxon: Routledge 2010) 31–44 at 31.

134 Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment, 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 (clarifying that ‘For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.’)

135 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 28 November 2007, IACtHR Series C, No. 172, at para. 82.

136 Ciaran O’Faircheallaigh, ‘Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia’ (2003) 39 *Development and Change* 25–51 at 27.

137 Erin M. Genia, ‘The Landscape and Language of Indigenous Cultural Rights’ (2012) 44 *Arizona State Law Journal* 653–679, 659.

138 Tumu te Heuheu, Merata Kawharu, and R. Ariihau Tuheiava, ‘World Heritage and Indigeneity’ (2012) 62 *World Heritage* 8–17 at 17.

139 Wiessner, ‘The Cultural Rights of Indigenous Peoples’, 121–22.

140 Id.

Unlike other categories of heritage, Indigenous cultural heritage is not governed by a dedicated UNESCO Convention. Like other branches of international law, international cultural heritage law remains state-centric, that is, made by states for states.<sup>141</sup> Although Indigenous peoples have traditionally played a role in international relations, the state-centric structure of international law has somehow delayed, if not altogether prevented, the adoption of a specific convention safeguarding Indigenous cultural heritage.

Nonetheless, the recognition of Indigenous peoples' rights and cultural heritage has gained some momentum at the international level since the adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>142</sup> Drafted with the active participation of Indigenous representatives, the Declaration constitutes a significant achievement for Indigenous peoples worldwide.<sup>143</sup> Not only does it re-empower Indigenous peoples, but it also shifts the discourse on their rights from the local to the international level with an intensity that was missing before.

The Declaration has mainstreamed the protection of Indigenous cultural heritage into the fabric of international law. The protection of Indigenous culture is a central theme of the Declaration<sup>144</sup> that dedicates many provisions to different aspects of Indigenous culture:<sup>145</sup> the word 'culture' appears no less than 30 times in the Declaration.<sup>146</sup> The UNDRIP recognizes the importance of Indigenous culture and acknowledges its essential contribution to the 'diversity and richness of civilizations ... which constitute the common heritage of mankind'.<sup>147</sup> The Declaration recognizes the right of Indigenous peoples to

141 George Scelle, 'Le Phénomène Juridique du Dédoublément Fonctionnel', in Walter Schätzel and Hans Jürgen Schlochauer (eds), *Rechtsfragen der Internationalen Organisation—Festschrift für Hans Wehberg* (Frankfurt am Main: Klostermann 1956) 324–342.

142 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res. 61/295, UN Doc. A/RES/61/295, in force 13 September 2007.

143 Elvira Pulitano, 'Indigenous Rights and International Law: An Introduction', in Elvira Pulitano (ed.), *Indigenous Rights in the Age of the UN Declaration* (Cambridge: CUP 2012) 1–30 at 25.

144 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 EJIL 9 at 15.

145 Elsa Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples', in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing 2011) 392.

146 See Yvonne Donders, 'The UN Declaration on the Rights of Indigenous Peoples. A Victory for Cultural Autonomy?', in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights* (Antwerp/Oxford/Portland: Intersentia 2008) 99.

147 UNDRIP preamble.

practice their cultural traditions<sup>148</sup> and maintain their distinctive spiritual and material relationship with the land that they have traditionally owned, occupied, or otherwise used.<sup>149</sup>

While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law.<sup>150</sup> Some of its contents already express customary international law and/or general principles of international law or repeat provisions appearing in binding treaty law. Therefore, the UNDRIP certainly constitutes a powerful and significant move toward the safeguarding of Indigenous cultural heritage that can spur further legally binding developments.

Such developments are needed because, despite the adoption of the UNDRIP, law and policy tend to prioritize macroeconomic notions of growth in spite of actual or potential infringements of Indigenous entitlements.<sup>151</sup> Many of the estimated 370 million Indigenous people around the world have lost or risk losing their ancestral lands because of the exploitation of natural resources.<sup>152</sup> The development of natural resources is increasingly taking place in, or very close to, traditional Indigenous areas. While development analysts point to extractive projects as anti-poverty measures, and advocate FDI as a major catalyst for development,<sup>153</sup> Indigenous peoples in the areas where the resources are located tend to bear a disproportionate burden of the negative impacts of development through reduced access to natural resources, exposure to environmental degradation, and loss of cultural heritage and traditional lifestyle.<sup>154</sup> In parallel, free trade may destabilize Indigenous communities by commodifying their cultural heritage, transforming their lifestyles, and affecting their traditional cultural practices.<sup>155</sup> Indigenous peoples con-

148 UNDRIP Article 11.

149 UNDRIP preamble, Articles 8, 11, 12.1, and 13.1.

150 On the legal status of the Declaration, see Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 ICLQ 957–983.

151 Lila Barrera-Hernández, 'Indigenous Peoples, Human Rights, and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water' (2005) 11 *Annual Survey of International & Comparative Law* 1–28, 1.

152 Navi Pillay, 'Let us Ensure that Development for Some is not to the Detriment of the Human Rights of Others', Statement by the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11284&LangID=E> (2011).

153 OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) 3.

154 Barrera-Hernandez, 'Indigenous Peoples, Human Rights, and Natural Resource Development', 6.

155 See e.g. Carmen G Gonzalez, 'An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2010–2011) 32 *University of Pennsylvania Journal of International Law* 723–803.

sider that trade liberalization and FDI ‘are creating the most adverse impacts on [their] lives’ through environmental degradation, forced relocation, and deforestation among others.<sup>156</sup>

Therefore, the protection of Indigenous heritage has increasingly intersected with the promotion of free trade and foreign direct investments. The collision between the protection of economic interests and Indigenous entitlements in international law makes the case for strengthening the current regime in place for the protection of Indigenous heritage. A real limitation of the legal framework protecting Indigenous cultural heritage is the absence—aside from the classical human rights mechanisms—of a special international court or tribunal where Indigenous peoples can raise complaints regarding measures that affect them. In fact, the UNDRIP has no binding force nor does it have enforcement or compliance mechanisms. While the jurisprudence of domestic courts and regional human rights courts has contributed to the interpretation and application of Indigenous rights, and international bodies have monitored the implementation of such rights,<sup>157</sup> the lack of a dedicated world court allows Indigenous heritage-related cases to be adjudicated by international (economic) courts with limited if no mandate to adjudicate Indigenous claims.

#### 4 A Multipolar Cultural Heritage Law

Cultural heritage law has developed in a multipolar and multilevel way.<sup>158</sup> Different branches of law have regulated different categories of heritage at the national, regional, and international level. In this complex system, national policymakers and regional and international organizations jointly govern cultural heritage.<sup>159</sup> While states maintain primary responsibilities in the cultural field, other actors have come to play an important role with regard to cultural heritage governance, ranging from regional and international organizations to private actors. After briefly examining the aims and objectives of cultural heritage law, this section illuminates the main features of the field.

The fundamental aim of cultural heritage law is the conservation of heritage for the enjoyment of present and future generations.<sup>160</sup> Like any other field of

156 See Indigenous Peoples’ Seattle Declaration on the Third Ministerial Meeting of the World Trade Organization, 30 November–3 December 1999.

157 Gaetano Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2011) 22 *EJIL* 165–202.

158 Janet Blake, ‘On Defining Cultural Heritage’, (2000) 49 *ICLQ* 61–85, 85.

159 Lorenzo Casini, ‘I Beni Culturali e la Globalizzazione’ in Lorenzo Casini (ed.), *La Globalizzazione dei Beni Culturali* (Bologna: Il Mulino 2010).

160 Prott and O’Keefe, ‘Cultural Heritage or Cultural Property?’ 310–311.

law, at the heart of cultural heritage law are human beings. This field protects cultural products and processes because they express human creativity and symbolize human experience.<sup>161</sup> The tendency to prioritize the conservation of cultural objects as such (in French, *primauté de l'objet*) has gradually begun to fade. A growing awareness has emerged that 'an object as such can never be of an absolute value.'<sup>162</sup> Rather, by protecting cultural heritage, states protect the human rights of individuals and communities. The effective protection of cultural heritage is thus linked to the protection of fundamental human rights and the maintenance of peace and security.<sup>163</sup>

Cultural heritage law has three principal objectives: (1) protecting cultural heritage by empowering state cultural sovereignty and enhancing international cooperation in the cultural domain; (2) promoting just, peaceful, and prosperous relations among nations by promoting mutual understanding; and (3) settling cultural heritage-related conflicts and disputes. First, cultural heritage law enhances state capacity to safeguard different types of cultural heritage and facilitates international cooperation in such protection. At the international level, the principal instruments protecting cultural heritage include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention),<sup>164</sup> the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention or WHC),<sup>165</sup> the Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH),<sup>166</sup> the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD),<sup>167</sup> and the Convention on the Protection of the Underwater Cultural Heritage (CPUCH).<sup>168</sup>

Second, cultural heritage law can promote just and peaceful relations among nations by fostering respect and appreciation of cultural diversity, prohibiting and preventing the illicit trade of cultural property, requiring the return of

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161 Fechner, 'The Fundamental Aims of Cultural Property Law', 378.

162 *Id.* 379.

163 Prott and O'Keefe, 'Cultural Heritage or Cultural Property?', 310–311.

164 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), 14 May 1954, in force 7 August 1956, 249 UNTS 240.

165 Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

166 Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1.

167 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), 20 October 2005, in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. 1, at 83.

168 Convention on the Protection of the Underwater Cultural Heritage (CPUCH), 2 November 2001, in force 2 January 2009, 41 ILM (2002) 37.

stolen cultural artifacts,<sup>169</sup> and forbidding the destruction of cultural heritage. Because ‘claims for restitution and return of cultural heritage are typically the legacy of armed combat, imperial conquest, and theft,’<sup>170</sup> the return of such items contributes to the pursuance of just and peaceful relations among nations by fulfilling the promise of decolonization.<sup>171</sup> Because cultural heritage is ‘a record of human experience and aspirations’, its protection can ‘inspire a genuine dialogue between cultures,’<sup>172</sup> facilitate mutual understanding, and contribute to growth and sustainable development.

Finally, cultural heritage law provides mechanisms and rules for settling cultural heritage-related disputes. This is perhaps the most flexible pillar of the emerging architecture of cultural heritage law. In fact, at the international law level, the proliferation of international instruments governing cultural heritage has not been matched by the creation of a World Heritage Court. Rather, international cultural heritage law instruments generally have bland dispute settlement provisions mostly providing for diplomatic means of dispute settlement, such as negotiations in good faith,<sup>173</sup> good offices,<sup>174</sup> mediation,<sup>175</sup> and conciliation.<sup>176</sup> Some contemplate arbitration and, albeit more rarely, litigation before national and international courts.<sup>177</sup>

The flexibility characterizing the dispute settlement mechanisms under international cultural heritage law is intentional. Because cultural matters are perceived to be at the heart of state sovereignty, States have never agreed on

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169 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, in force 1 July 1998, (1995) 34 ILM 1322.

170 Nafziger, ‘The Present State of Research’, 261

171 Cynthia Scott, *Cultural Diplomacy and the Heritage of Empire—Negotiating Post-Colonial Returns* (Abingdon: Routledge 2021).

172 General Comment No. 21, para. 50(a).

173 CPUCH, Article 25(1); CCD, Article 25(1).

174 Hague Convention, Article 22; 1970 UNESCO Convention, Article 17(5); CCD, Article 25(2).

175 CPUCH, Article 25(2); CCD, Article 25(2).

176 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, in force 9 March 2004, 38 ILM (1999), Articles 35–36; CCD, Article 25(3) and Annex.

177 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Article 8(1) (referring to domestic courts) and 8(2) (referring to arbitration and international courts); CPUCH Article 25(3) (referring to the rules set forth in Part xv of the United Nations Convention on the Law of the Sea (UNCLOS) and providing that any party to the dispute that is also a party to the UNCLOS may submit the matter to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, or an *ad hoc* arbitral tribunal.) United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

establishing permanent courts and tribunals in the cultural field. As Shi points out, ‘the conventional view of state power ... asserts that culture is pre-political: culture precedes and constitutes the state and the state exists to protect that culture.’<sup>178</sup> If the traditional elements of states are territory, people, and government, culture constitutes the invisible glue that links and keeps the three elements together.

The agility of the dispute settlement provisions of international cultural heritage law can be perceived as both a strength and a weakness of the regime. It can be seen as a strength of the system because it enables cultural heritage law to be flexible enough to adapt to emerging circumstances and accommodate change. Diplomatic dispute settlement mechanisms can encourage amicable and mutually satisfactory solutions. This pragmatic approach can balance the different interests involved timely, efficiently, and effectively.

Nonetheless, the flexibility of such dispute settlement mechanisms can also be perceived as a weakness of the system. It can lead to temporary solutions that do not take into account the inherent value of cultural items, the long-term interests of local communities, and international justice.<sup>179</sup> Heritage matters can be, and have been, linked to other matters in a sort of give-and-take. For instance, negotiators have linked the restitution of cultural artifacts to security and migration.<sup>180</sup> Such linkages can reflect power politics, thus affecting international justice. Moreover, with the exception of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, none of the above mentioned UNESCO conventions allows claims to be brought by non-state actors. Arbitration between an individual and a state remains possible where the parties consent to it. Nonetheless, the lack of an automatic, binding, and exclusive dispute settlement mechanism in the cultural field entails that private actors, minorities, and given communities are not granted direct access (*locus standi*) to international courts and tribunals in matters of cultural concern. Consequently, while international cultural heritage law has been effective, it has not been as effective as it should be for all of the relevant stakeholders.

Three dualisms have traditionally characterized cultural heritage law: (1) the division between domestic and international law; (2) the distinction

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178 Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Oxford: Hart 2013) 4.7.1.1.

179 Fechner, ‘The Fundamental Aims of Cultural Property Law’, 377.

180 Alessandro Chechi, ‘The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene’, (2008) *Italian Yearbook of International Law* 159–181.

between public law and private law; and (3) the distinction between mandatory and voluntary approaches. However, these traditional boundaries have become blurry in contemporary cultural heritage law, as both national and international dimensions and private and public traits constantly interact in several different ways. Moreover, voluntary approaches often pave the way to mandatory ones.

#### 4.1 *National v. International*

Cultural heritage law is emerging as 'a distinct field in its own right' in international law and domestic law 'with its own concepts and principles'.<sup>181</sup> At the international law level, international humanitarian law requires special protection for cultural heritage in times of war. International criminal law provides for individual criminal responsibility for serious offenses against cultural heritage. In addition, a number of international law instruments require the protection of cultural heritage in times of peace. UNESCO has played a leading role in the making of international cultural heritage law.<sup>182</sup> It has produced conventions, nonbinding (but influential and morally suasive) declarations, and guidelines that have gradually extended the scope of international cultural heritage law. Due to their almost global ratification, these instruments raise awareness of the importance of heritage protection, channel cultural concerns into the fabric of international law, and influence policymaking and adjudication.<sup>183</sup>

Nonetheless, 'the duty of ensuring the identification, protection, ... and transmission to future generations of cultural heritage belongs primarily to the state on whose territory it is situated.'<sup>184</sup> At the domestic level, even before the inception of UNESCO, many states had developed regimes protecting cultural heritage.<sup>185</sup> Nowadays, several municipal constitutions require the state to

181 Ana Filipa Vrdoljak, 'History and Evolution of International Cultural Heritage Law', paper presented at the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin, Seoul, 28 November 2008, p. 4.

182 Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), 16 November 1945, in force 4 November 1946, 4 UNTS 275.

183 See generally Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO, Normative Action in Education, Science, and Culture* (vol. I) (Leiden/Boston: Martinus Nijhoff Publishers 2007).

184 Human Rights Council, Cultural Rights and the Protection of Cultural Heritage, A/HRC/37/L.30, 19 March 2018, preamble; Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, para. 50.

185 Regina Bendix, Aditya Eggert, and Arnika Peselmann, 'Introduction: Heritage Regimes and the State', in Regina Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 11–20, 17.

protect cultural heritage,<sup>186</sup> and the domestic implementation of the international heritage regime 'brings forth a profusion of additional heritage regimes.'<sup>187</sup>

In parallel, the boundaries between the international and the domestic are gradually fading, due to the increased connection between the two fields. There is a sort of mimesis and dialectic between the local and global dimensions of cultural governance. The emergence of international cultural heritage law has fostered global awareness that the conservation of cultural heritage constitutes a common concern of humanity.<sup>188</sup> While cultural heritage is normally located within the boundaries of sovereign states, international cultural heritage law has contributed to the consolidation of the idea that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all [hu]mankind since each people makes its contribution to the culture of the world.'<sup>189</sup>

At the same time, if UNESCO Member States choose to ratify a given convention, they have to translate the internationally binding legal instrument into domestic cultural policy. While the implementation of some conventions could build on pre-existing domestic legal frameworks, the implementation of others has required the adoption of new regulatory frameworks. The result of this process is not only that international cultural heritage law shapes national heritage law, but also that national cultural policies are embedded in and part of the global heritage system.<sup>190</sup>

Which interest should prevail in the management of cultural heritage: the interest of the locals or the interests of the international community? Often the two interests coincide. Both communities have an interest in the conservation of cultural heritage. However, when interests collide, policymakers and adjudicators face the dilemma as to whether they should prioritize international interests over local concerns or vice versa.<sup>191</sup> While internationalists perceive cultural heritage as expressing 'a common human culture', wherever its place

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186 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 49.

187 Bendix, Eggert, and Peselmann, 'Introduction: Heritage Regimes and the State', 14.

188 CSICH, preamble; Human Rights Council, Cultural Rights and the Protection of Cultural Heritage, A/HRC/37/L.30, 19 March 2018, preamble.

189 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, preamble.

190 Markus Tauschek, 'The Bureaucratic Texture of National Patrimonial Policies', in Bendix, Eggert, and Peselmann (eds), *Heritage Regimes and the State*, 195–212, 197.

191 John Henry Merryman, 'Two Ways of Thinking about Cultural Property Law' (1986) 80 *AJIL* 831–853, 831.

and location,<sup>192</sup> nationalists perceive it as part of the national culture.<sup>193</sup> Even assuming that relevant UNESCO Conventions incorporate a mixture of both approaches,<sup>194</sup> questions remain in those cases in which the two interests—internationalist and nationalist—diverge.

Under international law, once a State assumes a treaty commitment, it is bound by that commitment (*pacta sunt servanda*), and a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>195</sup> International law prevails over domestic law, and governments must comply with the various international law instruments they have signed to. Therefore, state responsibility arises if a state fails to comply with its international obligations. For instance, under the WHC, if the state party fails to safeguard a given site's outstanding universal value, such a site will be delisted, a process which has happened three times.

The first site to be delisted was the Arabian Oryx Sanctuary in Oman, inscribed in 1994 and delisted in 2007. The decision was a consequence of the Omani government's reduction of the size of the protected area by 90 percent after oil was discovered at the site, and the depletion of the rare antelope occurred. The World Heritage Committee considered these events as destroying the outstanding universal value of the site.<sup>196</sup>

The second site to be delisted was the Dresden Elbe Valley in Germany, designated in 2004 and delisted in 2009 in response to the building of a four-lane bridge through the heart of the cultural landscape. For the World Heritage Committee, the construction of the bridge had a major visual impact on the cultural landscape and irreversibly damaged the site's outstanding universal value.<sup>197</sup> While some scholars consider that local communities should have

192 Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan JIL* 1209–1228, at 1213–1214.

193 Merryman, 'Two Ways of Thinking about Cultural Property Law', 831–2.

194 Raechel Anglin, 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide' (2008) 20 *Yale Journal of Law and the Humanities* 241–275, at 241 ff.

195 Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 27.

196 UNESCO, World Heritage Committee, Arabian Oryx Sanctuary–Oman, Decision 31 COM 7B.11 (2 July 2007).

197 UNESCO, World Heritage Committee, Dresden Elbe Valley–Germany, Decision 33 COM 7A.26 (30 June 2009). Douglas Schoch, 'Whose World Heritage? Dresden's Waldschlößchen Bridge and UNESCO's Delisting of the Dresden Elbe Valley' (2014) 21 *International Journal of Cultural Property* 199–223.

rescaled their project in order to maintain the integrity of the landscape, others argue that the expectations of UNESCO were unrealistic.<sup>198</sup>

The third site to be delisted was the Liverpool Maritime Mercantile City, designated in 2004 because of the architectural beauty of its waterfront and delisted in 2021 due to concerns over new buildings.<sup>199</sup> The Committee held that urban development, including siting a stadium on the waterfront, had significantly changed the city's skyline and lessened its authenticity and integrity thus undermining the outstanding universal value of the City. Whether such development amounts to cultural vandalism or a sort of cultural investment remains debatable. On the one hand, sport constitutes a fundamental aspect of modern cultures and can be seen 'as a means to promote education, health, [and] development.'<sup>200</sup> On the other hand, sport can foster international cooperation and peace by 'reduc[ing] the potential for actual conflict by playing out hostilities in ... [a] controlled setting' and enhancing cultural understanding.<sup>201</sup>

Nonetheless, these decisions highlight three important points. First, inscription on the List does not mean that a given site will necessarily maintain outstanding and universal value forever or that circumstances leading to its inscription will not change. The World Heritage Committee needs to ascertain whether a given world heritage site keeps its relevance to the contemporary international community or whether the circumstances leading to its inscription have changed to such an extent to make its delisting inevitable.<sup>202</sup> In the case of the Oryx Sanctuary, a fundamental change of circumstances—the decline of the Arabian antelope due to poaching and habitat degradation—led to the deletion of the Sanctuary from the List.

Second, questions arise about how to balance economic development and the protection of cultural heritage. The 2030 Agenda for Sustainable Development endorses the compatibility between economic development, social

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198 Compare Sabine Von Schorlemer, 'Compliance with the World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge', (2008) 51 *German YIL* 3 with Amy Strecker, *Landscape Protection in International Law* (Oxford: OUP 2018) 89.

199 Josh Halliday, 'UNESCO Strips Liverpool of its World Heritage Status', *Guardian*, 21 July 2021.

200 UNESCO, International Convention Against Doping in Sport, adopted on 19 October 2005, in force on 1 February 2007, preamble.

201 James H. Frey and D. Stanley Eitzen, 'Sport and Society', in James A.R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln (eds), *Cultural Law—International, Comparative, and Indigenous* (Cambridge: CUP 2010) 755–756.

202 Rodney Harrison, 'Forgetting to Remember, Remembering to Forget: Late Modern Heritage Practices, Sustainability, and the 'Crisis' of Accumulation of the Past' (2013) 19 *International Journal of Heritage Studies* 579–595.

needs, and cultural heritage protection.<sup>203</sup> Nonetheless, balancing economic development and conservation of cultural heritage remains complex in practice. Views diverge on the matter as the delisting of the Dresden Elbe Valley and Liverpool Maritime Mercantile City aptly demonstrates. On the one hand, local communities benefit from the conservation of cultural heritage because it is part of their identity, attracts tourism, and sustains a number of related economic activities. On the other hand, some urban infrastructure may be necessary to enable sustainable development and the long-term viability of heritage conservation.

Third, and more fundamentally, these examples also illustrate the tension between state cultural sovereignty and international obligations under the WHC.<sup>204</sup> In fact, the different approaches to the conservation of cultural heritage reflect the divided identity of international law that sits somewhere between realism and idealism.<sup>205</sup> International law itself thus ‘constantly shifts between the opposing positions’ and ‘works so as to make them seem compatible.’<sup>206</sup> From an international law perspective, the delisting of a site can entail some reputational damage and loss of international funding for its conservation. From a domestic perspective, however, one may wonder whether local administrators can ignore the will of local communities. In the case of Dresden, local communities had voted in a referendum for the construction of the bridge. In the case of Liverpool, even the locals were divided. On the one hand, the building of a stadium reflected contemporary ambition of the city to become ‘a veritable Mecca for football fans.’<sup>207</sup> At the same time, locals also expressed concerns that a historic city could be filled with shiny but cold high-rise buildings and transformed into the ‘soulless’ shell of a city.<sup>208</sup>

203 UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted on 25 September 2015, A/RES/70/1, Goal 11, (Making cities and human settlements inclusive, safe, resilient, and sustainable) Target 11.3 (mentioning the need of enhancing ‘inclusive and sustainable urbanization’) and Target 11.4 (mentioning the goal of ‘strengthen[ing] efforts to protect and safeguard the world’s cultural and natural heritage.’)

204 Ole Christian Fauchald, ‘International Environmental Governance and Protected Areas’ (2021) *Yearbook of International Environmental Law* 1–35, at 27.

205 Marina Lostal, ‘The Role of Specific Discipline Principles in International Law’ (2013) 82 *Nordic JIL* 401.

206 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP 2005) 59–60.

207 Marthe De Ferrer, ‘Liverpool Loses its UNESCO World Heritage Status’, *Euronews*, 26 July 2021.

208 *Id.*

#### 4.2 *Public v. Private*

The distinction between public and private is blurred in cultural heritage law. While states remain major actors in cultural heritage law, ‘individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage.’<sup>209</sup> Rather, individuals, communities, and nongovernmental organizations also play an important role in cultural governance.<sup>210</sup> Essentially, private actors have played a dual role in international cultural heritage law: on the one hand they can contribute, and have contributed, to the development of cultural heritage law, influencing its creation, implementation, and enforcement. At the same time, however, non-state actors can also affect the protection of cultural heritage, by damaging or destroying monuments and sites.<sup>211</sup> Therefore, their action elicits the aims and strengths of international cultural heritage law, but also highlights the limits of the field.

Private actors can be a force for good, increasingly contributing to the making, monitoring, and implementation of international cultural heritage law. For instance, nongovernmental associations have adopted a number of instruments on the protection of monuments.<sup>212</sup> Indigenous associations have voiced Indigenous peoples’ claims with respect to the protection of their heritage before UN human rights bodies.<sup>213</sup> Even more significantly, litigation led by private actors has contributed to shaping the emerging field of cultural heritage law.<sup>214</sup>

If adjudication is considered to be a mode of governance, the expanding role of private actors in cultural heritage-related disputes has contributed to the development of the field. The jurisprudence arising from these claims before international bodies, regional human rights courts, and national tribunals underpins the development of law in this field.<sup>215</sup> Private actors

209 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 58.

210 Nafziger, ‘The Present State of Research’, 181.

211 Alessandro Chechi, ‘Non-State Actors and Cultural Heritage: Friends or Foes?’, in Elena Rodríguez Pineau and Soledad Torrecuadrada García-Lozano (eds), *Bienes Culturales y Derecho* (Madrid: Universidad Autónoma de Madrid 2015) 457–479.

212 Valentina Vadi, ‘Exploring the Borderlands: The Role of Private Actors in International Cultural Law’, in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution, and Enforcement* (Leiden: Brill 2018) 109–125.

213 Ana Filipa Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’ (2018) 25 *International Journal of Cultural Property* 245–281, 250.

214 See e.g. James A.R. Nafziger, ‘The Evolving Role of Admiralty Courts in Litigation of Historical Wreck’ (2003) 44 *Harvard International Law Journal* 251–270.

215 Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’, 274.

often file claims against states for the recovery of cultural property looted in times of war, or for the violation of cultural entitlements before human rights courts and tribunals. Foreign investors may also file claims against the host state alleging that the state's cultural policies amount to disguised discrimination or an indirect expropriation of their investments. Such disputes present a mixture of private and public interests, which at times coincide converging towards the protection of a cultural item, and at times conflict when private economic or cultural interests clash with collective cultural or economic entitlements.<sup>216</sup>

The role of non-state actors in cultural heritage law also highlights the limits of the field. If the protection of cultural heritage can benefit individuals, local communities, and the international community as a whole, in certain cases, an excessive protection of cultural heritage can lead to scarce, if any, consideration of local communities' needs. Especially in the past, conservation has often privileged the physical protection of cultural heritage, thus separating cultural artifacts from their everyday context and their interaction with local communities.<sup>217</sup>

Countering *heritagization* processes within cultural heritage law requires overcoming the protection of heritage because of its mere intrinsic features ('heritage is heritage'), seeing cultural heritage against the background of human history, and illuminating the human dimension of cultural heritage law.<sup>218</sup> Therefore, the debate on the role of non-state actors in cultural heritage law contributes to the *humanization* of law, making it more porous to other interests and needs which go beyond the reason of state (*raison d'état*) and include the respect for human dignity and fundamental human rights.

Non-state actors can also affect the protection of cultural heritage, by damaging or destroying monuments and sites. Their expanding role in the damage and destruction of cultural heritage challenges the traditional way in which international law has responded to international crises, and calls for new and more effective approaches.

Finally, a sort of mimesis and dialectic exists between the private and public dimensions of cultural heritage law. There is an increasing awareness that

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216 Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (Ann Arbor: University of Michigan Press 1999) 197–98.

217 Chiara de Cesari, 'World Heritage and Mosaic Universalism' (2010) 10 *Journal of Social Archaeology* 307.

218 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: an Introduction' (2011) 22 *EJIL* 9–16.

cultural resources require public intervention because the conservation of cultural heritage includes elements of intra- and intergenerational equity. The protection of cultural heritage has come to be regarded as a form of public interest in addition to traditional instances of public interest such as public security, public order, and public health. Moreover, since the end of WWII, the protection of cultural heritage has been recognized to constitute a common interest of humankind.<sup>219</sup> However, private funding is also needed to recover and protect cultural heritage, and cooperation between the private and public sectors is particularly needed in times of economic crisis.

In conclusion, non-state actors lie at the heart of contemporary cultural governance. While their action elicits the aims and strengths of cultural heritage law, it can also highlight the limits of the field. Therefore, the expanding role of non-state actors in cultural heritage law requires some critical reflection. On the one hand, private actors can play a positive role in the development of cultural heritage law, contributing to rule-making and the conservation and safeguarding of heritage. On the other hand, political, religious, and economic iconoclasm by non-state actors risks damaging and/or destroying valuable cultural heritage. Their action highlights the urgent need to rethink the field and build bridges across different fields of law. In particular, the emerging role of non-state actors requires reconsideration of the available dispute settlement and enforcement mechanisms, as well as the linkage issue.

### 4.3 *Mandatory v. Voluntary Approaches*

The third dualism that characterizes international cultural heritage law is the distinction between mandatory and voluntary approaches. Binding cultural entitlements abound in international cultural heritage law, which is composed of a discrete number of treaties which are binding upon the parties who ratified them.<sup>220</sup> The great majority of such treaties have been adopted under the auspices of UNESCO. These instruments have raised awareness of the importance of heritage protection, in part codifying existing customary law and in part setting new standards in the cultural field, thus spurring the development

219 Jan Malīř, 'Public Interest before the ECtHR: Protection of Cultural Heritage and the Right to Property' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021).

220 These include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property; the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; the 2001 Convention on the Protection of the Underwater Cultural Property; the 2003 Convention to Safeguard Intangible Cultural Heritage; and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

of domestic cultural policies.<sup>221</sup> All of these instruments channel cultural concerns into the fabric of international law and influence policymaking and adjudication, due to their almost global ratification.

International cultural heritage law is also composed of a myriad of non-binding resolutions, declarations, recommendations, and other instruments of soft law such as standards, ethical codes, and rules of conduct.<sup>222</sup> Soft law does not constitute binding law, and some even question whether it can be considered to be law. It can prioritize political over legal reasoning, thus becoming an instrument of power in international relations. Such international instruments deal with a range of topics from the preservation of cultural heritage endangered by public or private works<sup>223</sup> to the safeguarding of cultural diversity<sup>224</sup> and the intentional destruction of cultural heritage.<sup>225</sup>

The adoption of soft law language in international cultural heritage law reflects the ongoing dialectics between the state and the international community in the cultural domain. On the one hand, the use of soft law language demonstrates the persisting importance of state sovereignty and the principle of nonintervention in international law.<sup>226</sup> On the other hand, the use of soft law also suggests a slow but progressive curbing of state sovereignty in the cultural field. In fact, soft law can constitute as sort of pre-legal, experimental, and formative framework that can endorse compromise, facilitate agreement on challenging issues, and shape opinion and practice, thus contributing to the emergence of customary law or general principles of law. In this sense, states may be more willing to adhere to soft law instruments and gradually undertake international obligations.

Consequently, the traditional boundaries between mandatory and voluntary approaches are blurring in contemporary cultural heritage law. On the one hand, certain binding instruments of international cultural heritage law

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221 See generally Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO, Normative Action in Education, Science, and Culture* (vol. 1) (Leiden/Boston: Martinus Nijhoff 2007).

222 Examples of codes of ethics include the 1931 Athens Charter for the Restoration of Historical Monuments, adopted at the first International Congress of Architects and Technicians of Historic Museums and the 1964 Venice Charter for the Conservation and Restoration of Monuments and Sites, adopted by the European Council for Town Planners.

223 UNESCO, Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, 19 November 1968.

224 UNESCO, Universal Declaration on Cultural Diversity, Paris, 2 November 2001.

225 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003.

226 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Judgment) [1986] 1CJ Rep 14, paras 202–209 (holding that ‘each state is permitted, by the principle of state sovereignty, to decide freely for example the choice of political, economic, social, and cultural system, and formulation of foreign policy.’)

contain only vague provisions encouraging states to adopt cultural policies. For instance, the 2003 ICH Convention is seen as a soft law instrument in formal hard law clothing. On the other hand, coalescing state practice, the global recognition of the importance of cultural heritage protection, and emerging jurisprudence contribute to the formation of general principles of international law and/or customary law requiring the protection of cultural heritage.

As is known, general principles are sources of international law only insofar as (a) they are recognized by the vast majority of states in international relations; or (b) they are derived from concepts recognized in the vast majority of domestic legal systems.<sup>227</sup> In examining international practice, ‘some general principles have formed or are in the process of being formed, as part of general international law with regard to the obligation to respect and protect cultural heritage of significant importance.’<sup>228</sup> Such general principles ‘have the potential to penetrate the sphere of domestic jurisdiction of individual States and also to provide standards of reference for States that are not parties to specific treaties.’<sup>229</sup> Moreover, the protection of cultural heritage is also recognized in the vast majority of municipal systems. In fact, respect for cultural heritage and cultural entitlements forms part of the constitutional traditions of many states not only in Europe,<sup>230</sup> but also in Oceania,<sup>231</sup> Africa,<sup>232</sup> Asia,<sup>233</sup> and the Americas.<sup>234</sup>

227 ICJ Statute, Article 38(1)(c). *See generally*, Hersch Lauterpacht, *Private Law Sources and Analogies in International Law* (London: Longmans, Green, & Co. 1927).

228 Francesco Francioni, ‘The Evolving Framework for the Protection of Cultural Heritage in International Law’, in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Leiden: Martinus Nijhoff 2012) 25.

229 Francesco Francioni, ‘Cultural Heritage’, in *Max Planck Encyclopaedia of Public International Law* (2013) para. 2.

230 Céline Romainville, ‘The Effects of EU Intervention in the Cultural Field on the Respect, the Protection, and the Promotion of the Right to Participate in Cultural Life’ in Céline Romainville (ed.), *European Law and Cultural Policies* (Peter Lang 2015) 191.

231 Craig Forrest and Jennifer Corrin, ‘Oceania’, in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 860–877, 876 (reporting that ‘many states in Oceania have made a constitutional pledge to uphold tradition and cultural values’ and scrutinizing a number of such provisions.)

232 Folaryn Shyllon, ‘Africa’, in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 811–834 (detailing provisions of post-independence constitutions in Africa ‘enshrining the protection of cultural heritage in the fundamental law (*grundnorm*) of the land’).

233 Zhengxin Huo, ‘Legal Protection of Cultural Heritage in China’ (2016) 22 *International Journal of Cultural Policy*, 497–515, 498 (reporting that China has embedded the duty of the state to protect its cultural heritage in the Constitution since 1982); Manish Chalana and Ashima Krishna (eds), *Heritage Conservation in Postcolonial India* (Abingdon: Routledge 2020) (referring, *inter alia*, to Article 49 of the Indian Constitution).

234 James A.R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law—International, Comparative, and Indigenous* (Cambridge: CUP 2010) 273–287.

Moreover, the emergence of state practice and the belief that such a practice is carried out as a legal obligation (*opinio juris*) can lead to the emergence of customary international law. Customs are sources of international law. For the time being, norms of customary law prohibit the destruction of cultural heritage of great importance for humanity in the event of armed conflict and in time of military occupation, as well as the looting and illicit transfer of cultural property from territories under military occupation.<sup>235</sup>

The question as to whether general principles of international law and customary law demand the protection of cultural heritage in peacetime has been a matter of much debate and controversy. The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage explicitly refers to ‘the development of rules of customary international law ... related to the protection of cultural heritage in peacetime as well as in the event of armed conflict’.<sup>236</sup> The Declaration articulates the need to protect cultural heritage both in times of peace and in the event of armed conflict.<sup>237</sup> It then affirms that if a State ‘intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO ..., [it] bears the responsibility for such destruction, to the extent provided for by international law’.<sup>238</sup> It is uncertain whether, and if so, to what extent, the Declaration reflects customary international law. It certainly codifies (albeit in soft law terms) the prohibition against the intentional destruction of cultural heritage during peacetime.

Nonetheless, the gradual emergence of customary law prohibiting the destruction of cultural heritage in peacetime can be inferred from three grounds. First, there is the developing State practice of condemning deliberate acts of destruction of significant cultural heritage. This evidence is strengthened by the growing number of signatories to UNESCO conventions for the protection of cultural heritage during peacetime.<sup>239</sup> Second, it would

235 Francesco Francioni, ‘Custom and General Principles of International Cultural Heritage Law’, in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 531–551, 540.

236 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Paris, 17 October 2003, Preamble.

237 Id. Articles IV and V.

238 Id. Article V.

239 As at 1 June 2022, the World Heritage Convention had 194 States parties; the Convention for the Safeguarding of the Intangible Cultural Heritage had 180 states parties; the Convention on the Protection and Promotion of the Diversity of Cultural Expressions had 150 states parties; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property had 141 States parties.

be illogical to provide greater protection of cultural heritage during period of armed conflict than peacetime.<sup>240</sup> In fact, the protection provided by international law during peacetime is necessarily greater than that applicable during armed conflict. Analogously, it can be argued that the customary law prohibition on the intentional destruction of cultural heritage in times of war logically presupposes analogous and even more forceful prohibition in peacetime. Third, the burgeoning jurisprudence of international courts and tribunals such as the ICJ, the ICTY, and even international economic courts may signal an evolution in this sense. Both scholars and practitioners argue that general principles of international law are gradually emerging, requiring the protection of cultural heritage in times of peace.<sup>241</sup>

## 5 Cultural Governance as a Battlefield

Cultural policies constitute a battlefield: they reflect fundamental political and legal choices about memory, heritage, and identity.<sup>242</sup> This section briefly illuminates some key dilemmas that have informed the making of cultural heritage law. First, the dichotomy between tangible and intangible heritage is examined, highlighting that this is a false dichotomy as most tangible cultural heritage also has a valuable intangible dimension, while intangible heritage often presupposes material practices. Second, the section investigates the shift from the past elitist conceptualization of cultural heritage to contemporary bottom-up approaches to the same. Third, the section discusses the clash between idealism and pragmatism that characterizes cultural heritage law. Fourth, the section scrutinizes the perceived effectiveness of cultural heritage law by illuminating its substantive overreach and procedural underachievement. Finally, the section discusses the potential clash between an excessive safeguarding of heritage and the protection of human rights.

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240 See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, p. 226 (stating that international environmental law is applicable during armed conflict subject to certain provisos, including military necessity).

241 Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge/New York: CUP 2014).

242 *Id.* 27.

### 5.1 *Tangible v. Intangible Heritage*

For a long time, cultural heritage law favored the protection of monumental heritage over the intangible, protecting material artifacts only.<sup>243</sup> This monumental understanding of heritage reflected a Western vision of culture and permeated both domestic and international protection of cultural heritage.<sup>244</sup>

At the domestic level, by adopting a monumental vision of cultural heritage, cultural policies tended to favor hegemonic values.<sup>245</sup> In fact, dominant cultural communities used cultural policies to impose their own culture on minorities and Indigenous groups.<sup>246</sup> The inscription of given sites on the World Heritage list led to the forced displacement of minorities and Indigenous communities, thus not only restricting their access to culturally significant sites but also violating their human rights.<sup>247</sup> In these cases, conservation policies excluded people from their heritage, despite the fact that they had created, conserved, and cared for such heritage in the first place. The forced relocation of such groups from world heritage sites amounted to a violation of a range of distinct, albeit related, human rights.<sup>248</sup>

At the international level, the adoption of a monumental vision of cultural heritage prioritized the protection of built heritage, mostly characterizing Western cultures, over the natural heritage of different civilizations.<sup>249</sup> Because the WHC privileged a monumental conception of heritage, it ended up favoring the inscription of European sites on the World Heritage list, thus failing to appreciate the different intangible manifestations of heritage in Africa, the Americas, Asia, and Oceania.<sup>250</sup>

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243 Laurajane Smith, 'Discussion' in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 389–395, 390.

244 Rosemary J. Coombe, 'Managing Cultural Heritage as Neoliberal Governmentality', in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 375–387, 375.

245 Kristin Kuutma, 'Concepts and Contingencies in the Shaping of Heritage Regimes', in Regina F. Bendix, Aditya Eggert, and Arnika Peselmann (eds), *Heritage Regimes and the State*, 11 ed. (Göttingen: Göttingen University Press 2017) 21–36, 26.

246 Anne-Laura Kraak and Bahar Aykan, 'The Possibilities and Limitations of Rights-Based Approaches to Heritage Practice', (2018) 25 *International Journal of Cultural Property* 1–10, 6.

247 See generally Stener Ekern, William Logan, Brigitte Sauge, and Amund Sinding-Larsen (eds), *World Heritage Management and Human Rights* (London: Routledge 2014); Peter Bille Larsen (ed.), *World Heritage and Human Rights—Lessons from the Asia-Pacific and Global Arena* (London: Routledge 2018).

248 Anne-Laura Kraak, 'Human Rights-Based Approaches to World Heritage Conservation in Bagan, Myanmar: Conceptual, Political, and Practical Considerations', (2018) 25 *International Journal of Cultural Property* 111–133, 118.

249 Smith, 'Discussion', 391.

250 Coombe, 'Managing Cultural Heritage as Neoliberal Governmentality', 376.

In the past decades, however, there has been a paradigm shift: a monumental conceptualization of cultural heritage ‘has given way to greater appreciation for cultural diversity, intangible cultural heritage, traditional cultural expressions’, cultural landscapes, and Indigenous cultural heritage.<sup>251</sup> Cultural heritage is increasingly perceived not simply as a static good in need of conservation, but as a dynamic whole that includes both material and immaterial dimensions.<sup>252</sup> The addition of the category of cultural landscapes to the World Heritage List in 1992 and the adoption of the CCD and the CSICH have been crucial steps for determining this shift.<sup>253</sup>

## 5.2 *Toward a More Democratic and Bottom-up Heritage Governance*

Under international cultural heritage law, decision-making processes have long tended to be elitist, opaque, and top-down. Conflicts have arisen with regard to the question of who defines cultural heritage, who should manage it, and for whose benefit—and such conflicts have been particularly intense with regard to Indigenous and minorities’ heritage.<sup>254</sup> Most UNESCO Conventions remain state-centric: States identify what cultural property falls within the relevant Convention’s definition and is therefore protected.<sup>255</sup>

In the past decades, however, questions have arisen whether local communities, minorities, and Indigenous peoples were adequately consulted about, and involved in, the protection of cultural heritage. Such communities ‘may have diverging interpretations of a specific cultural heritage’, which states do not always take into consideration when adopting cultural policies.<sup>256</sup> In addition, international heritage policies can differ from or contrast with local values. Because the UNESCO heritage system adopts a global common language, its operation may create uniform and general protection policies, irrespective of diverse special needs. In fact, while the use of such common language can enhance the clarity and predictability of cultural policies, in some cases it can also disregard the various needs of local communities, minorities, and

251 Coombe, ‘Managing Cultural Heritage as Neoliberal Governmentality’, 382.

252 *Id.* 376

253 See generally Amy Strecker, *Landscape Protection in International Law* (Oxford: OUP 2018).

254 Helaine Silverman and D. Fairchild Ruggles, ‘Cultural Heritage and Human Rights’, in Helaine Silverman and D. Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Heidelberg: Springer 2007) 3–22, 3.

255 Athanasios Yupsanis, ‘Cultural Property Aspects in International Law: The Case of the Still Inadequate Safeguarding of Indigenous Peoples’ (Tangible) Cultural Heritage’, (2011) 58 *Netherlands International LR* 335–361, 348.

256 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 11.

Indigenous peoples who should have the right to effectively participate in ‘the development of, and decision-making on, [their] cultural heritage.’<sup>257</sup>

For instance, ‘conservation programs ... have had negative consequences on the rights of Indigenous peoples through forced evictions.’<sup>258</sup> After state authorities evicted the Endorois, an Indigenous group, from their ancestral lands to establish a game reserve in Kenya, the group filed a claim before the Africa Commission on Human and Peoples’ Rights (ACHPR). The Commission held that Kenya had violated, *inter alia*, the group’s cultural rights including access to cultural sites and the right to development, by failing to consult Indigenous peoples or to obtain their free, prior, and informed consent (FPIC).<sup>259</sup> Therefore, the Commission requested the return of the tribes to their ancestral lands. In the meanwhile, the state applied for the inscription of the Kenya Lake System, which includes the Endorois’ ancestral lands, on the World Heritage List. Although the Endorois had not been consulted, the WHC inscribed the Kenya Lake System on the World Heritage List in 2011 because of its outstanding universal value.<sup>260</sup> The ACHPR held that the inscription violated its decision and called the state, the World Heritage Committee, and UNESCO to ensure full and effective participation of the Endorois in the decision-making concerning the site.<sup>261</sup> In 2014, the World Heritage Committee requested Kenya to address the ACHPR’s decision and ‘ensure full and effective participation of the Endorois in the management and decision-making of the property.’<sup>262</sup>

Therefore, international cultural heritage law has been called to adopt a more bottom-up approach to the treatment and protection of cultural heritage. The field has gradually started to respond to these concerns by enabling the limited participation of non-state actors to a growing number of UNESCO activities.<sup>263</sup>

257 Alexandra Xanthaki, ‘The Cultural Heritage of Minorities and Indigenous Peoples in the EU: Weaknesses or Opportunities?’ in Andrzej Jakubowski, Kristin Hausler, and Francesca Fiorentini (eds), *Cultural Heritage in the European Union* (Leiden: Brill 2019) 269–293, 269.

258 UN Permanent Forum on Indigenous Issues, Report of the Seventeenth Session, UN Doc. E/2018/43-E/C.19/2018/11 (2018).

259 Africa Commission on Human and Peoples’ Rights (ACHPR), *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication no. 276/03, 25 November 2009.

260 Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’, 262.

261 ACHPR, ‘Protection of Indigenous Peoples’ Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site’, ACHPR Resolution 197, 5 November 2011.

262 Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’, 262.

263 Valentina Vadi, ‘Exploring the Borderlands: The Role of Private Actors in International Cultural Law’, in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations—Creation, Evolution, and Enforcement* (Leiden: Brill 2018) 109–125.

For instance, the 2003 CSICH has contributed to democratizing global cultural governance by fostering the cooperation between heritage institutions and social actors in the recognition and safeguarding of intangible heritage.<sup>264</sup> At the regional level, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) recognizes the ‘need to put people and human values at the center of an enlarged and cross-disciplinary concept of cultural heritage.’<sup>265</sup> The 2012 Social Charter of the Americas<sup>266</sup> ‘makes people, rather than states, the primary beneficiaries of cultural development’ thus ‘mov[ing] the focus of heritage protection away from the protection of state interests and toward the people who actually practice and live with or around heritage.’<sup>267</sup>

Since 2015, the Operational Guidelines for World Heritage sites have been amended to list Indigenous peoples as partners in the conservation of world heritage sites and require their consultation before the inscription of sites in the lists.<sup>268</sup> In 2017 the International Indigenous Peoples’ Forum on World Heritage (IIPFWH) was established to engage with the World Heritage Committee during its meetings, in order to support and advise Indigenous peoples involved in the nomination, conservation, and management of world heritage sites. Finally, UNESCO adopted the 2018 Policy on Engaging with Indigenous Peoples, which calls for ensuring the full and effective participation of Indigenous peoples in the safeguarding and protection of their heritage.<sup>269</sup> As noted by Vrdoljak, ‘by pressing for their effective participation in the protection and control of their heritage, ... Indigenous peoples are ... pushing [international law] to be more internally consistent in its interpretation and application.’<sup>270</sup>

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264 CSICH, Article 15.

265 2005 Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), opened for signature 27 October 2005, entered into force 1 June 2011, ETS No. 199, Article 4.

266 Organization of American States, Social Charter of the Americas, adopted on 4 June 2012, Doc OEA/Ser.P. AG/doc 5242/12 rev2 (20 September 2012).

267 Lucas Lixinski, ‘Central and South America’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 878–907, 905.

268 UNESCO, World Heritage Committee, 2021 Operational Guidelines for the Implementation of the World Heritage Convention, WHC 21/01, 31 July 2021, available at <https://whc.unesco.org/en/guidelines/>, paras. 40 and 123.

269 UNESCO Policy on Engaging with Indigenous Peoples, approved by the Executive Board of UNESCO in October 2017 and available at <https://unesdoc.unesco.org/ark:/48223/pf0000262748>.

270 Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’, 249.

In conclusion, while in the past cultural heritage law tended to be state-centric and prioritized monumental heritage, thus privileging certain cultures over other civilizations, over the past decades there has been an attempt to ‘democratize’ cultural heritage law.<sup>271</sup> On the one hand, non-state actors such as local and Indigenous communities have been increasingly involved in the identification, conservation, and management of heritage.<sup>272</sup> Non-state entities, such as individuals and even groups (such as Indigenous peoples) which used to be on the periphery of the international legal order, are now increasingly playing an active and important role in international cultural relations. On the other hand, the concept of heritage has expanded to include intangible heritage and cultural landscapes.

### 5.3 *Pragmatism v. Idealism*

Cultural heritage law has often been considered to have a utopian character.<sup>273</sup> Having a multidisciplinary origin, it involves the work of archaeologists, anthropologists, architects, historians, and philosophers, as well as lawyers. Thus, it often relies on concepts and principles derived from archaeology and translated into law. It aims at conserving heritage in the context in which it was created. At the same time, the aims and objectives of cultural heritage law transcend a purely archaeological dimension. Founded in 1945 and based on the idea that peace can be built in the minds of people through education, science, and culture, UNESCO aims to foster international peace by promoting intercultural understanding and ‘unit[ing] all nations in a universal community ... through the promotion of ... education, science, and culture.’<sup>274</sup> Whether this is a ‘utopian dream’ or a self-fulfilling prophecy remains open to debate.<sup>275</sup>

The mixture of archaeological and political objectives characterizes a number of legal instruments adopted by UNESCO. For instance, while the CPUCH reflects the increasing awareness within the international community of the

271 Miikka Pykkönen, ‘UNESCO and Cultural Diversity: Democratisation, Commodification, or Governmentalisation of Culture?’, in Geir Vestheim (ed.), *Cultural Policy and Democracy* (London: Routledge 2015) chapter 6.

272 Kristin Hausler, ‘The Participation of Non-State Actors in the Implementation of Cultural Heritage Law’, in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 760–786, 763.

273 Felice Casula and Liliosa Azara, *UNESCO 1945–2005. Un’Utopia Necessaria. Scienza, Educazione e Cultura* (Enna: Città Aperta 2005).

274 Lynn Meskell, *A Future in Ruins—UNESCO, World Heritage, and the Dream of Peace* (Oxford: OUP 2018).

275 Vincenzo Pavone, *From the Labyrinth of the World to the Paradise of the Heart: Science and Humanism in UNESCO’s Approach to Globalization* (New York: Lexington 2008) 25–26.

importance of protecting underwater cultural heritage, it has been criticized for its utopian character.<sup>276</sup> The convention ‘aims to ensure and strengthen the protection of underwater cultural heritage’ ‘for the benefit of humanity.’<sup>277</sup> The CPUCH describes *in situ* preservation of UCH as the preferred policy option and provides a rule against the commercialization of UCH for trade.<sup>278</sup> These provisions aim to enable the conservation of cultural artifacts in the context where they were found, protect cultural artifacts from looting, and foster tourism. They reflect the archaeological tenet that every archaeological object should be preserved in its original location; in this manner, archaeologists can map its history also relying on context.<sup>279</sup> The commercialization of UCH is lawful only if it is authorized by the competent authorities, in full conformity with the CPUCH.<sup>280</sup> In fact, once a resource has been sold, it is no longer capable of being seen by the public and providing any further economic benefit to the state in which it was found.

Because of its preservationist approach, several states remain reluctant to ratify the CPUCH because they lack the financial resources to implement it.<sup>281</sup> Locating UCH and deep-water excavation require extensive research, hard work, and significant monetary resources. Most countries lack the expertise, equipment, and funding for such works; they may have to prioritize other policy areas in times of economic crisis. Unless UCH can be located, the potential addition of that heritage to humankind’s store of knowledge will never occur: the benefits of the quest for knowledge will only be realized if the quest is undertaken. In conclusion, by adopting a preservationist approach without conceding much space to private actors’ concerns, the CPUCH has not established a global consensus on how to protect UCH.<sup>282</sup>

Instead, useful joint ventures can be envisaged in which investors would assume financial risks in exchange for a share of the revenues obtained by the

276 Valentina Vadi, ‘Investing in Culture: Underwater Cultural Heritage and International Investment Law’, (2009) 42 *Vanderbilt Journal of Transnational Law* 853–904, 864 (reporting this criticism).

277 CPUCH, Article 2(1) and (3).

278 CPUCH, Article 2(5) and (7).

279 Mariano Aznar, ‘*In Situ* Preservation of Underwater Cultural Heritage as an International Legal Principle’, (2018) 13 *Journal of Maritime Archaeology* 67–81, 68.

280 CPUCH, Article 4.

281 Sarah Dromgoole, ‘The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage and Its Principles relating to the Recovery and Disposition of Material from Shipwrecks’, in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford: OUP 2020) 293–315.

282 Derek Luxford, ‘Finders Keepers Losers Weepers—Myth or Reality? An Australian Perspective on Historic Shipwrecks’, in Barbara T. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy, and Practice* (Cambridge: CUP 2006) 300–307, 307.

conservation and public display of UCH.<sup>283</sup> There is much to recommend joining private and public forces. First, private actors have been extremely successful in locating UCH. Second, because the risk of looting or unintentional destruction of UCH is relatively high, joint ventures between states and private companies represent a means of recovering UCH before it is damaged. Such recovery can provide great benefits to humanity.<sup>284</sup>

In conclusion, international cultural heritage law oscillates between idealism and realism. Some idealism seems necessary especially in times of crisis; the protection of cultural heritage can foster resilience and a sense of unity. The safeguarding of cultural heritage can also promote mutual understanding and international peace. In this sense, international cultural heritage law shares the ambition of international law to achieve just and peaceful relations among nations. Nonetheless, acknowledging that, like any other branch of international law, international cultural heritage law oscillates between realism and idealism enables a deeper appreciation of its functioning and its mission to promote just and peaceful relations among nations.<sup>285</sup>

#### 5.4 *Substantive Overreach and Procedural Underachievement?*

International cultural heritage law is characterized by substantive overreach and procedural underachievement. Substantively, the field has been increasingly governed by a growing number of UNESCO Conventions and declarations as well as multilateral, regional, and bilateral legal instruments. Most of these instruments provide broad and inclusive definitions of cultural property, cultural diversity, and cultural heritage.<sup>286</sup>

At the same time, however, international cultural heritage law is characterized by intrinsic vagueness and a combination of hard and soft law. As mentioned, the vagueness of international cultural heritage law enables states to adopt different cultural policies on the basis of their specific needs. Many international cultural heritage law instruments have a 'soft' character and are not binding. Even those international cultural heritage law instruments

283 Vadi, 'Investing in Culture', 47–48.

284 Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge: CUP 2013) 240.

285 See generally Koskenniemi, *From Apology to Utopia*.

286 The substantive overreach of international cultural heritage law is also accompanied by some critical underinclusiveness—for instance, there is no specific convention governing Indigenous cultural heritage. While Indigenous cultural heritage plays a prominent role in the UNDRIP and a range of human rights instruments, the lack of an apposite legal instrument is a missed opportunity, as it would confer further momentum to the need for protecting such heritage.

that have a binding character often include obligations of means rather than results,<sup>287</sup> or explicitly lack supremacy *vis-à-vis* other international treaty provisions.<sup>288</sup> Therefore, states maintain a wide margin of appreciation as to how to implement their obligations under these instruments. This flexibility can be a positive aspect of global cultural governance as it enables states to strike the appropriate balance between different interests and to fine-tune their cultural policies to the evolution of international law.

However, the flexibility of international cultural heritage law can also constitute a weakness as its vagueness can lead to disputes relating to its proper implementation. Moreover, the soft law character of its provisions and the diplomatic nature of its dispute settlement mechanisms raise some enforcement issues. In fact, diplomatic dispute settlement mechanisms are not always effective in preventing breaches of international cultural heritage law.

At the procedural level, the lack of courts and tribunals dedicated to settling cultural heritage-related disputes can be particularly problematic. Problems of conflict and/or coordination between international cultural heritage law and other international law norms—whether customary or conventional—have highlighted this procedural shortcoming of the field. The development of international cultural heritage law as a distinct field of international law has not been accompanied by the establishment of a dedicated court. Such a field does not provide binding, centralized, and exclusive dispute settlement mechanisms. As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing a dedicated international court. The approach endorsed by international cultural heritage law clashes with international economic governance, which is conversely characterized by substantive underachievement and procedural overreach. The absence of international cultural heritage courts determines a sort of ‘diaspora’ of cultural heritage-related disputes before other courts and tribunals, such as international economic courts, which may lack the mandate to adjudicate on the violation of cultural heritage law.

The magnetism of other international courts and tribunals raises the question as to whether cultural heritage receives adequate consideration in adjudication before such courts. While some overlapping is inevitable among various areas of international law, the question of what steps should be taken to ensure

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287 See e.g. Faro Convention, Article 6c (stating that no provision of the Convention shall be interpreted so as to create enforceable rights).

288 CSICH, Article 3(b) (stating that none of the provisions of the CSICH can be interpreted as affecting ‘the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights.’).

mutual supportiveness between different treaty regimes should also be examined. With the notable exception of the International Criminal Court, which has the mandate to adjudicate on the damages and/or destruction of cultural sites under Article 8(2)(e)(IV) of its Statute,<sup>289</sup> other courts and tribunals may not have the mandate to adjudicate on the eventual violation of cultural heritage law. This has led to the emergence of cases where important cultural issues were mentioned in passing and/or given various weights.

Finally, international cultural heritage law 'provides few indications as to the remedies, making enforcement contingent upon states' willingness to provide domestic remedies, and thus contributing to an even greater dilution of cultural heritage protection.'<sup>290</sup> Despite the existence of legal remedies, substantiating such remedies has been complex in the cultural field. Repairing cultural harms and damages poses a range of difficult theoretical and practical questions ranging from the identification of the victims entitled to reparation to the adequate forms of reparation.<sup>291</sup> While it is doubtful that the destruction of cultural monuments may ever be repaired, the misappropriation of Indigenous and local communities' intangible heritage has raised questions about the adequacy of existing remedies.

In conclusion, international cultural heritage law is characterized by substantive overreach and procedural underachievement. Substantively, the field has been increasingly governed by a growing number of UNESCO Conventions and declarations as well as multilateral, regional, and bilateral legal instruments. These developments have made international cultural heritage law quite a sophisticated area of international law governing cultural heritage both in times of war and in times of peace. Nonetheless, at the procedural level, international cultural heritage law remains underdeveloped, mostly including diplomatic, nonbinding dispute settlement mechanisms. Only rarely have cultural heritage-related disputes been brought before the ICJ. Rather, because of the partial overlapping of international cultural heritage law with other fields of international law, several cultural heritage-related disputes have been brought before specialized dispute settlement mechanisms established in specific subfields of international law. This diaspora of cultural heritage-related disputes raises the question as to whether cultural heritage concerns have received adequate consideration before these specialized fora that do not

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289 Rome Statute of the International Criminal Court, adopted on 17 July 1998, in force on 1 July 2002, last amended 2010, 37 ILM 999 (1998).

290 Elisa Novic, 'Remedies', in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 642–662, 642–643.

291 Id. 643.

necessarily have the mandate to check state compliance with international cultural heritage law.

### 5.5 *Heritagization – Heritage v. Humanity?*

The extraordinary expansion of international cultural heritage law since the aftermath of WWII has provided states with the much-needed leverage to adopt comprehensive cultural policies. It has led to the growing awareness that the protection of cultural heritage benefits states and the international community as a whole. Such protection is also significantly linked to the protection of cultural rights and a range of other freedoms and human rights.

However, an excessive emphasis on the protection of cultural heritage without sufficient input from the relevant stakeholders risks overprotecting heritage at the expense of other interests and values. Anthropologists have discussed the risks of ‘heritagization’ processes whereby items of heritage are identified without the consultation and participation of local communities, and/or overprotected irrespective of the impact of such conservation on local communities’ needs. Cultural artifacts and sites have been commodified and detached from the life of local communities who contributed to create them in the first place.<sup>292</sup>

For instance, in Egypt, the vernacular architecture of the village of Gurna has been destroyed to preserve the ‘authorized heritage discourse’ in Luxor.<sup>293</sup> In Cambodia, local villagers have been excluded from Angkor, a World Heritage Site, in the name of conservation.<sup>294</sup> In Naples, a world heritage site of ineffable beauty, urban plans to requalify the Spanish Quarters (*Quartieri Spagnoli*) have raised concerns. Since its creation in the 16th century to house Spanish garrisons, the district has become a hotspot of Neapolitan popular culture.<sup>295</sup> Will the renovation render the poor communities invisible or can it constitute an opportunity for sustainable development?

While respect of human rights is built into UNESCO treaties, in practice there has been scarce community engagement in their implementation. In parallel, human rights courts have condemned the forced eviction of local

292 Aníbal Arregui, Gesa Mackenthun, and Stephanie Wodianka, ‘Introduction’, in Aníbal Arregui, Gesa Mackenthun, Stephanie Wodianka (eds), *Decolonial Heritage. Natures, Cultures, and the Asymmetries of Memory* (Münster/New York: Waxmann 2018) 7–28, 13.

293 Laurajane Smith, *Uses of Heritage* (London and New York: Routledge 2006).

294 Vadi, ‘Exploring the Borderlands: The Role of Private Actors in International Cultural Law’, 121.

295 Marta Pappalardo, ‘Le Centre Historique de Naples: Patrimonialisation contre Pratiques Populaires?’ (2014) 5 *Journal of Urban Research* 1–16.

communities from heritage sites. For instance, in the *Ogiek* case, the African Court on Human and Peoples' Rights condemned the forced eviction of the Ogieks, a Kenyan hunter-gatherer Indigenous community, from their ancestral lands. The government had evicted them from the Mau Forest, in Kenya's Rift Valley, for conservation reasons.<sup>296</sup> The Court held that the government had violated several of the Ogieks' rights under the African Charter on Human and Peoples' Rights, including their rights to freedom of religion and culture, to free disposal of wealth and natural resources, and to economic, social, and cultural development.<sup>297</sup>

These and similar cases require addressing the question of why international law protects heritage. Should international law conserve heritage because it is heritage or should it conserve heritage because of its importance to humanity? International law scholars have called for a 'humanization' of international cultural heritage law, that is, a recalibration of the field around its human dimension. Such evolution reflects the importance that the protection of cultural heritage has for individuals, local communities, and the international community as a whole. The humanization of international cultural heritage law would make it more porous to interests and needs which go beyond the reason of state (*ragion di stato*) and include the respect for human dignity and human rights.<sup>298</sup> The humanization of cultural heritage law can contribute to counteracting heritagization processes within international cultural heritage law which emphasize the protection of heritage because of its mere intrinsic features. Rather, cultural heritage should be seen against the background of human history. It matters to a variety of actors who attach different narratives to the same objects.

Moreover, cultural heritage often reflects the cultural identity, cultural practices, and sometimes the spiritual beliefs of local communities. While it can be 'part of national identity,' it can also reflect 'the spiritual, religious, and cultural specificity of minorities and groups.'<sup>299</sup> Cultural heritage 'is inextricably

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296 ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* ('Ogiek case'), Application. No. 006/2012, Judgement, 26 May 2017.

297 African Charter on Human and Peoples Rights, adopted on 27 June 1981, in force on 21 October 1986, OAU DOC. CAB/LEG/67/3 rev. 5, 21 I, Articles 8, 17, 21, and 22.

298 Valentina Vadi and Hildegard Schneider, 'Art, Cultural Heritage and the Market: Legal and Ethical Issues', in Valentina Vadi and Hildegard Schneider (eds), *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Heidelberg: Springer 2014) 1–26, 16.

299 Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 EJIL 9–16, 9–10.

intertwined with its ... social, cultural, and economic context.<sup>300</sup> Therefore, not only the tangible aspects of heritage, but also its intangible dimension should be considered in the conservation of cultural heritage. Acknowledging the interaction between people and their heritage enables synergies between global and local cultural governance and between universal and particular values in the conservation of cultural heritage. Therefore, cultural policies should enable local communities to maintain a close connection to their tangible and intangible heritage. In this manner, the protection of cultural heritage can facilitate cultural understanding and international cooperation, and even promote just, peaceful, and friendly relations among nations.

## 6 Cultural Heritage as a Human Rights Issue

The protection of cultural heritage is ‘a human rights issue.’<sup>301</sup> Several international human rights instruments refer to cultural heritage, highlighting the importance of its protection for individuals and communities, including Indigenous peoples.<sup>302</sup> As the protection of cultural heritage is essential to enable individuals to enjoy their cultural rights, its conservation is crucial to make these rights effective.<sup>303</sup> Engaging with the cultural heritage of one’s choice is considered to be an aspect of the right freely to participate in cultural life and a range of other human rights.<sup>304</sup>

Moreover, the Committee on Economic, Social, and Cultural Rights has specified the state obligations to respect, protect, and fulfill cultural rights by explicitly referring to cultural heritage. For the Committee, the obligation to respect requires states to guarantee the right to access one own’s cultural heritage and that of others, and the right to participate in decision-making processes that may have an impact on cultural rights.<sup>305</sup> The obligation to protect cultural rights requires states to safeguard cultural heritage in all its forms and

300 Jonathan Bell, ‘The Politics of Preservation: Privileging One Heritage over Another’ (2013) 20 *International Journal of Cultural Property* 431–450, 434.

301 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, A/HRC/17/38, 21 March 2011, para. 77.

302 Id. para. 7

303 Ringelheim, ‘Cultural Rights’, 284.

304 Council of Europe, Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), adopted and opened for signature on 27 October 2005, in force 1 June 2011, CETS 199, preamble.

305 CESCR, General Comment No. 21, para. 49.

at all times, whether in times of war or peace.<sup>306</sup> The Committee has emphasized the need to protect cultural heritage and in particular that of the most disadvantaged and marginalized individuals and groups from ‘the adverse consequences of globalization’ and economic development.<sup>307</sup> While drafting international economic agreements, ‘states should take into account the right to access and enjoy cultural heritage and ensure it is respected.’<sup>308</sup> States Parties to the International Covenant on Economic, Social, and Cultural Rights have an obligation to ensure that policies and decisions of UNESCO and the WTO in the field of culture ‘are in conformity with their obligations under the Covenant.’<sup>309</sup> Finally, for the Committee, the obligation to fulfill entails a duty for states to take appropriate measures necessary for the full realization of cultural rights.

Therefore, a human rights-based approach to cultural heritage must complement cultural conservation policies. Such an approach obliges states to safeguard cultural heritage, taking into account the rights of individuals and communities in relation to such heritage. A human rights-based approach to heritage protection has a ‘transformational impact’ on international cultural heritage law by moving it away from its state-centric focus.<sup>310</sup> In fact, ‘cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities.’<sup>311</sup> The protection of such heritage is thus mandated ‘not for its own sake but as an indispensable element of human flourishing.’<sup>312</sup>

The protection of cultural heritage is clearly linked to the enjoyment of cultural rights.<sup>313</sup> Cultural rights generally refer to the right to freely choose one’s cultural identity and the right to take part in cultural life, the right to maintain

306 CESCR, General Comment No. 21, para. 50(a).

307 *Id.* para. 50(b).

308 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, para. 77.

309 CESCR, General Comment No. 21, para. 75.

310 Vrdoljak, ‘Indigenous Peoples, World Heritage, and Human Rights’, 273.

311 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 77.

312 Roger O’Keefe, ‘Tangible Cultural Heritage and International Human Rights Law’, in Lyndell Prott, Ruth Redmint-Cooper, and Stephen Urice (eds), *Realising Cultural Heritage Law, Festschrift for Patrick O’Keefe* (London: Institute for Art and Law 2013) 87, 95.

313 UN Committee on Economic, Social, and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Article 15, para. 1a of the Covenant on Economic, Social, and Cultural Rights), 21 December 2009, E/C.12/GC/21, para. 50.

a way of life and the right to contribute to, and benefit from, cultural heritage.<sup>314</sup> Although a right to access and enjoy cultural heritage does not yet exist in the human rights' pantheon,<sup>315</sup> access to cultural heritage can be instrumental to the enjoyment of cultural rights. For instance, the Faro Convention recognizes that 'every person has a right to engage [in] the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right to participate freely in cultural life.'<sup>316</sup> Conversely, 'the destruction of, or damage to, cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights.'<sup>317</sup>

Notwithstanding early jurisprudence and the formal entry of cultural rights into the human rights pantheon after WWII, cultural rights have long been neglected, and have therefore been significantly less developed than civil, political, economic, and social rights.<sup>318</sup> They used to be considered as 'second-generation' and 'merely aspirational' rights to be left to governments to implement progressively.<sup>319</sup> States have feared that cultural entitlements could have emancipatory potential, determine claims of self-determination among minorities and Indigenous peoples, and ultimately jeopardize national unity.<sup>320</sup> Furthermore, the distinction between civil and political rights on the one hand, and economic, social, and cultural rights on the other was traditionally based on the perceived characterization of civil and political rights as entailing negative obligations on the part of the state, and economic, social, and cultural rights as requiring positive duties.

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314 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 27.1; International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted 16 December 1966, in force 3 January 1976 (1967) 6 ILM 360 et seq, Article 15; International Covenant on Civil and Political Rights (ICCPR), Article 27.

315 But see UNGA Resolution 56/6, adopted on 9 November 2001, *Global Agenda for Dialogue among Civilizations* (recognizing 'the right of all members of all civilizations to preserve and develop their cultural heritage within their own societies').

316 Faro Convention, preamble.

317 UN Human Rights Council, *Cultural Rights and the Protection of Cultural Heritage*, Resolution A/HRC/RES/33/20, 6 October 2016, preamble. See also the 2003 UNESCO Declaration on the Intentional Destruction of Cultural Heritage, preamble (highlighting that the intentional destruction of cultural heritage 'may have adverse consequences on human dignity and human rights.')

318 See Janusz Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science Journal* 559–572.

319 ICESCR, Article 2(1) (articulating the obligation to achieve progressively the full realization of rights 'by all appropriate means, including particularly the adoption of legislative measures' and applying the 'maximum of available resources').

320 Symonides, 'Cultural Rights', 559.

In recent decades, however, cultural rights have undergone a renaissance.<sup>321</sup> UN treaty bodies have highlighted the indivisibility and interrelatedness of all human rights, recognizing that ‘without affording full guarantees for ... cultural rights ... the protection offered ... by other rights can become practically meaningless’.<sup>322</sup> Seminal studies have clarified the content of cultural rights and highlighted their transformatory and empowering potential by ‘enabling the pursuit of knowledge and understanding’, thereby ‘promoting the full human personality and realizing all other human rights’.<sup>323</sup> Without their recognition and respect, may neither human dignity be guaranteed nor other human rights be fully implemented. Moreover, protecting cultural rights may form a crucial part of the response to many current global challenges by fostering ‘dialogue, peace, and reconciliation.’<sup>324</sup>

The ICJ has adopted a ‘culturally sensitive understanding of legal issues brought to the Hague’.<sup>325</sup> In parallel, human rights bodies have defined and elaborated upon cultural rights that have been increasingly claimed and adjudicated under domestic, regional, and international law.<sup>326</sup> The entry into force of the Optional Protocol to the ICESCR in 2013 has strengthened the view that cultural rights matter as much as the other human rights.<sup>327</sup> Such a mechanism enables individuals or groups of individuals to bring claims,

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321 Lucky Belder and Helle Porsdam (eds), *Negotiating Cultural Rights* (Cheltenham: EE 2017); Andrzej Jakubowski (ed.), *Cultural Rights as Collective Rights: an International Law Perspective* (Leiden: Brill 2016); Manisuli Ssenyonjo, *Economic, Social, and Cultural Rights in International Law* 11 ed. (Oxford: Hart 2016); Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Leiden/Boston: Martinus Nijhoff 2008); Elsa Stamatopoulou, *Cultural Rights in International Law* (Leiden: Brill 2007); Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerp: Intersentia 2002).

322 UN Economic and Social Council, ‘Commission on Human Rights: Final Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (D Türk), the Realization of Economic, Social, and Cultural Rights’, 3 July 1992, UN Doc E/CN.4/Sub.2/1992/16.

323 Helle Porsdam, *The Transforming Power of Cultural Rights: A Promising Law and Humanities Approach* (Cambridge: CUP 2019).

324 Human Rights Council, Resolution 33/20, Cultural Rights and the Protection of Cultural Heritage, A/HRC/RES/33/20, 30 September 2016, preamble.

325 Eleni Polymenopoulou, ‘Cultural Rights in the Case Law of the International Court of Justice’ (2014) 27 *Leiden Journal of International Law* 447–464, 447.

326 State compliance with its obligations is now assessed in individual cases under the Optional Protocol to the ICESCR (OP-ICESCR) as well as in the growing number of cultural rights-related cases being adjudicated before domestic and regional courts.

327 Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (OP-ICESCR) adopted 10 December 2008, in force 5 May 2013, G.A. Res. 63/117, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/117 (2009).

thus strengthening the legal protection of cultural rights and enhancing their justiciability. Nowadays, it is generally acknowledged that all human rights entail both positive and negative obligations.<sup>328</sup> In addition, the Committee on Economic, Social, and Cultural Rights has clarified that the progressive realization of cultural rights must be compatible with the minimum core of such rights, that is, the minimum essential levels of cultural rights that must be immediately implemented by all states as a matter of top priority.<sup>329</sup> Such core obligations of states include the duty to prohibit discrimination based on cultural identity and guarantee equality in the enjoyment of the right to take part in cultural life.<sup>330</sup> Because the content of such a minimum core is closely related to human dignity, such a minimum core is absolute and immediately enforceable.

Some elements of cultural rights can achieve and have achieved a peremptory character (*jus cogens* status) and prevail over treaty obligations in the hierarchy of international public policy. Peremptory norms of general international law are 'norm[s] accepted and recognized by the international community of States as a whole as norm[s] from which no derogation is permitted and which can be modified only by subsequent norm[s] of general international law having the same character.'<sup>331</sup> For instance, the right of peoples to freely pursue their cultural development, that is a component of the right of self-determination, is commonly regarded as a *jus cogens* rule.<sup>332</sup>

The protection of cultural heritage is also linked to other human rights norms, including the right to self-determination, the right to education, the right of freedom of expression, and the right of freedom of thought and religion. It is also linked to the prohibition of discrimination and the promotion of substantive equality.<sup>333</sup> For instance, the Committee on the Elimination of

328 Bruce Porter, Jackie Dugard, Daniela Ikawa, and Lilian Chenwi, 'Introduction', in Bruce Porter, Jackie Dugard, Daniela Ikawa, and Lilian Chenwi (eds), *Research Handbook on Economic, Social, and Cultural Rights as Human Rights* (Cheltenham: EE 2020) XVIII–XXVII, XXI.

329 Committee on Economic, Social, and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (1990) para. 10 (stating that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.)

330 Committee on Economic, Social, and Cultural Rights, General Comment No. 21, para. 55.

331 VCLT, Article 53.

332 ICCPR, Article 1.1 and ICESCR, Article 1.1 (emphasis added). Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006) at 51.

333 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 7 March 1966, in force 4 January 1969, 660 UNTS 195, Article 5 (requiring states to prohibit discrimination and guarantee, *inter alia*, cultural rights) and Article 2.2 (enabling states 'when the circumstances so warrant' to take positive measures

Racial Discrimination called for the recognition, respect, and preservation of ‘Indigenous distinct culture, history, language, and way of life as an enrichment of the State’s cultural identity.’<sup>334</sup> It also called upon states parties to ‘provide Indigenous peoples with conditions allowing for a sustainable ... development compatible with their cultural characteristics’ and ‘recognize and protect the rights of Indigenous peoples to own, develop, control, and use their communal lands, territories, and resources.’<sup>335</sup>

A number of international legal instruments call for universal respect for human rights including the protection of cultural heritage.<sup>336</sup> These instruments acknowledge that the destruction of cultural heritage can affect the enjoyment of human rights, including cultural rights, and reaffirm that all human rights must be treated ‘with the same emphasis’ because of their universality and indivisibility.<sup>337</sup> Raising awareness on the mutually reinforcing relation between the protection of cultural heritage and human rights, these instruments call for ‘the identification of innovative ways and best practices, at the national, regional, and international levels ... for the prevention and mitigation of damage caused to cultural heritage.’<sup>338</sup> They also encourage states ‘to take the measures necessary to prevent the destruction of historical monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples, both in conflict and non-conflict situations, and promote respect for cultural diversity.’<sup>339</sup>

While the protection of cultural heritage is mainly the responsibility of states, all members of civil society—individuals, companies, local communities, minorities, and Indigenous peoples—also have responsibilities. For instance, certain types of business such as the extractive industries can cause

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in the cultural field, that is, ‘special and concrete measures to ensure the adequate development and protection of certain [ethnic] groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different [ethnic] groups after the objectives for which they were taken have been achieved.’)

334 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of Indigenous Peoples (Fifty-first session, 1997), UN Doc. A/52/18 (1997) para. 4(a).

335 Id. para. 4(c) and para. 5.

336 Human Rights Council, Resolution 33/20, *Cultural Rights and the Protection of Cultural Heritage*, A/HRC/RES/33/20, 30 September 2016.

337 Id. preamble.

338 Id. para. 7.

339 Human Rights Council, *Cultural Rights and the Protection of Cultural Heritage*, A/HRC/37/L.30, 19 March 2018, para. 12.

irreversible damage to the cultural heritage of Indigenous communities.<sup>340</sup> Therefore, ‘businesses have a responsibility to protect the right to cultural heritage; if operations have a negative impact on the realization of that right, businesses have a responsibility to remedy that impact.’<sup>341</sup> In parallel, states should regulate the activities of the corporate sector that may have an impact on the protection of cultural heritage.<sup>342</sup> In particular, they ‘should ensure that investors and corporations respect the cultural heritage of Indigenous peoples.’<sup>343</sup> Moreover, human rights bodies advise that states should ‘declar[e] cultural heritage sites, sacred sites, and other areas of spiritual significance to Indigenous peoples as no-go zones for extractive industries, tourism development, and other development projects which have not received the free, prior, and informed consent of the Indigenous peoples concerned.’<sup>344</sup> In this regard, the Inter-American Court of Human Rights has held that when dealing with major investment projects that may affect the traditional land of Indigenous Peoples, states must not only carry out prior consultations, but also obtain Indigenous Peoples’ free, prior, and informed consent.<sup>345</sup>

The interplay between heritage and human rights has been acknowledged not only in international human rights law and general international law, but also in international cultural heritage law. In fact, several instruments protecting various types of cultural heritage refer to human rights. The 2003 CSICH refers to existing international human rights instruments.<sup>346</sup> The UNESCO Declaration on Cultural Diversity recalls the commitment of the parties to ‘the full implementation’ of human rights and fundamental freedoms.<sup>347</sup> It also specifically calls for respect for human dignity and commitment to the human rights of minorities and Indigenous peoples.<sup>348</sup> More fundamentally,

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340 Human Rights Council, ‘Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage’, Study by the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/30/53 19 August 2015, para. 56.

341 *Id.* para. 22.

342 General Comment No. 21, para. 73.

343 Human Rights Council, ‘Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage’, Study by the Expert Mechanism, para. 22.

344 *Id.* para. 13.

345 IACtHR, *Case of the Saramaka People v. Suriname*, IACtHR Series C No. 172, 28 November 2007, para. 137.

346 CSICH, preamble.

347 UNESCO Universal Declaration on Cultural Diversity, Adopted by the 31st Session of the General Conference of UNESCO in Paris, 2 November 2001, preamble.

348 *Id.* Article 4.

international cultural heritage law only protects heritage that is compatible with existing human rights instruments.<sup>349</sup>

In conclusion, a human rights-based approach to cultural heritage protection, as required by a number of international law instruments, centers on the human dimension of heritage discourse, expressing the need to put humanity at the center of international cultural heritage law. Such an approach obliges states to consider the rights of individuals and communities in relation to cultural heritage. In fact, '[a]ccessing and enjoying cultural heritage is an important feature of being a member of the human society.'<sup>350</sup>

## 7 Conclusions

Cultural heritage is a multifaceted concept which includes both tangible and intangible cultural resources. While culture represents inherited values, ideas, and traditions, which characterize social groups and their behavior, heritage indicates something to be cherished and handed down from one generation to another. There is no single definition of cultural heritage at the international law level; rather, different legal instruments provide *ad hoc* definitions often focusing on distinct categories of cultural heritage, rather than approaching it holistically.

The protection of cultural heritage is a fundamental public interest. It can be an engine of economic growth and welfare, being central in people's lives, enriching their existence in both a material and immaterial sense. It can foster sustainable development, that is, development which meets the needs of the present and future generations. Moreover, cultural exchanges create the conditions for renewed dialogue among civilizations. Respect for the diversity of cultures is deemed to be among the best guarantees of international peace and security.<sup>351</sup>

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349 Faro Convention, Article 4c; Convention on Cultural Diversity, Article 2.1 (providing that '[c]ultural diversity can be protected and promoted only if human rights and fundamental freedoms ... are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as ... guaranteed by international law, or to limit the scope thereof.');

350 CSICH, Article 2 (delimiting its scope of application 'solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups, and individuals, and of sustainable development.')

350 Human Rights Council, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, para. 2.

351 Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), adopted 16 November 1945, in force 1946, 4 UNTS 275 (1945), preamble.

Cultural governance has come of age. Once the domain of elitist scholars and practitioners, cultural governance has emerged as a new frontier of study and has come to the forefront of legal debate. Cultural governance is multilevel because different layers of regulations enacted at different levels—international, regional, and national—can conflict and/or overlap. It is also multipolar, as a number of different bodies—ranging from international administrative bodies to private actors—govern cultural heritage at national, regional, and international levels.

International cultural heritage law is a thriving part of international law. Constantly evolving, the field is characterized by some fragmentation as different legal instruments protect various types of cultural heritage.<sup>352</sup> Most such instruments have a soft character and are not binding. Even those instruments that are binding often explicitly lack supremacy *vis-à-vis* other international treaties and include obligations of means rather than results. Therefore, states have a wide margin of appreciation as to how to implement their obligations under international cultural heritage law. This flexibility can be a positive aspect of global cultural governance as it enables states to strike the appropriate balance between different interests.

As rule-making in the cultural field ‘has not been matched by a corresponding development of enforcement procedures and mechanisms’,<sup>353</sup> many cultural heritage-related disputes have been adjudicated by borrowed fora, that is, courts or tribunals established within other branches of law.<sup>354</sup> As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not established a dedicated international court in the field of cultural heritage. Such absence determines a sort of ‘diaspora’ of cultural heritage-related disputes before other courts and tribunals which may lack the mandate to adjudicate on the violation of cultural heritage law. The magnetism of other courts raises the question as to whether cultural heritage receives adequate consideration before such courts.<sup>355</sup>

Top-down approaches in policy making and an excessive emphasis on the protection of cultural heritage without sufficient input of the relevant

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352 See Jean-Baptiste Harelimana, *La Defragmentation du Droit International de la Culture: Vers une Cohérence des Normes Internationales* (Paris: L’Harmattan 2016).

353 Francesco Francioni and James Gordley, ‘Introduction’, in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford: OUP 2013) 1–5, 1–2.

354 See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014) 129–134; Federico Lenzerini, ‘The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage’, in Francioni and Gordley (eds), *Enforcing International Cultural Heritage Law*, 40–64.

355 Valentina Vadi, ‘Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage’ (2015) 18 *JIEL* 51–77.

stakeholders risks overprotecting heritage *vis-à-vis* other fundamental human values.<sup>356</sup> Anthropologists have discussed the risks of heritagization processes whereby items of heritage are overprotected irrespective of local communities' needs. While the respect of human rights is built into UNESCO treaties, there has been scarce community engagement in practice.

Of particular importance is the interplay between international cultural heritage law and human rights law. In the past decades, the United Nations has attempted to mainstream human rights law in the operation of its various organizations, including UNESCO.<sup>357</sup> While international cultural heritage law and human rights law have developed in quite separate ways, with different aims and objectives, nowadays scholars have increasingly focused on the linkage between the protection of cultural heritage and the fulfillment of human rights and fundamental freedoms.<sup>358</sup> While 'there is room for much more engagement between these two fields,' they have learned much from each other.<sup>359</sup> For instance, the content of the UNDRIP is influencing the development of international cultural heritage law, thus showing that international law can and should be interpreted holistically.

As a subfield of international law, international cultural heritage law is contributing to the development of international law in different ways. First, it is contributing to expanding the reach of international law to areas that used to be the *domaine réservé* of states. Second, the growing competition between international cultural heritage law and other subfields of international law can give rise to a cross-pollination of concepts and principles and the eventual emergence of general principles of law or customary international law requiring the protection of cultural heritage in times of war and in times of peace. The cross-pollination of concepts from a subfield of international law to another can help interpreters and practitioners to overcome the alleged fragmentation of international law through treaty interpretation.<sup>360</sup> It can also help treaty-makers and international organizations to overcome the alleged fragmentation of international law by adopting new policies and principles, and authoritative interpretations of existing instruments.

356 See generally Matthew Humphrey, *Preservation Versus the People? Nature, Humanity, and Political Philosophy* (Oxford: OUP 2002).

357 Hilary Charlesworth, 'Human Rights and the UNESCO Memory of the World Programme', in Michele Langfield, William Logan, and Mairead Nic Craith (eds), *Cultural Diversity, Heritage, and Human Rights—Intersections in Theory and Practice* (London: Routledge 2010) 21–30, 21.

358 Id.

359 Id.

360 Lostal, 'The Role of Specific Discipline Principles in International Law', 415.

# International Economic Law

In economics, as in physics,  
changes are generally continuous.

ALFRED MARSHALL<sup>1</sup>



## 1 Introduction

International economic law is the branch of public international law that governs international economic relations.<sup>2</sup> Although the regulation of international economic relations has always been a central aspect of international law, it has become a distinct field of the international legal system since the end of WWII. In its aftermath, states representatives met at Bretton Woods, New Hampshire, United States, motivated by the belief that a closer economic integration among states could prevent economic warfare, enhance international peace, and promote global welfare. The creation of international institutions dealing with international trade, foreign direct investment (FDI), and foreign exchange was seen as a means to avoid protectionism and foster peaceful and prosperous relations among nations.<sup>3</sup>

During the negotiations, three international institutions were imagined to form the pillars of the international economic order: the International Trade

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1 Alfred Marshall, *Principles of Economics* [1890], 8th edition (London: Macmillan 1920) 409, footnote 1.

2 Georg Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 *Recueil des Cours* 1 and 7; Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law* (Leiden: Brill 1981) 9–11.

3 The policy of protecting domestic industries against foreign competition by means of tariffs, subsidies, quotas, and other restrictions placed on foreign goods had characterized the 1930s, undermining international cooperation, fostering nationalism, and ultimately contributing to the Second World War. Leon Trotsky, 'Nationalism and Economic Life' (1934) 12 *Foreign Affairs* 395, at 395 (noting that 'everywhere policy is being directed toward as hermetic a segregation as possible of national life away from world economy.');

Rafael Lima Sakr, 'Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law' (2019) 22 *JIEL* 57–91, 66.

Organization (ITO), the International Bank for Reconstruction and Development (World Bank), and the International Monetary Fund (IMF). The ITO was to govern both trade and investment; the IMF was to provide short-term finance to countries in balance of payment difficulties; and the World Bank was meant to provide long-term capital to support development. Of the three institutions, only the IMF and the World Bank were established. The ITO never saw the light of the day: its founding instrument was adopted in Havana in 1948 but it failed to enter into force since the United States Congress did not approve it, and other states could not establish an international trade system without the largest economy in the world.<sup>4</sup>

Instead, the parties signed the much less ambitious, but perhaps more pragmatic General Agreement on Tariffs and Trade (GATT 1947).<sup>5</sup> The GATT was not an international organization nor did it have an international personality. Rather, it was a multilateral treaty with an agile structure. Although the GATT was meant to have a provisional application, over time, it became extremely successful, probably because of its practical and diplomatic nature. It gradually developed some institutional and dispute settlement features, and after almost five decades, an agreement was reached to establish the World Trade Organization (WTO).<sup>6</sup>

Nowadays, international economic law is a well-developed area of law that includes international monetary law, international investment law, and international trade law, as well as elements of international financial law and international development law. This chapter provides some sense of the various debates and trends in international economic law focusing on two of its subfields, namely international trade law and international investment law.<sup>7</sup> Although each subfield could be treated in its own right, this book attempts to

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4 Gerhard Loibl, 'International Economic Law', in Malcom Evans (ed.), *International Law* (Oxford: OUP 2010) 722–751, 732.

5 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

6 Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement or WTO Agreement), 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

7 As the interplay between international financial law and the protection of cultural heritage has been already investigated by a number of contributions, it will be mentioned by way of reference. See Antonia Zervaki, 'The Cultural Heritage of Mankind Beyond UNESCO: The Case for International Financial Institutions', in Photini Pazartzis and Maria Gavouneli (eds), *Reconceptualizing the Rule of Law in Global Governance—Resources, Investment, and Trade* (Oxford: Hart 2016) 169–184 (examining the practice of the World Bank and the European Investment Bank in relation to the financing of projects that have an impact on the cultural heritage of humankind). See also Willem Van Genugten, *The World Bank Group, the IMF, and Human Rights: A Contextualized Way Forward* (Intersentia 2015); Juan Pablo Bohoslavsky and Jernej Letnar Černič (eds), *Making Sovereign Financing and Human Rights Work* (Oxford:

examine the converging divergences between the two fields in relation to their interplay with cultural heritage protection. The in-depth and holistic scrutiny of these two subfields of international economic law enables the detection of the possible emergence of general principles of international law mandating the protection of cultural heritage in peacetime. Such a holistic approach also enables a better understanding of the international economic order and its various parts. Finally, it allows the defragmentation of international law.<sup>8</sup>

The chapter shows that international economic law cannot be isolated from general international law. On the one hand, international economic law can influence the development of general international law. The jurisprudence of international economic courts can be informally considered by other international courts and tribunals. Moreover, state practice and *opinio juris* developed under the aegis of international economic law can contribute to the coalescence of customary law or general principles of international law. On the other hand, as mentioned, international economic law is rooted in general international law. Its sources are treaties, customs, and general principles of law—the same sources of general international law. Moreover, international economic law is gradually becoming permeable to the influence of other subfields of international law, such as international cultural heritage law, albeit to a varying extent. Therefore, general international law and its subfields should not be read in clinical isolation from each other.

The chapter provides a brief overview of the features, aims, and objectives of international economic law and dispute settlement mechanisms, thus setting the stage for illuminating the linkage between cultural heritage protection and international economic law in theory and practice. While international economic law can be approached from a variety of different perspectives,<sup>9</sup> the chapter primarily adopts an international law perspective. Additional perspectives such as economics, political science, and history come into play when necessary, to understand this complex field of study.

The chapter proceeds as follows. Section 1 briefly examines the content, aims, and objectives of international economic law. Section 2 analyzes its

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Hart 2014); Galit Sarfaty, *Values in Translation—Human Rights and the Culture of the World Bank* (Stanford, CA: Stanford University Press 2012).

8 Asif Qureishi and Andreas Ziegler, *International Economic Law*, 11 ed. (London: Sweet & Maxwell 2009) 6.

9 John Haskell and Akbar Rasulov (eds), *New Voices and New Perspectives in International Economic Law* (Heidelberg: Springer 2020). On the hegemony of economic analysis in international economic law, see Oisín Suttle, 'Poverty and Justice: Competing Lenses on International Economic Law' (2014) 15 *JWIT* 1071–1086 (noting that 'the hegemony of economic analysis, and in particular the power of comparative advantage in trade scholarship, left little space for alternative theoretical approaches.').

sources. Section 3 discusses the interplay between state sovereignty and international economic law. Section 4 investigates the settlement of international economic disputes. Finally, Section 5 analyses and critically assesses the current legitimacy crisis of international economic law. Final remarks sum up the key findings of the chapter.

## 2 Content, Aims and Objectives of International Economic Law

International economic law governs economic phenomena, including but not limited to trade, investment, services, currency, and finance when such activities cross national borders.<sup>10</sup> Due to economic globalization, international economic law has expanded in breadth and width – governing a growing number of fields and to an extent unknown before. While most fields of international law have an economic dimension, such economic tools of governance formally remain outside the normative ambit of international economic law.<sup>11</sup>

Rather, it is possible to identify ‘the core and the penumbra’ of international economic law.<sup>12</sup> The core of international economic law includes international trade, foreign investment, and international monetary relations. Because of their centrality to the field, these areas have been under the spotlight for decades and have become worthy of investigation in their own right. Within the matrix of international economic law, international investment law and international trade law are often examined together as the twin pillars of the system.<sup>13</sup> They share the general objectives of providing security and predictability to economic actors and increasing world prosperity by reducing barriers to international flows of goods, services, and investments. Foreign investments and international trade often interact in a globalized economy, and there is some partial overlapping in their respective legal frameworks, as some aspects of

10 John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations* (St. Paul, MN: West Group 2002) 193–194.

11 For instance, Article 15 of the 1972 World Heritage Convention established a Fund for the Protection of the World Cultural and Natural Heritage. The operation of such fund remains outside the formal borders of international economic law, despite having an economic character.

12 Qureishi and Ziegler, *International Economic Law*, 14.

13 Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016); Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: CUP 2016); Jürgen Kurtz, ‘Charting the Future of the Twin Pillars of International Economic Law’ (2014) 9 *Jerusalem Review of Legal Studies* 36–51; Mary E. Footer, ‘International Investment Law and Trade: The Relationship that Never Went Away’, in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge: CUP 2013) chapter 12.

foreign direct investments are governed by relevant WTO agreements. Negotiations on an Investment Facilitation for Development Agreement have been underway in the WTO since September 2020; they are meant to conclude by the end of 2022. The negotiations are far advanced and focus on a wide range of measures that governments can put in place to facilitate the flow of FDI. In turn, some trade elements surface in relevant investment arbitrations.<sup>14</sup> Both regimes prohibit unjustifiable discrimination.<sup>15</sup>

Because of the expansive character of international economic law, this field has increasingly interacted with other regimes of international law. International economic law has thus become increasingly porous to noneconomic values including, but not limited to, human rights, public health, environmental protection, and cultural concerns.<sup>16</sup> This interaction—the so-called linkage issue—has attracted growing attention, but remains in a twilight zone, thus deserving further scrutiny.<sup>17</sup>

International economic law aims to promote peaceful and prosperous relations among nations, thus enhancing global welfare. The participants to the Bretton Woods conference endorsed the idea that by promoting a closer economic integration among nations, a mutual and better understanding would follow. Accordingly, an economically close-knit international community would develop a sense of interdependence, unity, and common destiny among its members.

Because of its three-fold aim—namely, growth, welfare, and peace—international economic law has multi-layered objectives, including both economic and noneconomic goals. Economic objectives include ‘raising the standards of living, ensuring full employment, ... the facilitation of growth in real income.’<sup>18</sup> The most important undertakings that a country makes pursuant to international economic law are the so-called most-favored nation (MFN) treatment

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14 See e.g. Anastasios Gourgourinis, ‘Reviewing the Administration of Domestic Regulation in WTO and Investment Law’, in Freya Baetens (ed.), *Investment Law within International Law Integrationist Perspectives* (Cambridge: CUP 2013) chapter 13.

15 See e.g. Nicholas DiMascio and Joost Pauwelyn, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’, (2008) 102 *AJIL* 48–89, 88.

16 Daniel Drache and Lesley A. Jacobs, *Grey Zones in International Economic Law and Global Governance* (Vancouver: University of British Columbia 2019).

17 Isabella D. Bunn, ‘Linkages between Ethics and International Economic Law’ (1998) 19 *University of Pennsylvania JIEL* 319–327; Frank J. Garcia, ‘Trade and Justice: Linking the Trade Linkage Debates’ (1998) 19 *University of Pennsylvania JIEL* 391–434; James Harrison, ‘The Case for Investigative Legal Pluralism in International Economic Law Linkage Debates’ (2014) 2 *London Review of International Law* 115–145.

18 Marrakesh Agreement Establishing the World Trade Organization, preamble.

and national treatment.<sup>19</sup> MFN treatment requires generally that ‘any advantage, favor, privilege or immunity granted by any contracting party’ to any foreign investor, investment, or product ‘shall be accorded immediately and unconditionally’ to the like investor, investment or ‘product originating in or destined for the territories of all other contracting parties.’<sup>20</sup> In other words, the best treatment extended to any has to be extended to all. National treatment requires equal treatment of foreigners and locals.

Noneconomic objectives relate to the respect of community values such as the optimal utilization of world’s resources ‘in line with the objectives of sustainable development and the preservation of the environment.’<sup>21</sup> While the preamble of the WTO Agreement expressly refers to sustainable development, preambles of investment treaties vary.<sup>22</sup> Such noneconomic objectives also include the respect of cultural diversity or public morals (*ordre public*)<sup>23</sup> and national and international security.<sup>24</sup> While expressed in the form of specific or general exceptions, noneconomic concerns should not be considered to be antithetical to international economic law, but as a necessary component of the same. They constitute necessary limits to economic freedoms, enabling a vital connection between international economic law and general international law.

### 3 The Sources of International Economic Law

This section briefly maps the sources of international economic law and discusses their past and contemporary relevance. The sources of international

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19 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 ILM 1153 (1994), Articles I and III.

20 See GATT Article I and analogous provisions in IIA s.

21 Qureshi and Ziegler, *International Economic Law*, 17.

22 The Canadian Model BIT expressly lists sustainable development among the objectives of the respective treaties.

23 Article XIV(a) of the General Agreement on Trade in Services (GATS) authorizes countries, under certain conditions, to maintain trade-restrictive measures ‘necessary to protect public morals.’ General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994). Other WTO Agreements contain parallel public morals clauses. See General Agreement on Tariffs and Trade as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, 15 April 1994, 33 ILM 1125 (1994), Article XX(a).

24 GATT Article XXI.

law are set forth in Article 38 of the Statute of the ICJ.<sup>25</sup> Such sources are international conventions, customary international law, and general principles of law.<sup>26</sup> The decisions of international economic courts and the teachings of the most highly qualified jurists constitute subsidiary means for the determination of international law.<sup>27</sup> As is known, the provision specifically empowers the ICJ to apply these sources when deciding disputes in accordance with international law. Nonetheless, such provision is generally interpreted as listing the sources of international law that international courts and tribunals can use to detect, interpret, and apply international law. Therefore, this provision is generally considered to constitute a roadmap of the sources of international law in general and of its subfields in particular.

International economic law is mainly governed by a number of bilateral, regional, and multilateral agreements and is composed of detailed rules. Examples of bilateral treaties are BITs. As there is no single comprehensive multilateral investment agreement, more than 3,000 international investment agreements (IIAs) define investors' rights. The first BIT was concluded between West Germany and Pakistan in 1959; the number of BITs has grown steadily since then. Such IIAs generally require states to grant foreign investors fair and equitable treatment, full protection and security, and non-discrimination, in addition to prohibiting unlawful expropriation and other forms of state misconduct. Regional agreements include FTAs and agreements establishing customs unions.

Multilateral agreements include the Marrakesh Agreement establishing the WTO and its covered agreements.<sup>28</sup> Contrary to the GATT 1947, which granted states some latitude in signing up to the different agreements, creating a complex mosaic of commitments (*GATT-à-la-carte*), the WTO obliges its members to accept a core package of multilateral agreements. This includes GATT 1994, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Dispute Settlement Understanding (DSU).<sup>29</sup>

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- 25 United Nations, Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993.
- 26 Article 38 Statute of the ICJ. The Statute of the International Court of Justice is annexed to the Charter of the United Nations. Charter of the United Nations, 26 June 1945, in force 24 October 1946, 1 UNTS XVI.
- 27 ICJ Statute, Article 38(1)(d).
- 28 Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).
- 29 General Agreement on Tariffs and Trade as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, 15 April 1994, 33 ILM 1125 (1994); General Agreement on Trade in Services (GATS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade

To date, the idea of governing both trade and foreign investments at a multi-lateral level has been unsuccessful.<sup>30</sup> While the Havana Charter contained provisions on the treatment of foreign investment,<sup>31</sup> it was never ratified, and only its provisions on trade were incorporated into the GATT 1947.<sup>32</sup> Later attempts to govern FDI at the WTO also proved unsuccessful. For example, the 1996 Singapore Ministerial Conference decided to establish a new working group on trade and investment, and the subject was originally included on the Doha Development Agenda (DDA).<sup>33</sup> According to the mandate, the negotiations would start after the 2003 Cancún Ministerial Conference, on the basis of a decision to be taken, by explicit consensus, at that session.<sup>34</sup> However, there was no consensus, and the item was therefore dropped from the DDA in 2004. The United States and developing countries converged in their desire to eliminate investment from the DDA, albeit for different reasons. Developing countries opposed the insertion of investment governance on the negotiation table, fearing a race to the top of investment protection standards and the consequent dilution of their regulatory autonomy. Meanwhile, the US and other industrialized countries expected to achieve a greater degree of liberalization for investment via bilateral and regional deals. Nowadays, negotiations are under way to develop a Multilateral Agreement on Investment Facilitation for Development. However, such agreement does not cover market access, investment protection, and investor-state dispute settlement.

Most international economic instruments include internal mechanisms of interpretation and dispute settlement that tend to reach pragmatic rather than strictly judicial settlement. Given the abundance of international economic legal instruments, conflicts can arise, and have arisen, between such instruments.<sup>35</sup> While some multilateral instruments explicitly include an

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Organization, Annex 1C, 1869 UNTS 299; Understanding on the Rules and Procedures Governing the Settlement of Disputes, Dispute Settlement Understanding (DSU), Annex 2 to the Marrakesh Agreement, 1869 UNTS 401, 33 ILM 1226 (1994).

30 See generally Pierre Sauv , 'Multilateral Rules on Investment: Is Forward Movement Possible?' (2006) 9 JIEL 325–355.

31 Havana Charter for an International Trade Organization, adopted 24 March 1948, United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/CONF.2/78, Article 12.

32 General Agreement on Tariffs and Trade, adopted 30 October 1947, in force 1 January 1948, 55 UNTS 194.

33 Singapore WTO Ministerial Declaration, adopted 13 December 1996, in force 18 December 1996, WT/Min(96)/DEC, para 20.

34 Doha WTO Ministerial Declaration, adopted on 14 November 2001, in force 20 November 2001, WT/MIN(01)/DEC/1, para 20.

35 *Argentina—Certain Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, WT/DS56/R, WTO Panel Report, 25 November 1997 (detailing Argentina's obligations under the IMF and under GATT 1994).

exception enabling states to achieve closer forms of economic integration,<sup>36</sup> other instruments do not specifically govern such interaction, and in some instances, parallel litigations have taken place before different *fora*.<sup>37</sup>

Customary international law has developed in the area of international economic law. Historically, customary law principles of the freedom of communication (*jus communicationis*) and freedom of the sea (*mare liberum*) played a significant role in promoting freedom of commerce in the past centuries.<sup>38</sup> Despite its historic importance, customary law now plays a residual and limited role in international economic relations because of the abundance of treaties and their detailed provisions. Nonetheless, customary law remains the bedrock of international economic law, and the norms of the former still constitute fundamental threads of the fabric of the latter. Important rules of customary law pertain to treaty interpretation, the treatment of aliens, diplomatic protection, and the principle that agreements must be kept (*pacta sunt servanda*).<sup>39</sup> Despite the existence of many international treaties, recourse to customary law enables the system to be flexible, and to adapt to changing circumstances and the evolving needs of states. Nonetheless, customary law presents distinct challenges due to the possible lack of consensus among states as to the customary law nature and extent of given norms.

General principles of law also play an important role in international economic relations.<sup>40</sup> As is known, these can have a domestic or international origin. Because international law has promoted standardization in domestic law, in turn such harmonization can foster the emergence of general principles of law.<sup>41</sup> As for customary law, the identification of general principles of

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36 GATT 1994, Article XXIV.

37 Michelle Zang, 'Judicial Interaction of International Trade Courts and Tribunals' in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: CUP 2018) 432–453; William Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8 *World Trade Review* 5–23; Daowei Zhang, *The Softwood Lumber War: Politics, Economics, and the Long U.S.-Canadian Trade Dispute* (Abington: Routledge 2007); Marcos Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic JIL* 55–81.

38 Valentina Vadi, *War and Peace, Alberico Gentili and the Early Modern Law of Nations* (Leiden: Brill 2020).

39 Qureshi and Ziegler, *International Economic Law*, 27.

40 Georges Abi-Saab, 'General Principles of Law in International Economic Law', in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Encyclopedia of International Economic Law* (Cheltenham: Elgar 2017) 42–43.

41 Qureshi and Ziegler, *International Economic Law*, 28.

international law can be challenging. While universal consensus is not needed, a careful scrutiny of various legal systems is required.

The decisions of international economic courts and the teachings of the most highly qualified jurists constitute subsidiary means for the determination of international economic law.<sup>42</sup> Although there is no binding precedent in international law,<sup>43</sup> the decisions of international courts and tribunals have played an important role in clarifying, interpreting, and even developing international economic law.<sup>44</sup> The teachings of jurists also significantly appear in the jurisprudence of international economic courts. While this can contribute to the development of international economic law, commentators have called for more diversity within the field in order to enable different perspectives to emerge and contribute to the evolution of international economic law.<sup>45</sup>

The incidence of each type of source inevitably varies in each subfield of international economic law, depending on the development of the same. For instance, in international monetary law, soft law in the form of nonbinding instruments still prevails. Instead, both international trade law and international investment law are characterized by a significant number of treaties, expressing a clear preference for a rule-based system.<sup>46</sup> More importantly, 'the manner in which these sources are elucidated, for example with or without a positivist or natural orientation, serves the goals of certain interest groups better than others.'<sup>47</sup>

#### 4 State Sovereignty and International Economic Law

Sovereignty is an elusive concept that has different meanings depending on context.<sup>48</sup> A flexible notion, it mainly refers to 'the power of a state freely and autonomously to organize itself and to exercise a monopoly of legitimate

42 ICJ Statute, Article 38(1)(d).

43 ICJ Statute, Article 59.

44 Joanna Jemielniak, Laura Nielsen, and Henrik Olsen (eds), *Establishing Judicial Authority in International Economic Law* (Cambridge: CUP 2016) 139–212; Giorgio Sacerdoti, 'Precedent In The Settlement Of International Economic Disputes: The WTO And Investment Arbitration Models', in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Leiden: Brill 2010) 225–246.

45 Qureshi and Ziegler, *International Economic Law*, 31.

46 Id. 36.

47 Id.

48 Daniel Sarooshi, *International Economic Organizations and their Exercise of Sovereign Powers* (Oxford: OUP 2005) 1; John Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: CUP 2006) 58.

power within its territory.<sup>49</sup> It also forms the basis for the state's external relations.<sup>50</sup> In discussing sovereignty, scholars generally distinguish between internal sovereignty, that is, 'governing authority within the state', and external sovereignty, that is, 'sovereignty as between states.'<sup>51</sup>

Internal sovereignty refers to the capacity of the country to govern itself regardless of its form, and to pursue the achievement of its own destiny. It indicates a geopolitical entity with its own rules, its own administration, and the monopoly of force within the state. Internal sovereignty also includes a state's permanent control over its natural and cultural resources,<sup>52</sup> self-determination,<sup>53</sup> and general jurisdiction over activities within its own territory.

External sovereignty<sup>54</sup> refers to the capacity of states to operate externally as the main actors of international law. It indicates that states owe authority to no other ruler (*rex superiorem non recognoscens*); rather, they are considered to be perfect communities, complete in and of themselves (*communitates perfectae*).<sup>55</sup> As states are independent and equal, they have the duty not to interfere in the domestic affairs of other states under international law.<sup>56</sup>

The two types of sovereignty are in fact closely connected, as polities 'act in international relations by virtue of [their] authority in internal relations.'<sup>57</sup> The concept of sovereignty is thus at the heart of international law, and how sovereignty is theorized is relevant to the theory and practice of international law.<sup>58</sup> Only sovereign states are independent subjects of international law.

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49 Qureshi and Ziegler, *International Economic Law*, 31.

50 See PCIJ, *The Case of the S.S. Lotus (France v Turkey)*, Judgment, 7 September 1927, 1927 PCIJ (ser. A) No. 9, at 18 (stating that '[i]nternational law governs relations between ... states').

51 James Crawford, 'Sovereignty as a Legal Value', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: CUP 2012) 117–133, 120.

52 General Assembly Resolution 1803 (XVII) 14 December 1962 on Permanent Sovereignty over Natural Resources.

53 International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, 6 ILM 360, 993 UNTS 3, Article 1.

54 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: CUP 2010) 5.

55 Crawford, 'Sovereignty as a Legal Value', 123.

56 United Nations, Charter of the United Nations, signed on 26 June 1945, published on 24 October 1945, 1 UNTS XVI, Article 2(7).

57 Crawford, 'Sovereignty as a Legal Value', 128.

58 Nehal Bhuta, 'State Theory, State Order, State System—*Jus Gentium* and the Constitution of Public Power', in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford: OUP 2017) 398–417, 398.

The reason of state—in the form of cultural, security, public health, and public morals exceptions—qualifies a number of international law provisions. In turn, international law also deeply interacts with, and seeks to limit, the reason of state.<sup>59</sup> In fact, the main role of international law is to restrain the scope of state action. Therefore, ‘the apparently clear distinction between internal and international tends to break down ... depending on the development of international relations.’<sup>60</sup>

Much ink has been spilled on the vexed question as to whether global economic governance threatens state sovereignty.<sup>61</sup> International economic law traditionally imposed only narrow limits on national autonomy, by restricting measures at the border such as tariffs and quotas and prohibiting export subsidies.<sup>62</sup> It ‘did not traditionally address regulation with more prudential purposes ... except to require that it be applied to imported and domestic goods on a non-discriminatory basis.’<sup>63</sup> Since the inception of the WTO in 1995, however, as tariffs and other forms of protection were sensibly reduced, other forms of protection arose and domestic regulation came to be seen as ‘the next frontier of protection.’<sup>64</sup> Nowadays, the WTO administers a number of agreements that contain detailed rules regulating economic activity that reach behind the border and affect the regulatory autonomy of states. In parallel, international investment law has pervasive effect on domestic policies, thus raising the question as to whether policymakers truly retain regulatory autonomy after signing IIAs.<sup>65</sup>

Although international economic governance supposedly requires economic and technical changes, such changes ‘shape the policy choices available to governments, alter existing constitutional and political arrangements, ... thus affecting functions that go at the heart of political and constitutional authority.’ In other words, ‘the shifting of decision-making authority from

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59 Martti Koskeniemi, ‘International Law and *Raison d’État*: Rethinking the Prehistory of International Law’, in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations* (Oxford: OUP 2010) 298.

60 Crawford, ‘Sovereignty as a Legal Value’, 121–122.

61 Julian Ku and John Yoo, ‘Globalization and Sovereignty’ (2013) 31 *Berkeley JIL* 210–234; John H. Jackson, ‘Sovereignty-Modern, A New Approach to an Outdated Concept’ (2003) 97 *AJIL* 782.

62 Joel Trachtman, ‘Regulatory Jurisdiction and the WTO’, in William Davey and John Jackson (eds), *The Future of the WTO* (Oxford: OUP 2008) 193–213, 194.

63 Id.

64 Id. 195.

65 Brigitte Stern, ‘Investment Arbitration and State Sovereignty’ (2020) 35 *ICSID Review—Foreign Investment Law Journal* 443–458.

governments to international economic institutions affects ... sovereignty.<sup>66</sup> Critics have cautioned that economic globalization can even lead to a race to the bottom, that is, a leveling down of human rights, labour, environmental, and cultural standards, and that 'transnational corporations often overpower national ... regulators with self-interested interpretations of international economic law.'<sup>67</sup>

Nonetheless, global economic governance 'depends in part on the willingness of sovereign states to constrain themselves.'<sup>68</sup> By entering into treaty obligations, states necessarily exercise, if not cede, some sovereignty.<sup>69</sup> States voluntarily join international economic organizations because of growing interdependence in international relations.<sup>70</sup> Membership of such organizations does not affect state sovereignty because states can generally withdraw from international economic agreements.<sup>71</sup> Rather, international economic law constitutes a tool for safeguarding if not strengthening sovereignty and helping states to maintain their clout in unstable, uneven, and perennially changing international relations.

Because of the pervasiveness of international economic law, the national economic system is then subjected to international legal scrutiny and the purview of international economic courts. Nonetheless, states generally comply with international economic law because of reputation, reciprocity, and self-interest—only by participating in the system can they contribute to shaping global economic governance and achieve common aims and objectives such as growth and sustainable development. Only by maintaining their commitments can they attract growing investment flows and participate in global trade. By participating in international economic agreements, especially those

66 Anne Orford, 'Locating the International: Military and Monetary Interventions After the Cold War' (1997) 38 *Harvard International Law Journal* 443, 464–67, 470.

67 Tim Dorlach and Paul Mertenskötter, 'Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label' (2020) 54 *Law & Society Review* 571–606, 572.

68 Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *AJIL* 193, 193–95, 211–12.

69 *Japan—Taxes on Alcoholic Beverages*, WT/DSS/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 11 November 1996, p. 16 ('in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.')

70 Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6 *JIEL* 841–878, 860.

71 *Id.* 846.

of a multilateral character, countries may minimize the risk of power-based relations and maximize the benefits of a rule-based system.

More substantively, the meaning of international economic law and consequently the policy space left to national governments are strongly shaped by interpretation.<sup>72</sup> While investors tend to advance interpretations of international economic law that challenge unfavorable regulation, states have the capacity to uphold their own interpretations, defending the legality of their cultural policies.<sup>73</sup> Finally, much of the interpretation and construction of international economic law will occur before international economic courts.

## 5 The Settlement of International Economic Disputes

International economic law is characterized by sophisticated dispute settlement mechanisms. While the WTO Dispute Settlement Mechanism (DSM) was—until recently—defined as the ‘jewel in the crown’ of this organization,<sup>74</sup> investor-state arbitration has become the most successful mechanism for settling investment-related disputes.<sup>75</sup>

While the original GATT 1947 provided for informal, pragmatic, and flexible dispute settlement tools, during the Uruguay Round negotiations leading to the establishment of the WTO, ‘the United States agreed to refrain from unilateral actions in exchange for making the newly negotiated rules more credible through a stronger dispute settlement system.’<sup>76</sup> As a result, the WTO dispute settlement system has become highly legalized. The rule-based architecture of the DSM was designed to strengthen the multilateral trade system.<sup>77</sup> While under the GATT 1947 only two provisions dealt with dispute settlement, under the WTO, an entire treaty, the DSU, governs the matter.

In parallel, investment treaties provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at

72 Dorlach and Mertenskötter, ‘Interpreters of International Economic Law’, 599.

73 Id. 576 and 580.

74 Amrita Narlikar, *The WTO: A Very Short Introduction* (Oxford: OUP 2005).

75 Susan Franck ‘Development and Outcomes of Investor–State Arbitration’ (2009) 9 *Harvard Journal of International Law* 435–489.

76 Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche, ‘Introduction—International Economic Dispute Settlement: Demise or Transformation?’ in Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche (eds), *International Economic Dispute Settlement—Demise or Transformation?* (Cambridge: CUP 2021) 1–10, 2.

77 Croley and Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 193.

depoliticizing disputes, avoiding potential national court bias, and ensuring the advantages of confidentiality and effectiveness.<sup>78</sup> By allowing foreign investors to directly sue governments, states intended to credibly commit themselves and, as a consequence, encourage FDI. Whether the inclusion of investor–state dispute settlement in IIAs and the ratification of BITs more generally has contributed to attract FDI remains contested.<sup>79</sup>

Certainly, negotiators of the relevant agreements could not foresee the increasingly common use of the WTO DSM and investment arbitration. They likely assumed that the establishment of such dispute settlement mechanisms would lead states to follow agreed international rules. However, as international economic courts have been used beyond initial expectations, attention has moved to the consequences of legal proceedings.<sup>80</sup>

Due to the ever-expanding nature of international economic law and international law more generally, conflicts between economic values and other values have increasingly arisen. Given the structural imbalance between the vague and nonbinding dispute-settlement mechanisms provided by international cultural heritage law on the one hand, and the effective, sophisticated, and binding dispute-settlement mechanisms available under international economic law on the other hand, cultural disputes involving investors' or traders' rights have often been brought before international economic courts.<sup>81</sup> This raises both theoretical and practical concerns.

Questions arise concerning the fragmentation of international law. Are international cultural heritage law and international economic law self-contained regimes? One persistent problem both fields confront is the recognition, interpretation, and application of other international law. Can international economic courts interpret and apply other international law? To what extent

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78 Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 *ICSID Review* 1–25, 5.

79 Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Society Review* 805–832.

80 Elsig, Polanco, and Van den Bossche, 'Introduction'.

81 Clearly, this does not mean that these are the only available fora, let alone the superior fora for this kind of dispute. Other fora are available such as national courts, human rights courts, regional economic courts and the traditional state-to-state fora such as the International Court of Justice or even inter-state arbitration. Some of these dispute-settlement mechanisms may be more suitable than investor–state arbitration or the WTO DSM to address cultural concerns.

can international economic courts review domestic policies that are allegedly inconsistent with international economic law?

Conversely, one may wonder whether the fact that cultural heritage-related disputes tend to be adjudicated before international economic courts determines a sort of institutional bias. Treaty provisions can be vague, and their language encompasses a potentially wide variety of state regulation that may interfere with economic interests. Therefore, a potential tension exists when a state adopts measures interfering with foreign investments or free trade. The aggrieved investors may consider such measures to violate substantive standards of treatment under investment treaties. They may thus require compensation before arbitral tribunals. In parallel, affected traders may spur the home state to file a claim before the WTO organs.

More specifically, with regard to the WTO Dispute Settlement Body (DSB), 'it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade.'<sup>82</sup> According to some empirical studies, there is a consistently high rate of complainant success in WTO dispute resolution.<sup>83</sup> For some scholars, 'the WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of respondents' negotiated and reserved regulatory competencies.'<sup>84</sup> In particular, given the fact that about 80 percent of the cases have been settled in favor of the claimant, scholars have highlighted the fact that 'the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade.'<sup>85</sup>

In the parallel domain of investor–state arbitration, some scholars contend that such a mechanism is biased in favor of corporate and economic interests, and neglects vital noneconomic concerns.<sup>86</sup> Certainly, given the architecture of the arbitral process, significant concerns arise in the context of disputes involving cultural elements. While arbitration structurally constitutes a private

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82 Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International LJ* 333–377.

83 John Maton and Carolyn Maton, 'Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement' (2007) 10 *JIEL* 317–334.

84 Juscelino F Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383–439, at 388.

85 *Id.* at 387.

86 Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes—A Case Study of a Global Mining Corporation Suing El Salvador' (2015) 36 *University of Pennsylvania JIL* 851–874, at 854.

model of adjudication, investment disputes present public law aspects.<sup>87</sup> Arbitral awards ultimately shape the relationship between the state on the one hand and private individuals on the other.<sup>88</sup> Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.<sup>89</sup>

Despite, or perhaps because of, these apparent successes, both dispute settlement mechanisms have recently come to the forefront of legal debates. Many diplomats and scholars have expressed ‘concern regarding the magnitude of decision power’ allocated to international economic courts.<sup>90</sup> Such tribunals are asked to determine matters such as the interplay between cultural policies and international economic governance.

Because investor–state arbitration is characterized by the absence of an appeal mechanism and has produced a range of inconsistent awards on cases arising out of the same or similar factual issues, countries and commentators have proposed a range of alternatives moving toward some judicialization of the system.<sup>91</sup> Ongoing discussions focus on the establishment of a multilateral investment court. In turn, and perhaps paradoxically, WTO courts have been under siege for their alleged overreach, judicialization, and judicial activism.<sup>92</sup> After briefly delineating some fundamental features of investor-state arbitration and the WTO Dispute Settlement Mechanism in the next two subsections, the chapter discusses the current legitimacy crisis of international economic law.

### 5.1 *The Main Features of Investor–State Arbitration*

Once deemed to be an ‘exotic and highly specialised’ domain,<sup>93</sup> international investment law is now becoming mainstream.<sup>94</sup> Due to economic globalization

87 Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims against the State’ (2007) 56 *ICLQ* 371–393, at 372.

88 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2007) 70.

89 M Sornarajah, ‘The Clash of Globalizations and the International Law on Foreign Investment’ (2003) 10 *Canadian Foreign Policy* 1–20.

90 Trachtman, ‘The Domain of WTO Dispute Resolution’, 333.

91 Anthea Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor–State Arbitration’ (2018) 112 *AJIL* 410–32.

92 Gregory Shaffer, ‘A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations’ (2018) 44 *Yale Journal of International Law* 37–53.

93 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group (Martti Koskenniemi) UN Doc. A/CN.4/L.682, 13 April 2006, para. 8.

94 Stephan W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 *EJIL* 875–908.

and the rise of foreign direct investments, the regulation of the field has become a key area of international economic law and a well-developed field of study in its own right. As there is no single comprehensive global investment treaty, investors' rights are defined by an array of international investment agreements (IIAs), customary international law, and general principles of law as well as subsidiary means for the determination of rules of law, namely, awards of arbitral tribunals and the teachings of the most highly qualified jurists.<sup>95</sup>

At the substantive level, international investment law provides extensive protection to investors' rights in order to encourage FDI and to foster economic development. Since the inception of Bilateral Investment Treaties (BITs) in the late 1950s, countries have signed on to BITs with the distinct aims of protecting their investors overseas, attracting FDI, and fostering economic development.<sup>96</sup> Under IIAs, states parties agree to provide a certain degree of protection to investors who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation, fair and equitable treatment, non-discrimination, full protection and security, and repatriation of profits among others.

At the procedural level, international investment law is characterized by sophisticated dispute settlement mechanisms. Most investment treaties contain two dispute resolution clauses: one permitting investor–state arbitration for investment disputes, and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application. While state-to-state arbitration has become rare,<sup>97</sup> investor–state arbitration has become the most successful mechanism for settling investment-related disputes.<sup>98</sup>

Arbitral tribunals are typically composed of an uneven number of members, most frequently three: one arbitrator selected by the claimant, another selected by the respondent, and a third appointed by a method that attempts to ensure neutrality.<sup>99</sup> All arbitrators are required to be independent and

95 M. Somarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: CUP 2010) 79, 87.

96 Genevieve Fox, 'A Future for International Investment? Modifying BITs to Drive Economic Development' (2014) 46 *Georgetown JIL* 229–260, 229.

97 Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 *Harvard International Law Journal* 1–70, 1; Michele Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?', in Shaheez Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor–State Arbitration* (Leiden: Brill 2015) 249–273, 250.

98 Susan Franck, 'Development and Outcomes of Investor–State Arbitration' (2009) 9 *Harvard International Law Journal* 435–489, 435.

99 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *EJIL* 387–424, 397.

impartial.<sup>100</sup> Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of the relevant investment treaty provisions.

The internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes. Investor–state arbitration shields investment disputes from power politics and insulates them from the diplomatic relations between states.<sup>101</sup> The depoliticization of investment disputes benefits: (1) foreign investors, (2) the host state, and (3) the home state.<sup>102</sup> First, foreign investors no longer have to rely on the vagaries of diplomatic protection; rather, they can bring direct claims and make strategic choices in the conduct of the arbitral proceedings.<sup>103</sup> In this regard, investor–state arbitration can facilitate access to justice for foreign investors<sup>104</sup> and provide a neutral forum for the settlement of investment disputes.<sup>105</sup> Such access is perceived to be necessary to render meaningful the substantive investment treaty provisions. Second, the depoliticization of investment disputes protects the host state by reducing the home country’s interference in its domestic affairs.<sup>106</sup> It prevents or ‘limit[s] unwelcome diplomatic, economic, and perhaps military pressure from strong states whose nationals believe they have been injured.’<sup>107</sup> Third, the depoliticisation of investment disputes also protects the home state in that it no longer has to become involved in investor–state disputes.<sup>108</sup>

Arbitral tribunals have reviewed host-state conduct in key sectors, including cultural heritage. Consequently, many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate need for state regulation in the pursuit of the public interest on the one hand and the protection of private interests from state interference on the other.

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100 Antonio Parra, ‘The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations’, in Katia Yannaca–Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: OUP 2010) 105, 116.

101 Sergio Puig, ‘No Right without a Remedy: Foundations of Investor–State Arbitration’ (2013–2014) 35 *University of Pennsylvania JIL* 829–861, 848–53.

102 Anthea Roberts, ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56 *Harvard International Law Journal* 353–417, 390.

103 Puig, ‘No Right without a Remedy’, 844.

104 Francesco Francioni, ‘Access to Justice, Denial of Justice, and International Investment Law’ (2009) 20 *EJIL* 729–747.

105 Puig, ‘No Right without a Remedy’, 846.

106 Roberts, ‘Triangular Treaties’, 389–390.

107 Joost Pauwelyn, ‘At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System’ (2014) 29 *ICSID Review* 372–418, 404.

108 Roberts, ‘Triangular Treaties’, 390.

## 5.2 *The Main Features of the WTO Dispute Settlement Mechanism*

International trade law is characterized by a sophisticated dispute-settlement mechanism. The creation of the WTO DSM determined a major shift from the political consensus-based dispute settlement system of the GATT 1947 to a rule-based architecture designed to strengthen the multilateral trade system.<sup>109</sup>

Under the original GATT 1947, only two provisions were dedicated to dispute settlement. Articles XXII and XXIII of GATT 1947 provided for bilateral consultations between disputing parties; if no settlement could be reached, states could resort to good offices, mediation, or conciliation, before requesting a GATT panel of experts. The Council of Contracting Parties would then adopt the panel's report by consensus, that is, if any Contracting Party did not oppose it. Although quite successful, this informal, flexible, and pragmatic dispute settlement mechanism had several shortcomings.<sup>110</sup> The losing party could delay or even block the adoption of panel report by the Contracting Parties. This led some parties to adopt unilateral measures. The *ad hoc* nature of the panels meant that reports could be inconsistent. Furthermore, there was no time frame for the decision-making process. The dispute settlement experience of the GATT 1947 gave way to a more formalized dispute settlement mechanism since the inception of the WTO.

The WTO DSM is compulsory, exclusive, and, at least until recently, highly effective.<sup>111</sup> Only WTO member states have *locus standi* in the DSM, that is, individuals cannot file claims before panels and the Appellate Body (AB).<sup>112</sup> When trade disputes emerge, Article 23.1 of the DSU obliges members to subject the dispute exclusively to WTO bodies.<sup>113</sup> In *US—Section 301 Trade Act*, the Panel held that members 'have to have recourse to the DSU DSM to the exclusion of any other system.'<sup>114</sup> In *Mexico—Soft Drinks*, the AB clarified that the provision even implies that 'that Member is entitled to a ruling by a WTO panel.'<sup>115</sup>

109 Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 193.

110 Loibl, 'International Economic Law', 737.

111 Peter Van Den Bossche, *The Law and Policy of the World Trade Organization*, 4th edition (Cambridge: CUP 2017).

112 Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 JIEL 383–405, at 391.

113 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994), Article 23.1.

114 WTO Panel Report, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.43.

115 WTO Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 52.

Pursuant to WTO settled jurisprudence and Article XXIII:1 of the GATT 1994, each WTO Member which considers any of its benefits to be prejudiced under the covered agreements can bring a case before a panel.

If consultations among the disputing parties are unsuccessful, the complaining state may request the establishment of a panel of experts to hear the matter. The Dispute Settlement Body (DSB) (consisting of representatives of all WTO Members) must then establish a panel. It is now impossible for any of the parties to a dispute to block the formation of a dispute settlement panel or the adoption of a ruling by the adjudicators. After objectively assessing the matter, the panel renders a report that may be appealed to the AB. Panels and the AB interpret and apply the WTO treaties, preserving the rights and obligations of the WTO members under the covered agreements ‘in accordance with customary rules of treaty interpretation.’<sup>116</sup>

The WTO’s DSB automatically adopts the panel’s report—or, if the latter is appealed, the AB’s report—unless there is a consensus not to adopt a report. Adopted reports are binding on the parties, and the DSU provides remedies for breach of WTO law. The DSB can authorize countermeasures including the suspension of concessions if the report is not implemented. While the system is rule-based, it is designed to reduce the use of unilateralism in international economic relations and ensure mutually satisfactory solutions.

For the sake of clarity, the book adopts the term ‘international economic courts’ to refer to arbitral tribunals, panels, and the Appellate Body because they all present elements of growing judicialization. Nonetheless, the term *courts* is not used in the WTO agreements. Panels and the AB are usually referred to in literature as ‘quasi-judicial bodies’ since adjudication in the WTO contains both diplomatic and judicial elements: bilateral consultations must precede the referral of a dispute to a panel. Once a dispute has been referred to a panel, however, the procedure is quintessentially judicial.<sup>117</sup>

Until recently, the WTO DSM was a great success; with no real executive and a weak legislative branch, the WTO jurisprudence grew rich and strong. Perhaps exactly because of its success, this mechanism has come under growing scrutiny and criticism. For instance, the United States has raised concerns over questions of delay, judicial over-reach, and precedence.<sup>118</sup> Because the United

116 DSU Article 3.2.

117 Petros Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’ (2008) 102 AJIL 421–474, 421.

118 See Office of the United States Trade Representative (2020), *Report on the Appellate Body of the World Trade Organization*, February 2020, [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf) (accessed 1 February 2022).

States has blocked the appointment of several adjudicators to the Appellate Body since 2017, the organ is currently unable to hear new appeals. Nowadays, 'losing parties are in many instances likely to appeal ... panel reports to the paralysed AB, and thus prevent these panel reports from becoming legally binding' thus 'leaving the dispute unresolved.'<sup>119</sup> In parallel, parties that win a case at the panel stage will likely resort to unilateral retaliation.

Therefore, the current crisis of the AB not only affects the WTO Appellate review, but undermines the whole WTO dispute settlement system. It can cause escalating global trade protectionism and a return to power-based trade relations. To find a temporary solution to the impasse, the EU and a number of trade partners set up a Multiparty Interim Appeal arbitration arrangement (MPIA).<sup>120</sup> The parties continue to seek resolution of the AB crisis, and agree to use the MPIA as a second instance as long as the situation continues.

### 5.3 *Converging Divergences*

For the purpose of this discussion, the WTO dispute settlement mechanism and investor–state arbitration are examined in parallel for legal, structural, and functional reasons. From a legal perspective, both investor–state arbitration and the WTO DSM constitute legal dispute settlement mechanisms. As noted by Alvarez, 'Investor–state dispute settlement was designed to avoid politicized espousal and the gunboat diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage.'<sup>121</sup> From a structural perspective, as alternatives to gunboat diplomacy and power politics, both dispute settlement mechanisms are dominated by lawyers and constitute quintessentially legal dispute settlement mechanisms.<sup>122</sup> In fact, although the GATT system used to be run by diplomats and economists, an increasing juridification of the system has taken place since the inception of the WTO.<sup>123</sup> More and more arbitrators, WTO panelists, and Members of the AB

119 Elsig, Polanco, and Van den Bossche, 'Introduction', 7.

120 Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU (MPIA), JOB/DSB/1/Add.12, effective on 30 April 2020.

121 José Alvarez, 'Beware: Boundary Crossings' (2016) 17 *JWIT* 171–228.

122 On the judicialization of investment arbitration, see e.g. Alex Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance', in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: OUP 2014) 22–46, 23.

123 On the judicialization of the WTO DSM, see Joseph H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Harvard Jean Monnet Working Paper* 9/00 (2000) 1–18, 2.

have some legal background.<sup>124</sup> Such common legal expertise can contribute to mutual influence, cross-pollination of concepts, and possible convergence between international trade law and international investment law. Moreover, several AB Members and—albeit to a lesser extent—panelists have served as investment arbitrators.<sup>125</sup>

From a functional perspective, investment treaty arbitration and the WTO DSM do share the same function, settling international disputes in accordance with a specific set of international economic law rules and ensuring the proper administration of justice in this area. Both foreign investments and international trade are domains where conflict is latent between market freedom and free flow of capitals on the one hand, and the state regulatory autonomy on the other. Like WTO panels and the AB, arbitral tribunals may be asked to strike a balance between economic and noneconomic concerns. Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, there is some coincidence in the subject matter of investment treaties and several WTO covered agreements.<sup>126</sup>

However, investor–state arbitration and the WTO DSM present a number of notable differences. Although the present investment treaty network has been characterized as multilateral in nature due to the similarities among different treaties and dispute settlement mechanisms, it is still structurally based on a myriad of bilateral investment treaties.<sup>127</sup> There is no world investment organization charged with governing foreign investments, nor is there a ‘World Investment Court’. By contrast, since its inception in 1995, the WTO has emerged as the world forum for multilateral trade negotiations, and the AB has been frequently analogized to a World Trade Court. While *ad hoc* arbitral tribunals settle investment disputes without an appellate review by a permanent body, at least until recently WTO panel reports could be appealed before the AB.

124 José A. Fontoura Costa, ‘Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields’, *Oñati Socio-Legal Series Working Paper 1/4* (2011), 1–25, 16.

125 *Id.* 20.

126 See e.g. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; Agreement on Trade Related Investment Measures, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186; General Agreement on Trade in Services, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

127 See generally Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009); Efraim Chalamish, ‘The Future of BITs: A De Facto Multilateral Agreement?’ (2009) 34 *Brooklyn Journal of International Law* 303–354.

Investor–state arbitration differs from the WTO DSM along further three key dimensions: standing (that is, the right to file grievances), the nature of the remedy, and the remedial period. First, while only states can file claims before the WTO panels and the Appellate Body, private investors also have standing before arbitral tribunals under investment agreements. This is not to say that, at a substantive level, individuals do not play any role at the WTO; rather, many cases have been brought by states to protect the interests of given industrial sectors.<sup>128</sup> Yet, at a procedural level, companies cannot enforce their rights against a foreign state at the WTO; rather, they ‘depend on their state of nationality taking up a WTO case on their behalf.’<sup>129</sup> The various factors which influence the choice of a WTO member to bring a case against another member state include the magnitude of the impact of the measure in question, political considerations, and the lobbying efforts of the relevant industry sectors.<sup>130</sup>

Second, the trade and investment regimes offer different remedies to the aggrieved actors. In order to encourage trade liberalization and prevent protectionism, the WTO DSM can authorize trade retaliation by the injured state.<sup>131</sup> However, this is possible only after a state fails to withdraw or modify an offending measure within a ‘reasonable period of time.’<sup>132</sup> The investment regime, on the other hand, provides a monetary remedy or, in some cases, even restoration (*restitutio in integrum*) to foreign investors whose investments have been affected because of government action.<sup>133</sup>

Third, while trade agreements typically provide for only prospective remedies covering harm done subsequent to a ruling (*ex nunc*), the damages awarded in investment disputes routinely cover past as well as future harms

128 See e.g. Panel Report, *US–Section 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para 7.73 (stating that ‘it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish’).

129 Daniel Sarooshi, ‘Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?’ (2014) 49 *Texas International Law Journal* 445–466, 447.

130 Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor–State Arbitration’, (2009) 20 *EJIL* 749–771, 757.

131 DSU Article 22.

132 DSU Articles 19–21.

133 PCIJ, *Case Concerning the Factory at Chorzów*, (Claim for Indemnity) (Merits), *Germany v. Poland*, Judgment, 13 September 1928, 1928 PCIJ (ser. A) No. 17.

(*ex tunc*). Furthermore, arbitral tribunals can award damages to the foreign investors, while remedies at the WTO involve states only.

In conclusion, there are several reasons for juxtaposing investor–state dispute settlement and the WTO DSM. International investment law and international trade law belong to the same branch of international law, namely international economic law. Moreover, there are overlapping provisions in international investment law and international trade law. In addition, the nature of problems that both systems encounter is similar—that is, arbitral tribunals and WTO adjudicative bodies are often required to review domestic regulation pursuing certain noneconomic values against a set of obligations of a purely economic character (unlike, for instance, other international courts and tribunals).

Nonetheless, the dispute settlement mechanisms reflect the cultures of the legal frameworks to which they belong and thus have distinctive identities. Due to different treaty language, actors, and procedures, the two dispute settlement mechanisms require a critical assessment being cognisant of their inherent differences.

## 6 The ‘Legitimacy Crisis’ of International Economic Law

While investor–state arbitration and the WTO DSM have become increasingly popular and the number of disputes has grown significantly, international economic law and, more broadly, global economic governance have attracted criticism by scholars, states, and society at large. The system seems unable to address some of the greatest challenges of our time including environmental protection, redistributive justice, and the safeguarding of cultural diversity.<sup>134</sup> International economic law and adjudication can adversely affect state regulatory autonomy in important public policy-related fields, and even prevent regulation in such areas. The regulatory chill hypothesis suggests that states ‘fail to regulate in the public interest in a timely and effective manner because of concerns’ of international economic disputes.<sup>135</sup>

134 Alessandra Arcuri, ‘International Economic Law and Disintegration: Beware the Schmittean Moment’ (2020) 23 *JIEL* 323–345.

135 Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement’ (2018) 7 *Transnational Environmental Law* 229–250, 229.

Some scholars contend that global institutions have gone too far in eroding national sovereignty.<sup>136</sup>

Is international economic law and adjudication facing a 'legitimacy crisis'? A multidimensional concept used in different fields of study, legitimacy indicates the acceptance of a legal system.<sup>137</sup> A system is considered to be legitimate when it operates in a manner that is consistent with widely held values, rules, and beliefs. The legitimacy of the international legal system in general and international economic governance in particular has been discussed intensively.<sup>138</sup> Scholars have questioned whether international economic law lacks input legitimacy, criticizing how adjudicators are selected, and the procedures by which decisions are rendered and power exercised.<sup>139</sup> They have questioned whether international economic law lacks output legitimacy, that is, reasonable performance.<sup>140</sup> They have questioned whether international (economic) law has prioritized economic interests over noneconomic concerns.<sup>141</sup>

Legitimacy concerns relate to both substantive and procedural aspects of international economic governance.<sup>142</sup> From a substantive perspective, international economic law and adjudication are seen as having an increasing impact on sovereign policy objectives.<sup>143</sup> States sign and ratify international economic agreements, expressing their consent to be bound by the same to foster foreign direct investments and promote free trade.<sup>144</sup> However, they do

136 Arcuri, 'International Economic Law and Disintegration', 324 (reporting this criticism).

137 Jean-Marc Coicaud, *Legitimacy and Politics* (Cambridge: CUP 2002) 10.

138 On the legitimacy of international trade courts, see generally Robert Howse, H el ene Ruiz-Fabri, Geir Ulfstein, and Michelle Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: CUP 2018). On the legitimacy of international investment arbitration see David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration' (2011) 2 *JIDS* 471–495; Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' (2008) *Chicago JIL* 471–498.

139 Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: OUP 2017) chapter 9.

140 Id.

141 R udiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in R udiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Berlin: Springer 2008) 1–24, 2.

142 David Caron, 'Investor–State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2009) 32 *Suffolk Transnational LR* 513–26, 514–515.

143 Edward Guntrip, 'Self-determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law' (2016) 65 *ICLQ* 829–857, 829–830.

144 Georges Scelle, 'Essai sur les Sources Formelles du Droit International', in *Recueil d'Etudes sur les Sources du Droit en l'Honneur de Fran ois G eny* (vol. III) (Paris: Sirey 1934), 400–30, 410.

not intend to surrender their ability to govern.<sup>145</sup> Yet, investment and trade disputes can touch, and have touched, upon crucial public interests, ranging from access to water<sup>146</sup> to tobacco control,<sup>147</sup> from environmental protection<sup>148</sup> to the safeguarding of cultural heritage.<sup>149</sup>

As a result, both scholars and practitioners contend that international economic law and adjudication are constraining state sovereignty to an extent unknown before.<sup>150</sup> Concerns have arisen that IIAs ‘become a charter of rights for foreign investors, with no concomitant responsibilities or liabilities, no direct legal links to promoting development objectives, and no protection for public welfare in the face of environmentally or socially destabilizing foreign investment.’<sup>151</sup> Analogously, the legitimacy crisis of the WTO ‘occurred not—or not just—because the WTO became ... more powerful and intrusive’ in examining regulatory barriers to trade over the course of the 1980s and 1990s. Rather, what led to the WTO’s legitimacy crisis was its exercise of public power in the international economic field in a manner separated from the pursuit of other public objectives.<sup>152</sup> In other words, states perceive the WTO as a threat

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145 Catharine Titi, *The Right to Regulate in International Investment Law* (London: Bloomsbury 2014).

146 See Ana María Daza-Clark, *International Investment Law and Water Resources Management* (Leiden: Brill 2016); Edith Brown Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford: OUP 2008).

147 See Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon: Routledge 2012); Benn McGrady, *Trade and Public Health—The WTO, Tobacco, Alcohol, and Diet* (Cambridge: CUP 2011).

148 See Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: CUP 2012); James Watson, *The WTO and the Environment* (Abingdon: Routledge 2013); Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford: OUP 2009).

149 See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014); Tania Voon, *Cultural Products and the WTO* (Cambridge: CUP 2007).

150 See generally Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin, ‘The Backlash Against Investment Arbitration: Perceptions and Reality’, in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) xxxviii.

151 Howard Mann, ‘The Right of States to Regulate and International Investment Law: A Comment’, in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (Geneva: UN 2003) 212.

152 Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: OUP 2011) 346.

to sovereignty because it seems irresponsive to the development of international law.<sup>153</sup>

In other words, in their capacity as citizens, people also desire social goods, be they adequate standards of living, a clean environment, a rich cultural life, or appropriate health and labour standards. All these public objectives require individual efforts, internal regulation, and international cooperation. As states ratify international instruments, coherence and coordination are needed among these different sets of international law norms pursuing various non identical objectives. International economic law is not a self-contained regime.<sup>154</sup>

Alongside these substantive concerns, several procedural factors feed into the perception of a legitimacy crisis. Investor–state tribunals are constituted *ad hoc*, under different arbitral rules. The fact that arbitrators are untenured can fuel the perception of conflicts of interest within or between arbitral tribunals. While the selection of arbitrators can lead to requests for disqualification, such requests are rarely successful. There is no appellate court to ensure consistency in their rulings. Inconsistent awards have caused concern,<sup>155</sup> leaving many observers with the impression that investor-state arbitration lacks coherence.<sup>156</sup> Lack of transparency may preclude public awareness of the very existence of investor–state arbitrations.<sup>157</sup> Forum-shopping—either by using the most-favored-nation clause, or by corporate restructuring in order to be protected by a given IIA—risks altering ‘the delicate equilibrium between the complainant’s freedom of choice ... and protection to the defendant’, in addition to increasing the risk of conflicting awards.<sup>158</sup> In parallel, although the dispute settlement system of the WTO worked efficiently for two decades since its inception, it is now facing a number of criticisms for judicial overreach and issues of precedence.

153 Thomas Cottier, ‘Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review’ (2021) 24 *JIEL* 515–533, 517.

154 Valentina Vadi, ‘The Multilateral Trade Regime: Which Way Forward? A Look at the Warwick Report’ (2008) 6 *Global Trade and Customs Journal*, 203–215, at 211.

155 Compare *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 and Final Award, 14 March 2003.

156 Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham LR* 1521–1625, 1537–8.

157 But see United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (New York, 2014) (the Mauritius Convention on Transparency) adopted on 10 December 2014, in force 18 October 2017.

158 Luiz Eduardo Salles, *Forum Shopping in International Adjudication* (Cambridge: CUP 2014) 46.

In response to growing unrest about international economic governance, states have increasingly felt the need to protect their regulatory space and to limit economic integration. While a few developing countries withdrew from the ICSID system, other countries moved away from the Energy Charter Treaty and terminated existing IIAs.<sup>159</sup> EU states have terminated almost 300 intra-EU BITs due to the exclusive competence of the Union in the field.<sup>160</sup> Finally, a number of states are revising their Model BITs, reducing the level of protection provided by the treaty, restating their right to regulate, and expanding the scope of exception clauses.<sup>161</sup> Several countries have omitted investor–state arbitration from their treaties.<sup>162</sup> In 2017, the UNCITRAL entrusted its Working Group III with a broad mandate to elaborate the possible reform of ISDS. In parallel, the EU aims to replace ISDS with an envisaged Multilateral Investment Court, a two-instance standing court system, including a first instance and an appellate tribunal, composed of permanent judges appointed by adhering states.

In parallel, at the WTO, the latest round of trade negotiations among the WTO membership—the Doha Round—has not progressed smoothly and has been under way for almost two decades. Moreover, several states are weakening the multilateral order, by resorting to the national security exception in defense of their trade measures and by stalling the work of the WTO Appellate Body.

The ongoing debate about the perceived legitimacy of international economic law highlights the need for some rethinking of the system. Such debate has both evolutionary and revolutionary potential. On the one hand, evolutionary approaches assume that international economic governance is experiencing growth pains, but many legitimacy concerns can be resolved overtime. Evolutionary approaches rely on the traditional tools of treaty interpretation and negotiation to fine-tune international economic law to emerging circumstances. For instance, as IIAs are periodically renegotiated, states are recalibrating their treaties introducing some exceptions and reaffirming their right to regulate. At the WTO, the adoption of waivers and amendments can enable, and has enabled, the reconciliation between economic interests

159 Tania Voon and Andrew Mitchell, ‘Denunciation, Termination, and Survival: The Interplay of Treaty Law and International Investment Law’ (2016) 31 *ICSID Review* 413–433.

160 CJEU, *Slowakische Republik v. Achmea BV*, Case C-284/16, Judgment, 6 March 2018 (affirming the incompatibility of arbitration clauses contained in intra-EU BITs with EU law.)

161 Eric De Brabandere, ‘The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform’ (2021) 36 *ICSID Review* 319–338.

162 Jürgen Kurtz, ‘Australia’s Rejection of Investor–State Arbitration: Causation, Omission, and Implication’ (2012) 27 *ICSID Review* 65–86.

and noneconomic concerns in certain areas of the field.<sup>163</sup> Reform proposals include setting up an ombudsman to mediate between potential disputants, improving the quality of the work of panels by appointing a roster of full-time professional adjudicators, and introducing financial compensation in the list of possible remedies available to the WTO in case of noncompliance of a Member State.<sup>164</sup>

On the other hand, revolutionary approaches assume that the overall structure of international economic law is deeply flawed and requires some major reforms. With regard to international investment arbitration, revolutionary approaches suggest, *inter alia*, returning to state-to-state dispute resolution, the introduction of an appeals body to review arbitral awards, and the institution of a permanent world investment court. With regard to international trade law, revolutionary approaches go as far as proposing the abolition of the WTO,<sup>165</sup> the abolition of the AB,<sup>166</sup> or revitalizing the WTO as a forum for rule-making. The revival of the WTO as a forum for dialogue among civilizations seems particularly promising: In fact, its traditional focus on technical issues is insufficient to maintain the salience of the organization; rather, some fundamental rethinking of the aims and objectives of the organization is needed for the WTO to move forward.

In both evolutionary and revolutionary scenarios, legitimacy concerns do not merely indicate dissatisfaction with how the system works. They can also strengthen the system's perceived legitimacy by raising important issues, stimulating debate, and spurring novel approaches. They should be taken into account to allow global economic governance to develop properly. Whether states will opt for evolutionary or revolutionary approaches to the system remains to be seen. What is needed is to 'reimagine the international economic order following a different aspiration than just protecting capital.'<sup>167</sup> International economic law should be recalibrated to deliver not only economic growth but also enable environmental sustainability, cultural diversity, and social justice. This can be achieved through the adoption of diverse and

163 Dominic Rushe and Phillip Inman 'Hopes Rise for Covid Vaccine Patent Waiver after Key Countries Agree on Proposal', *Guardian*, 3 May 2022.

164 Vadi, 'The Multilateral Trade Regime: Which Way Forward?', 210.

165 Josh Hawley, 'The WTO Should be Abolished', *New York Times*, 5 May 2020.

166 Warren H. Maruyama, 'Can the Appellate Body Be Saved?' (2021) 55 *JWT* 197–230; Bernard M. Hoekman and Petros C. Mavroidis, 'To AB or Not to AB? Dispute Settlement in WTO Reform' (2020) 23 *JIEL* 1–20.

167 Arcuri, 'International Economic Law and Disintegration', 337.

competing developmental models, respect for culturally diverse worldviews, and intercivilizational approaches.<sup>168</sup>

## 7 Final Remarks

Given that international economic law is at a crossroads, there is urgent need to rethink its aims and objectives. While economic activities can be conceived as innate in human nature and as useful growth engines, their regulation has become more problematic than ever under current international economic law. The field is thus under unprecedented pressure from governments, scholars, and public opinion.

How can policymakers reconcile trade and investment on the one hand with noneconomic concerns such as environmental protection and the safeguarding of cultural diversity on the other hand? Should international economic law broaden its agenda, taking noneconomic issues into account? More generally, how can international economic law face emerging challenges and acquire renewed legitimacy?

Like other specialized international courts and tribunals, international economic courts may have an ‘in-built bias’ (*Missionsbewusstsein*).<sup>169</sup> Their mandate is to adjudicate on the eventual violation of relevant international economic law provisions. While their review of domestic regulations can strengthen the rule of law and good governance, an overly intrusive review may undermine state regulatory autonomy and the pursuit of legitimate public policy goals. In turn, this may fuel the alleged ‘legitimacy crisis’ of international economic law.

By contrast, international economic law should not be perceived as a self-contained system; rather, it should be conceived as a part of general international law. The boundary drawn between the economic and other values ‘is analytically untenable and yet, this argument has often been made to insulate trade and investment law from the demands of justice. There is obviously no sane economy without healthy environments or ... respect for human dignity.’<sup>170</sup> Rather than taking the path of functionalism and addressing demands of

168 See e.g. Alvaro Santos, Chantal Thomas, and David Trubek (eds), *World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization* (New York: Anthem Press 2019); Valentina Vadi, ‘Inter-Civilizational Approaches to Investor–State Dispute Settlement’ (2021) 42 *University of Pennsylvania Journal of International Law* 737–797.

169 Yuval Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’ (2009) 20 *EJIL* 73–91, 81.

170 Arcuri, ‘International Economic Law and Disintegration’, 341.

justice in rather fragmented ways, international law should address such demands in a holistic fashion.<sup>171</sup>

Trade and investment should not be considered as ends in themselves, but as tools to promote human well-being. At the legal level, well-being can be conceived as a fundamental dimension of sustainable development which is one of the objectives of the WTO.<sup>172</sup> Thus, international economic law, being part of public international law, needs to be rethought according to the new evolving kaleidoscope of international governance. The linkage between trade, investment, and non-economic concerns such as cultural heritage needs to be explored and co-ordinated.

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171 Id.

172 Marrakesh Agreement Establishing the World Trade Organization, preamble.

# Connecting the Fields

We should learn about people in other places, take an interest in their civilizations, their arguments, their errors, their achievements, not because that will bring us to agreement but because it will help us get used to one another—something we have a powerful need to do in this globalized era.<sup>1</sup>



## 1 Introduction

Adopting a long-term historical perspective, globalization has been going on since the beginning of humankind. Trade and foreign investments are ancient phenomena. Archaeological records demonstrate that both regional and long-distance trade and investments were ‘prominent features of all early civilizations.’<sup>2</sup> Since the Medieval and Renaissance times, exploration and trade by land and sea have made porous ‘the spatial and temporal distances that had historically moored distinct populations, languages, [and] cultures.’<sup>3</sup> Historically, cultural dynamism has been greatest where trade and investment have been frequent, for example on major trade routes, at the confluence or deltas of strategic rivers, or in major ports.<sup>4</sup>

Nowadays, economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations. The scale and pace of exchange has increased dramatically. Globalization has affected all civilizations: for some economists, culture itself is a ‘product of globalization’<sup>5</sup> and

1 Kwame Anthony Appiah, ‘The Case For Contamination’, *New York Times*, 1 January 2006, at 30, 32, 34.

2 Keith Griffin, ‘Globalization and Culture’, in Stephen Cullenberg and Prasanta Pattanaik (eds), *Globalization, Culture, and the Limits of the Market: Essays on Economics and Philosophy* (New Delhi: OUP 2004) 241–263, 245.

3 Susan Silbey, ‘Globalization’, in Bryan Turner (ed.), *Cambridge Dictionary of Sociology* (Cambridge: CUP 2006) 245–248, 245.

4 Griffin, ‘Globalization and Culture’ 248.

5 Id. 248.

markets are 'both the engine and product of human energy and imagination.'<sup>6</sup> Certainly, no culture has fixed boundaries and possesses timeless features. Instead, all civilizations have porous boundaries, engage in exchange with other cultures, and evolve over time.<sup>7</sup>

The expansion of trade and foreign investment facilitates the interaction between different cultures, and development may be conceived as a process for expanding cultural freedoms and potentially promoting cultural diversity.<sup>8</sup> Globalization has been a powerful mechanism for spreading new ideas, cultural products, and processes and providing the funds to recover and preserve cultural heritage.<sup>9</sup> As a result, there can be mutual supportiveness between the promotion of trade and foreign direct investment on the one hand and the protection of cultural heritage on the other.

However, economic globalization and international economic governance can also jeopardize cultural diversity. Historically, cultural contact, trade, and foreign investments have not always been accompanied by mutual respect and understanding: rather, they have often been accompanied by conquest, injustice, and uneven development.<sup>10</sup> For instance, during the colonial period, 'the same ship could alternate between legitimate trading and piracy depending upon the opportunities it faced. Trade and violence were of course intimately connected in the Atlantic slave trade and in the forced opening of China to trade and investment after the Opium War.'<sup>11</sup>

Nowadays, asymmetry in flows and exchanges of cultural goods can lead to cultural hegemony—domination maintained through cultural means.<sup>12</sup> Some

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6 Silbey, 'Globalization', 245.

7 Griffin, 'Globalization and Culture', 242–243.

8 See generally Amartya Sen, *Development as Freedom* (New York: Knopf 1999).

9 Silbey, 'Globalization', 245 (noting that 'while few human cultures in history ... have been unaffected by exchange with others ..., the degree of hybridity and ... hybridization is at a scale and pace unknown before.').

10 Griffin, 'Globalization and Culture', 256.

11 Id. 256.

12 The Italian philosopher Antonio Gramsci (1891–1937) developed the concept of 'cultural hegemony' for indicating the use of cultural institutions to maintain power in given societies. For Gramsci, dominant culture propagates its own values and norms so that they become the common values of all and thus maintains its political clout. In Gramsci's view, a state cannot dominate in modern conditions by merely advancing its own narrow economic interests; neither can it dominate purely through force. Rather, it must exert cultural leadership. Gramsci concluded that the only way to challenge cultural hegemony was resisting to dominant government and business interests by building counter-hegemonic alternative values in which the interests of subaltern groups could be recognized and articulated. Antonio Gramsci, *Quaderni del Carcere*, V. Gerratana (ed.) (Torino: Einaudi 1975) Quaderno 14, para. 56.

sociologists view globalization as ‘a historic process leading to a ... one-way relationship between the global realm inhabited by multinational corporations ... and a subjugated local realm where the identity-affirming sens[e] of place ... barely surviv[es].’<sup>13</sup> The subsequent loss of cultural identity would leave ‘a corrosive absence at the center of human life.’<sup>14</sup> Political scientists warn that culture is a component of ‘soft power’, that is, ‘the ability to get desired outcomes because others want what you want.’<sup>15</sup> Any dominance in the cultural sector inevitably leads to other forms of strategic influence in the political realm, as the market in cultural products has significant social externalities, including the formation of values, beliefs, and worldviews. In parallel, investments in the extractive industries have the ultimate capacity of changing cultural landscapes and thus eroding cultural identity. At the same time, legally binding and highly effective regimes demand that states promote foreign direct investments and free trade.

Now, as in the past, globalization must be governed to prevent or reduce potential harm and to enable the fair and equitable distribution of the benefits of economic and cultural interchange.<sup>16</sup> To govern such a process, the current architecture of international institutions seems asymmetrical as international cultural heritage law lacks dedicated international courts and tribunals, while international economic law presents sophisticated dispute settlement mechanisms. When states have tried to make globalization work for them, trading nations and investors have increasingly brought claims before international economic courts claiming that cultural policies breach international economic law provisions. In particular, they have alleged violation of national treatment, ban on performance requirements, and other treaty standards.

International disputes relating to the interplay between cultural heritage and economic integration are characterized by the need to balance the state duty to adopt cultural policies on the one hand, and the economic interests of investors and traders on the other. Does the existing legal framework adequately protect cultural diversity *vis-à-vis* economic globalization? Have international economic courts paid any attention to cultural heritage? Are they imposing standards of good cultural governance, by adopting general principles of law such as due process, reasonableness, and others? When should economic interests yield to the protection of cultural heritage?

The critical assessment of such jurisprudence is a fertile endeavor as it may help in detecting common patterns, leading to the coalescence of general

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13 Silbey, ‘Globalization’, 248.

14 Id.

15 Robert O. Keohane and Joseph S. Nye, ‘Power and Interdependence in the Information Age’, (1998) *Foreign Affairs* 81–94, 86.

16 Griffin, ‘Globalization and Culture’, 257.

principles of law and/or customary law requiring that a balance be struck between the protection of cultural heritage and the protection of economic interests in international law. At their core, cultural heritage-related disputes involve society's most cherished values that are definitive of national identity. The protection of cultural heritage can be thought of as a public interest in terms of the interest of the state, but it also contains the common interest of humankind – transcending borders and stressing the common bonds which unite the international community as a whole.<sup>17</sup> At the same time, economic freedoms can also promote the free flow of ideas, cultural diversity, and equality of opportunities, as well as social and economic welfare.<sup>18</sup>

Let us consider some examples. Indigenous hunting practices constitute a form of intangible cultural heritage deemed essential to preserve the Indigenous way of life. As Europeans perceive the hunting of seals to be morally objectionable, the EU has banned the trade in seal products except those derived from hunts traditionally conducted by the Inuit and other Indigenous communities for cultural and subsistence reasons.<sup>19</sup> Canada and Norway brought the seal ban before the WTO, contending that the ban violated relevant trade obligations. Is the Indigenous exemption in conformity with relevant international economic law obligations?

In another dispute, a US company filed an investment treaty arbitration against Ukraine because the state required that 50 percent of the general broadcasting of each radio company should be Ukrainian music. The claimant argued that the local music requirement breached the investment treaty provision prohibiting the state from imposing foreign companies to buy local goods. The claimant also contended that 'We should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market-economy, it should not introduce Ukrainian culture by force.'<sup>20</sup> Is the local music requirement a breach of the ban on performance requirements? Is it justified on public policy grounds as part of the state's duty to respect, protect, and fulfill cultural rights and preserve a nation's identity, culture, and way of life?

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17 Francesco Francioni, 'Public and Private in the International Protection of Global Cultural Goods' (2012) 23 *EJIL* 719–730, at 719 (considering the protection of cultural heritage as a global public good.).

18 Petros C. Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23 *EJIL* 731–742 at 731; Barnali Choudhuri, 'International Investment Law as a Global Public Good' (2013) 17 *Lewis & Clark LR* 481–520 at 481.

19 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 OJ (L. 286) 36.

20 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, para. 406.

This chapter investigates the distinct interplay between international cultural heritage law and international economic law and select areas where this interaction takes place. After discussing the so-called linkage issue, the chapter examines the distinction between protectionism (that is prohibited under international economic law) and the legitimate protection of cultural heritage (that is not only allowed but also required under international law). The chapter then briefly examines how international economic courts are attracting a growing number of cultural heritage-related international economic disputes. It then discusses the question as to whether and, if so, how international economic courts are factually (*de facto*) if not legally (*de jure*) contributing to global cultural governance by adjudicating such disputes. The chapter investigates the question as to whether international economic courts pay adequate attention to the necessity to preserve cultural heritage, contributing to the coalescence of consistent narratives and emerging general principles of law. Has a general principle of law emerged requiring the protection of cultural heritage in international law? Are there specific contributions arising from investor–state dispute settlement and the WTO DSM?

## 2 The Linkage Issue

The clash between cultural sovereignty and international economic governance constitutes a special case of the more general tug-of-war between the state regulatory autonomy and international law.<sup>21</sup> In the past decades, due to the proliferation of international law instruments and supranational institutions in a number of fields, sovereignty has evolved.<sup>22</sup> The traditional notion of sovereignty was based on the so-called Westphalian duo of internal and external state sovereignty: internal sovereignty indicated state sovereignty over territory free from outside intervention; external sovereignty indicated the coexistence of a multiplicity of states equal to one another.<sup>23</sup>

Nowadays, as states have increasingly delegated governmental agency to international institutions in various fields, sovereignty has been articulated in manifold ways and different places.<sup>24</sup> Although sovereignty remains

21 See generally John J. Jackson, *Sovereignty, the WTO, and the Changing Fundamentals of International Law* (Cambridge: CUP 2009).

22 Abram Chayes and Antonia H. Chayes, *The New Sovereignty—Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press 1998).

23 Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *AJIL* 20–41.

24 Gregor Feindt, Johannes Paulmann, and Bernhard Gissibl, 'Introduction: Cultural Sovereignty – Claims, Forms, and Contexts Beyond the Modern State', in Gregor Feindt,

an important feature of the international system, it is no longer confined to the nation-state; rather, new kinds of sovereignty have emerged.<sup>25</sup> The 'crisis' of state sovereignty has been matched by the growing exercise of power and agency by supranational institutions in the political realm and economic space. International legal regimes have now acquired a new type of shared sovereignty, with some competences that used to be within the exclusive domain of states.

Cultural sovereignty constitutes an essential aspect of governance. Not only can it be seen as 'a heuristic concept' for analyzing decision-making power in the cultural field, but it also constitutes a central aspect of sovereignty as countries view cultural identity as a prerequisite of political independence.<sup>26</sup> In the past century, the term was used 'in contexts of subaltern resistance and in situations of oppression and marginalization.'<sup>27</sup> Cultural entitlements surfaced in international treaties protecting minorities in the aftermath of World War I (wwi).<sup>28</sup> Such treaties 'helped deconstruct the sovereign State by legitimizing the claim to an international status of culturally distinct groups.'<sup>29</sup> International human rights law has confirmed this status with Article 27 of the Covenant on Civil and Political Rights.<sup>30</sup> Nowadays, however, as cultural rights have been recognized and mainstreamed in international law, cultural entitlements

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Johannes Paulmann, and Bernhard Gissibl (eds), *Cultural Sovereignty beyond the Modern State* (Berlin: De Gruyter 2021) 1–20, 8.

- 25 See Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization*, 11 ed. (New York: Columbia University Press 2015).
- 26 Feindt, Paulmann, and Gissibl, 'Introduction: Cultural Sovereignty', 4 (adopting a broad concept of cultural sovereignty).
- 27 Wallace Coffey and Rebecca A. Tsosie, 'Rethinking the Tribal Sovereignty Doctrine. Cultural Sovereignty and the Collective Future of Indian Nations' (2001) 12 *Stanford Law & Policy Review* 191–221.
- 28 See e.g. Treaty of Peace between the United States, the British Empire, France, Italy, Japan, and Poland, signed at Versailles, 28 June 1919 (the so-called Polish Minorities Treaty), 13 AJIL (1919) 423–440 (setting the pattern for all of the other post-World War I treaties on minorities). In 1993, the movement for the recognition of the rights of culturally distinct groups has led to the adoption of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, GA Res. 47/135, UN GAOR, 47th Sess., Agenda Item 97(b), UN Doc. A/RES/47/135 (1993).
- 29 Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan JIL* 1209–1228, 1211.
- 30 Article 27 of the International Covenant on Civil and Political Rights provides that: '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 6 ILM 368.

have been seen in more universal terms. There has been a growing recognition that international cooperation depends on the safeguarding of peoples' cultural diversity.

The tension between cultural sovereignty and international economic governance is similar to, but also differs from, other tensions, such as those between economic globalization on the one hand and public health and environmental protection on the other. In fact, the protection of cultural heritage is qualified, being subject to both internal and external limits. Internal limits require preventing an overprotection of cultural heritage and respecting cultural freedom. External limits to the protection of cultural heritage are posed by the respect of fundamental human rights. Only cultural policies and practices which are respectful of human rights are protected under international law.<sup>31</sup> The scope of cultural entitlements is thus qualified and limited under international law. At the same time, cultural governance is also being recognized by international law.

Therefore, the interplay between cultural sovereignty and international economic governance raises issues which can have a profound effect on international economic law, international cultural heritage law, and international law more generally. First, 'the linkage phenomenon calls for a reconsideration of the basic nature of international economic law.'<sup>32</sup> Rather than stressing the economic element of international economic law, the linkage phenomenon highlights the legal nature of the field: it reveals that international economic law is a part of international law as 'principles of justice underlie any linkage claim.'<sup>33</sup> The linkage between cultural heritage on the one hand and trade and investment on the other can change not only the way we understand international economic law, but also its development and direction. The recognition of this particular linkage alters the way international economic law is seen, negotiated, designed, interpreted, and implemented. Contemporary international economic law is undergoing a process of thorough reevaluation. The debate on the linkage between cultural heritage on the one hand and trade

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31 See e.g. Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1, Article 2.1 (stating that 'For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.').

32 Frank J. Garcia, 'The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century' (1998) 19 *University of Pennsylvania JIEL* 201–208, 206.

33 *Id.*

and investment on the other is a critical part of this reassessment and one of the issues to be addressed in the international economic law of the twenty-first century.<sup>34</sup> In fact, ‘the very success of globalization provides much of the impetus to protect and reinforce the role of states as ... primary value providers.’<sup>35</sup>

Second, the review by international economic courts of domestic cultural policies highlights some structural limits of international cultural heritage law such as its fragmentation and the lack of permanent courts and tribunals. The protection of cultural heritage under international law emerged after WWII in a fragmented fashion, through a series of international conventions and the formation of international customs. More importantly, there is no World Heritage Court to adjudicate cultural heritage-related disputes. Therefore, an increasing number of disputes with cultural elements have been adjudicated by international economic courts without a specific mandate to ascertain the adequate protection of cultural heritage. In the absence of a designated cultural heritage court, questions remain as to whether cultural heritage protection is taken into account in the jurisprudence of international economic courts.

At the same time, the review by international economic courts of domestic measures can improve good cultural governance and the transparent pursuit of legitimate cultural policies. Most governments will have to consider the impact of cultural policies on foreign investment and international trade before the enactment of such measures to avoid potential claims and subsequent liability. Whether this can promote the rule of law or rather cause a regulatory chill is a matter of debate.<sup>36</sup>

Third, examining the linkage between the protection of cultural diversity on the one hand and the promotion of trade and investment on the other contributes to the broader debate on the unity or fragmentation of international law. Examining cultural heritage-related disputes adjudicated by economic courts can help detect common patterns, leading to the coalescence of general principles of law and/or customary law requiring the protection of cultural heritage in international law. This outcome would be notable because states are bound by general principles of law irrespective of their consent. This can facilitate the consideration of cultural concerns in the future adjudication of

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34 Id. 208.

35 Philip Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’ (1997) 8 EJIL 435–448, 437.

36 Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford: Hart Publishing 2018); Thomas Schultz and Cedric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors?’ (2014) 25 EJIL 1147–1168.

analogous disputes. For these reasons, the linkage between cultural heritage and economic globalization deserves sustained attention.

### 3 Protectionist Cultural Policies v. Efficient Regulation?

Controversy over trade and investment on the one hand and culture on the other has a long history. In the seventeenth century, certain Asian countries such as Korea and Japan already maintained policies of seclusion, driven by concerns that ‘economic opening would leave the countr[ies] vulnerable to foreign cultural and political influences.’<sup>37</sup> Several philosophers developed similar ideas of economic, cultural, and political self-sufficiency in Europe, South America, and Africa to counter colonialism in the 18th and 19th centuries.<sup>38</sup>

Nonetheless, it was in the 1930s that autarkic thought achieved its greatest clout across the globe.<sup>39</sup> In the aftermath of WWI, the Great Depression of 1929, and the related collapse of international trade, foreign investment, and the international gold standard, many countries adopted protectionist policies to cope with the economic shock. In parallel, as forms of nationalism emerged, states increased the range and breadth of protectionist cultural policies.<sup>40</sup> Cultural autarky closed states’s creative borders, thus shunning the free flow of ideas and the inspiration that could have come from foreign exchange. European countries adopted linguistic policies to strengthen national identity.<sup>41</sup> In Britain, France, Germany, and Italy, movies ‘played a key role in engaging national publics with imperial agendas’ and supporting wars and occupations.<sup>42</sup> Screen quotas prioritized the exhibition of local films.<sup>43</sup> In parallel, Japan banned all imported films, implicitly targeting Hollywood given that

37 Eric Helleiner, ‘The Return of National Self-Sufficiency? Excavating Autarkic Thought in a De-Globalizing Era’ (2021) 23 *International Studies Review* 933–957, 943.

38 Id. 943–946.

39 Id. 946.

40 Karl Mannheim, ‘The Crisis of Culture in the Era of Mass-Democracies and Autarchies’ (1934) 26 *Journal of Sociology* 105–129.

41 Ruth Ben-Ghiat, ‘Language and the Construction of National Identity in Fascist Italy’ (1997) 2 *The European Legacy* 438–443, 438.

42 Ruth Ben-Ghiat, *Italian Fascism’s Empire Cinema* (Bloomington & Indianapolis: Indiana University Press 2015).

43 Eireann Brookes, ‘Cultural Imperialism v. Cultural Protectionism: Hollywood Response to UNESCO Efforts to Promote Cultural Diversity’ (2006) 5 *Journal of International Business and Law* 112–136, 120.

American movies had previously dominated the Japanese market.<sup>44</sup> Cultural, political, and economic factors underpinned such cultural policies: at the cultural and political level, protectionism highlighted nationalist ideological motives; at the economic level, it undoubtedly favored nascent domestic film industries.

In the aftermath of WWII, the architects of the international economic order explicitly rejected the idea of economic, cultural, and political self-sufficiency, believing that the protectionism of the 1930s had contributed to the outbreak of war. Instead, they committed to multilateralism, considering free trade and foreign investments as useful tools for achieving economic recovery, stability, and peace.

At the same time, the architects of the international economic order also recognized states' flexibility in the cultural domain. Article IV of the GATT 1947 explicitly permits screen quotas favoring domestic films.<sup>45</sup> The provision enabled countries to support their film industries after the devastation of war.<sup>46</sup> For instance, immediately after the Second World War, France imposed quotas on the importation of American movies and reserved a certain amount of time per screen for French films.<sup>47</sup> This protection facilitated the emergence of the New Wave (*La Nouvelle Vague*) in the 1950s. The film movement rejected traditional filmmaking conventions in favor of experimentation, engagement with the social and political upheavals of the time, and exploration of existential themes. Such creativity led France's then-Minister of Culture, André Malraux, to introduce several measures intended to further promote the production and distribution of French movies not just as commercial ventures but as works of art. This has contrasted with Hollywood's 'postwar foreign policy to treat film as an economic commodity subject to normal considerations of business rather than as a cultural item.'<sup>48</sup> In parallel, under Article XX of the GATT, states can adopt measures to protect public morals and national treasures of artistic value.<sup>49</sup> While Article IV and Article XX of the GATT do not constitute 'a culture exception' from the GATT regime,<sup>50</sup> they demonstrate that

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44 Stephen Ranger, 'Target Hollywood! Examining Japan's Film Import Ban in the 1930s' (2020) 11 *Global Policy* 65–71.

45 GATT Article IV.

46 Christopher Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products' (2008) *International Law and Politics* 351–436, 367.

47 Richard Brody, 'The Future of the French Cinema', *The New Yorker*, 2 January 2013.

48 Ian Jarvie, 'The Postwar Economic Foreign Policy of the American Film Industry: Europe 1945–1950' (1990) 4 *Film History* 277–288, 277.

49 GATT Article XX(a) and (f).

50 Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) 55 *ICLQ* 635–652, 646.

cultural concerns are part and parcel of the complex tapestry of international economic law.

Nowadays, many states employ an array of measures to protect and promote domestic culture such as subsidizing locally produced entertainment media—mainly movies, television, video, and music—, restricting the imports of foreign cultural goods, and favoring domestic content requirements.<sup>51</sup> For instance, Canada has adopted a number of cultural policies, including subsidies, tax incentives, and quotas requiring that specified amounts of ‘Canadian content’ be shown in Canadian cinemas and broadcast by Canadian media.<sup>52</sup> At the EU level, Member States have exclusive competence on cultural policy, while the Union’s role is to encourage cooperation and support and supplement Member States’ actions.<sup>53</sup> In this regard, the 2018 New European Agenda for Culture has three strategic objectives: (1) harnessing the power of culture and cultural diversity for social cohesion and well-being (social dimension); (2) supporting culture-based creativity in education and innovation, and for jobs and growth (economic dimension); and (3) strengthening international cultural relations (external dimension).<sup>54</sup>

Differing perspectives exist on measures protecting domestic culture: adopting a cultural heritage law lens, ‘culture – as expressed through film, television, music, and other forms – is essential to national identities’ and therefore cultural products ‘must be treated separately from other goods in international trade negotiations.’<sup>55</sup> Although globalization through international trade and foreign direct investment may ‘lead to closer ties and greater interaction between cultures, [such trend] may also harm the preservation of cultural identities.’<sup>56</sup> Accordingly, ‘state regulation of entertainment media is cultural policy, an essential means of preserving a nation’s identity, culture, and way of life.’<sup>57</sup> Such cultural policies can counter cultural imperialism.

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51 Kerry Chase, ‘Trade and Culture’, *Oxford Research Encyclopedia of Politics* (New York: OUP 2019).

52 Bruner, ‘Culture, Sovereignty, and Hollywood’, 355.

53 The legal basis for action in the area of culture at EU level is Article 3 of the Treaty on European Union and Article 167 of the Treaty on the Functioning of the European Union.

54 European Commission, *A New European Agenda for Culture*, 22 May 2018, COM(2018) 267 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1527241001038&uri=COM:2018:267:FIN>.

55 Brookes, ‘Cultural Imperialism v. Cultural Protectionism’, 120.

56 Ivan Bernier, ‘A UNESCO International Convention on Cultural Diversity’, *Media Trade Monitor*, 7 March 2003.

57 Chase, ‘Trade and Culture’.

However, from the vantage point of international economic law, films, television shows, and the like are simply 'entertainment commodities'. According to this view, if certain goods sell well oversea, it means that consumers regard such products as superior.<sup>58</sup> Accordingly, policies adopted to preserve local culture constitute 'backdoor protectionism', favoring local business and labor under the guise of cultural policy.<sup>59</sup> Economists highlight the fact that in some cases cultural policies may efficiently increase economic welfare and effectively protect domestic culture.<sup>60</sup> In other cases, however, such measures impede trade, affect foreign investments, and can be counterproductive for the states adopting them.<sup>61</sup> Therefore, questions arise as to why states adopt cultural policies and whether such measures comply with relevant international economic law provisions.

At the WTO, states could not agree on the adoption of a 'cultural exception' in trade rules to green-light state actions that interfere with trade on cultural grounds. While some WTO members such as Canada and the EU have pressed to accommodate the specificity of cultural products, the United States opposed such efforts in trade negotiations in favor of the free flow of capital and trade in the audiovisual sector. As is known, entertainment industries are 'the jewel in America's trade crown' and its 'most successful exporters, producing higher international revenues than any other industry'.<sup>62</sup> The ability to attract talent from all over the world, the size and wealth of the US market, and the fact that English is today's *lingua franca* have contributed to the huge success of American cultural industries.<sup>63</sup> According to the US, the free flow of entertainment goods would benefit trade, foster the free flow of information, and even promote the fulfillment of several human rights including the freedom of individuals to choose their cultural identity.<sup>64</sup> If states 'decid[e] what citizens can read, hear, or see', the argument goes, this ultimately 'denies individuals the opportunity to make independent choices about what they value'.<sup>65</sup>

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58 Bruner, 'Culture, Sovereignty, and Hollywood', 356 (reporting this view).

59 Chase, 'Trade and Culture'.

60 Lelio Iapadre, 'Cultural Products in the International Trading System', in Victor A. Ginsburgh and David Throsby (eds), *Handbook of the Economics of Art and Culture* (Amsterdam: Elsevier 2014) 381–409; Hahn, 'A Clash of Cultures?', 524.

61 Patrick Messerlin, Hwy-Chang Moon, and Jimmyn Parc, 'Cultural Industries in the Era of Protectionism' (2020) 11 *Global Policy* 5–6.

62 Bruner, 'Culture, Sovereignty, and Hollywood', 355–6.

63 Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 *JIEL* 515–552, 520.

64 Brookes, 'Cultural Imperialism v. Cultural Protectionism', 130.

65 Id.

Deadlock over trade and culture has inspired WTO members to explore other options in different institutional settings. Within international economic law, for instance, while the United States has pursued policy liberalization in a series of free trade agreements, Canada has sought to protect its capacity to adopt cultural policies by introducing cultural exceptions in the same agreements. In the Canada–United States Free Trade Agreement (CUSFTA), the predecessor of the North American Free Trade Agreement (NAFTA) and the United States–Mexico–Canada Agreement (USMCA), Canada obtained a broadly worded cultural exception, while the United States obtained a provision permitting retaliation for its use.<sup>66</sup> NAFTA Article 2106 simply incorporated the cultural exception of CUSFTA—including the retaliation provision.<sup>67</sup> The USMCA maintains Canada’s cultural industries exception.<sup>68</sup>

Within international cultural heritage law, the EU and Canada promoted the adoption of the Convention on Cultural Diversity (CCD) to strengthen state right to adopt cultural policies.<sup>69</sup> A binding treaty, the Convention declares that ‘cultural activities, goods, and services have both an economic and a cultural nature ... and must therefore not be treated as solely having commercial value.’<sup>70</sup> It then reaffirms the ‘sovereign right to formulate and implement ... cultural policies and to adopt measures to protect and promote the diversity of cultural expressions.’<sup>71</sup> At the same time, the CCD clarifies the fact that it only safeguards cultural diversity that does not infringe human rights and fundamental freedoms.<sup>72</sup>

The CCD aims to safeguard cultures from the threat of homogenization that accompanies the pervasive importation of cultural products, such as books,

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66 Canada–United States Free Trade Agreement, 22 December 1987–2 January 1988, 27 ILM 281 (1988), Article 2005 (providing that ‘[c]ultural industries are exempt from the provisions of this Agreement,’ but that either party could nevertheless ‘take measures of equivalent commercial effect in response to [such] actions.’)

67 North American Free Trade Agreement, 17 December 1992, in force 1 January 1994, 32 ILM 289 (1993) Article 2106.

68 Canada–United States–Mexico Agreement (USMCA), signed on 30 November 2018, in force 1 July 2020.

69 The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted on 20 October 2005. Of the 156 countries voting on the convention, 148 voted in favor, with opposing votes by the United States and Israel, and abstentions by Australia, Honduras, Liberia, and Nigeria. The CCD entered into force on 18 March 2007. UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. 1, at 83.

70 CCD preamble.

71 CCD Article 5.

72 CCD Article 2(1).

films, and television programs, from dominant countries. It thus attempts to ensure that cultures can develop along their own paths ‘while simultaneously remaining receptive to valuable input from other cultures’ and contributing to cultural diversity.<sup>73</sup> In other words, the CCD attempts to strike a balance between the free flow of ideas and the safeguarding of cultural identity.

Such a balance between cultural imports and exports creates opportunities for confrontation, dialogue, and exchange of ideas among civilizations based on respect for each other’s values.<sup>74</sup> Such a dialogue should not be narrowed down to a monologue, in which only one position and one opinion prevails.<sup>75</sup> Rather, the idea of dialogue among civilizations presupposes the existence of distinct albeit interacting cultures.<sup>76</sup> It derives from the awareness that ‘creation draws on the roots of cultural tradition, but flourishes in contact with other cultures.’<sup>77</sup> Such intercultural dialogue helps to create an environment conducive to sustainable development and peaceful relations among nations.<sup>78</sup>

To strike a balance between openness and protection, the CCD remains deliberately vague and does not offer detailed rules. As a consequence, the measures adopted by the state parties to comply with the Convention can be contradictory. Would cultural diversity be better promoted by allowing a foreign company to transmit foreign songs or by requiring the compulsory broadcasting of national music? Arbitral tribunals have upheld the argument that the broadcasting of music in a national language constitutes an important element of cultural sovereignty.<sup>79</sup>

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73 Brookes, ‘Cultural Imperialism v. Cultural Protectionism’, 115.

74 Bernier, ‘A UNESCO International Convention on Cultural Diversity’.

75 United Nations General Assembly, *United Nations Year of Dialogue among Civilizations*, Report of the Secretary General, A/56/523, 2 November 2001, para. 14 (noting that ‘the goal of dialogue is not to impose one’s viewpoints or even to reach consensus ... We can draw lessons from history to see how and why some inter- or cross-civilizational exchanges have been successful and others have not.’).

76 Outi Korhonen, ‘Dialogue among Civilizations: International Law, Human Rights, and Difference’ in Lauri Hannikainen and Seyed Kazem Sajjadpour (eds), *Dialogue Among Civilizations* (Rovaniemi: University of Lapland 2002) 30, 33.

77 Francesco Francioni, ‘Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity’ (2004) 25 *Michigan JIL* 1209–1228, 1227.

78 United Nations General Assembly, *United Nations Year of Dialogue among Civilizations*, Report of the Secretary General, A/56/523, 2 November 2001, para. 15 (warning that ‘Without this dialogue taking place ... among all nations ... no peace can be lasting and no prosperity can be secure.’); United Nations General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development*, Resolution 70/1, 21 October 2015, UN Doc. A/RES/70/1, para. 49.

79 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 407.

The interplay between the CCD and international economic law instruments is governed by Article 20 of the CCD. Under such provision the CCD does not ‘modify rights and obligations ... under any other treaties’ and it is not subordinated to any other treaty. Rather, the parties ‘foster mutual supportiveness’ between the CCD and other treaties and ‘take into account the relevant provisions’ of the CCD when applying or entering into other treaties.<sup>80</sup> In addition, the parties ‘undertake to promote the objectives and principles of this Convention in other international forums.’<sup>81</sup> As noted by Bruner, the ‘apparently contradictory language’ of Article 20 of the CCD ‘contemplates both that the [CCD] will affect the application of other treaty regimes while at the same time—somehow—not modifying rights and obligations under them.’<sup>82</sup>

In other words, while the fluidity of international cultural heritage law allows states to calibrate their cultural policies according to their specific needs, it can also make it difficult for adjudicators to ascertain the legitimacy of such measures. On the one hand, it can assist the achievement of a suitable balance between the protection of cultural heritage and the promotion of economic interests in international law. It can bolster the legal case of countries that are defending their cultural policies in international disputes or resisting pressure in future trade negotiations to open their cultural sectors to foreign import. On the other hand, however, concerns remain that cultural policies can disguise discrimination and protectionism.

#### 4 Global Cultural Governance by International Economic Courts?

Given the structural imbalance between the vague and nonbinding dispute settlement mechanisms provided by international cultural heritage law and the sophisticated dispute settlement mechanisms available under international economic law, cultural heritage disputes involving investors’ or traders’ rights have often been brought before international economic courts. Obviously, this does not mean that these are the only available tribunals, let alone the best tribunals for this kind of dispute. Other courts and tribunals are available such as national courts, human rights courts, regional economic courts, and the traditional state-to-state *fora* such as the International Court of Justice or even inter-state arbitration. Some of these dispute settlement mechanisms may be

80 CCD Article 20.

81 CCD Article 21.

82 Bruner, ‘Culture, Sovereignty, and Hollywood’, 404.

more suitable than investor–state arbitration or the WTO DSM to address cultural concerns. Given its scope, this study focuses on the jurisprudence of the WTO bodies and arbitral tribunals.

Given the magnetism of international economic courts, and the significant and steadily increasing number of international disputes involving cultural elements due to economic integration, an examination of such jurisprudence is both timely and topical to ascertain whether and how international economic courts have dealt with cultural interests and values.

The international tribunals' review of domestic regulations in the cultural sector can improve good cultural governance and the transparent pursuit of legitimate cultural policies. In fact, the growing importance of such tribunals shows that most governments will have to consider the impact of regulations (including cultural policies) on foreign investors and traders, before the enactment of such measures to avoid potential claims and subsequent liability.<sup>83</sup>

Yet, global cultural governance by international economic courts is also a matter of great concern. The adjudication of cultural heritage-related disputes by international economic courts can cause a regulatory chill, as states may be wary of possible disputes and thus avoid adopting conservation measures. For instance, Indonesia reversed its ban on mining in several protected forests following the threat of ISDS arbitration.<sup>84</sup> Romania withdrew a World Heritage Site nomination due to an ongoing investment arbitration.<sup>85</sup> Regulatory chill can take various forms such as delaying, amending, or withdrawing cultural policies out of fear of litigation. In this scenario, policymakers prioritize avoiding disputes over developing appropriate cultural policies in the public interest. Such an approach risks leading to a race to the bottom in cultural policy and determining the irremediable loss of cultural heritage.

Moreover, given their institutional mandate that is to settle trade and investment disputes, there is a risk that international economic courts water down or overlook noteworthy cultural aspects, eventually prioritizing economic interests over other concerns. International adjudicators may not have specific expertise in international cultural heritage law, as their appointment requires expertise in international (economic) law. They may

83 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *AJIL* 295–333.

84 Stuart Gross, 'Inordinate Chill: BITS, Non-NAFTA MITs, and Host-State Regulatory Freedom—An Indonesian Case Study' (2003) 24 *Michigan JIL* 893–960.

85 World Heritage Committee, Decision 42 COM 8B.32, 4 July 2018 (referring the nomination of Rosia Montana as a World Heritage site back to Romania at the state's request 'due to the ongoing international arbitration.') The State then resubmitted its application later.

be perceived as detached from local communities, their cultural concerns and core values. For instance, in *Bilcon v. Canada*, a company sought to develop a mining and marine terminal project in Canada.<sup>86</sup> To obtain approval from domestic authorities, the investor prepared an environmental impact study (EIS) addressing the project's potential impacts on the human environment. A panel of experts reviewed the EIS and recommended that the project not proceed, mentioning among other things the project's inconsistency with 'community core values.' After the project was rejected on the basis of such recommendation, the company sued Canada under NAFTA Chapter 11. The majority of the Arbitral Tribunal questioned the legality of the concept of 'community core values.'<sup>87</sup> It also considered that the panel's consideration of such values went beyond the panel's duty to consider the project's impacts on the human environment.<sup>88</sup> Thus, the Tribunal concluded that the state had breached the fair and equitable treatment standard.

In his Dissenting Opinion, Arbitrator McRae cautioned that the award risks chilling domestic authorities' environmental impact assessments for fear of resulting claims for damages.<sup>89</sup> Moreover, he added that 'subjugation of human environment concerns to the ... technical feasibility of a project is not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state.'<sup>90</sup>

Furthermore, due to the emergence of a *jurisprudence constante* in international trade and investment law respectively, there is a risk that international economic courts consider cultural goods and services as analogous to other commodities and thus conform to the jurisprudence of past international economic disputes without necessarily considering analogous cultural heritage-related cases adjudicated before other international courts and tribunals. For instance, human rights bodies have interpreted the principle of living together (*le vivre ensemble*) and the respect of society's 'minimum set of values' as 'the protection of the rights and freedoms of others',<sup>91</sup> or 'the principles of dignity, liberty, equality, and fraternity between human beings.'<sup>92</sup>

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86 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; *Bilcon v. Canada*, Dissenting Opinion of Professor Donald McRae, 17 March 2015.

87 *Bilcon v. Canada*, Award on Jurisdiction and Liability, paras 505-6.

88 *Id.* para. 535.

89 *Bilcon v. Canada*, Dissenting Opinion of Professor Donald McRae, paras 48-9.

90 *Id.* para. 49.

91 ECtHR, *SAS v. France*, Judgment, 1 July 2014, paras 114-116.

92 *Id.* para. 24.

This is not to say that consistency in decision-making is undesirable; obviously, it can enhance the coherence and predictability of the international economic system contributing to its legitimacy. Yet, the selection of the relevant precedents matters as it can have an impact on the decision. Moreover, in dealing with cultural heritage-related disputes, the interpretative pathways adopted by international economic courts may converge or diverge due to the different institutional mandates of each forum. Therefore, it is of crucial importance to ascertain whether, and if so how, cultural considerations have been taken into account by these courts and tribunals.

Some scholars have argued that cultural concerns should remain outside the scope of international economic disputes. According to this view, international economic courts should focus on relevant international economic treaties and leave aside the cultural implications of the adjudicated cases.<sup>93</sup> After all, investment treaty arbitral tribunals, the WTO panels, and the Appellate Body are of limited jurisdiction and cannot adjudicate on the eventual violation of international cultural heritage law. Their mandate derives from international economic treaties or investment contracts rather than cultural heritage treaties. According to these scholars, the role of international economic courts is that of interpreting and applying international economic law, rather than making law, regarding the latter as the role for legislators.<sup>94</sup>

In practice, however, one may wonder whether this is feasible. Economic globalization has fostered and multiplied cultural contacts among nations. Therefore, it is not only possible, but perhaps even inevitable that cultural heritage-related economic disputes arise. Cultural policies can (and have) affect(ed.) the economic interests of a number of stakeholders, including foreign investors and traders.<sup>95</sup> Construction and similar economic activities can be delayed, precluded, or canceled for preserving potentially affected world heritage sites.<sup>96</sup> Some governments may provide for the compulsory acquisition, through purchase or expropriation, of important cultural property, thus

93 Ioana Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms', in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 310–343.

94 Andreas Follesdal, 'The Legitimacy of International Courts' (2020) 28 *Journal of Political Philosophy* 476–499, 476.

95 Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration' (2013) 28 *ICSID Review* 123, 123–24.

96 See e.g. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, 32 ILM 933 (1993); *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/ Request for Arbitration, 21 July 2015.

potentially affecting the economic interests of foreign investors.<sup>97</sup> As there is no hierarchical relationship between different treaties, governance in this area is left to the adjudicators.<sup>98</sup>

Can international economic courts consider other norms of international law when adjudicating cultural heritage-related disputes? Can they adjudicate on the breach of cultural heritage law? Are they contributing to global cultural governance and the emergence of customary law or general principles of law requiring the protection of cultural heritage in times of peace? Or rather, are they expropriating states of their cultural sovereignty? In order to address these questions, Chapters 4 and 5 examine the jurisprudence of arbitral tribunals, GATT/WTO panels, and the Appellate Body, to ascertain whether, and if so how, international economic courts consider cultural concerns when settling international economic disputes. Chapter 6 then examines the converging divergences in the jurisprudence of cultural heritage-related international economic disputes and addresses the question as to whether general principles of law and/or customary law are emerging requiring the protection of cultural heritage in times of peace. Chapter 7 then investigates the toolkit available to international economic courts to strike an appropriate balance between economic and cultural interests.

## 5 The Settlement of Heritage-Related International Economic Disputes

Cultural heritage disputes can be classified as cultural heritage disputes in a narrow sense, or in the broad sense. The former centers on the destiny of a given cultural artifact.<sup>99</sup> The latter deals with cultural heritage only tangentially. For instance, there are situations where the cultural object is not the *petitum* (subject matter) or the *causa petendi* (cause of action) of a given dispute

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97 *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012; *Compañía del Desarrollo de Santa Elena v. Costa Rica*, Case No. ARB/96/1, Final Award, 17 February 2000.

98 See e.g. CCD Article 20.

99 ECtHR, *Sylogos Ton Athinaion v. The United Kingdom*, Application No. 48259/15, 31 May 2016 (relating to a request of returning the Parthenon Marbles to Greece, rejecting the application, but holding that 'the protection of cultural heritage is a legitimate aim that the State may pursue when interfering with individual rights.').

but rather its context.<sup>100</sup> Cultural heritage disputes in the broad sense relate to cultural heritage in an oblique or indirect fashion. Nonetheless, due to their possible consequences for the destiny of the relevant cultural heritage, such cases deserve further scrutiny from a cultural heritage law perspective as they tend to be investigated almost exclusively from the perspectives of international economic law. International economic disputes can relate to cultural heritage in both narrow and broad senses depending on the circumstances of the case.

Cultural heritage-related international economic disputes generally arise in three different scenarios: (1) when state measures protecting cultural heritage affect the economic interests of traders and investors; (2) when traders and investors allege that state non-compliance with its cultural heritage law obligations also amount to a breach of relevant provisions of international economic law; (3) when a given dispute may have cultural repercussions on third parties who attempt to intervene as friends of the court (*amici curiae*).

A preliminary set of questions can arise on the very classification of heritage-related international economic disputes as ‘cultural’ disputes. One of the parties—often the respondent—will have an interest in categorizing a given dispute as purely economic in nature.<sup>101</sup> While a too broad interpretation of cultural heritage could lead to abuses, nowadays a range of international law instruments governs different aspects of cultural heritage and provides definitions of culture, heritage, and diversity. Therefore, concerns about the dynamic nature of culture and its identification, albeit plausible, can be addressed by a careful scrutiny of the various definitions of cultural heritage that are available not only under domestic law but also under international law.

100 ECtHR, *Zeynep Ahunbay and Others v. Turkey*, Decision, Application No. 6080/06, 29 January 2019 (relating to the construction of the Ilisu dam on the Tigris river. The project entailed flooding major cultural sites and ancient Mesopotamian remains. The applicants—private individuals involved in the local archaeological projects—regarded this as a violation of the right to respect private life under Article 8 of the ECHR, but the Court rejected the claim). Compare with ECtHR, *Sargsyan v. Azerbaijan*, Case No. 40167/07 Judgment, 12 December 2017 (holding that rights under Art. 1 of Protocol 1 of the ECHR (protection of property), Art. 8 ECHR (right to respect for private and family life) and Art. 13 ECHR (right to an effective remedy) had been violated as the claimant had been deprived of access to his home and to his late relatives’ graves in Gulistan in the context of the Nagorno-Karabakh conflict.).

101 For a similar argument, see Philippe Sands, ‘Litigating Environmental Disputes: Courts, Tribunals, and the Progressive Development of International Environmental Law’ in Tafsir Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes—Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff 2007) 313–325.

The conservation of cultural heritage has a relatively stable nucleus which forbids and/or limits categories of economic activities which easily conflict with heritage management.<sup>102</sup> For instance, states can prohibit mining or oil and gas development for safeguarding world heritage sites.<sup>103</sup> However, moving from the core of cultural heritage protection to its periphery, conservation policies may become more nuanced and contested. Heritage policy discourse is varied; safeguarding policies rely on different assumptions as to what is worth being protected, why, and how.<sup>104</sup>

Cultural heritage disputes heard by international economic courts could not be more dissimilar. They involve different claimants and respondents, different treaties, and even different tribunals. Yet, they have an important commonality: the clash between the protection of private economic interests and the conservation of cultural heritage. International economic courts are given the power to review the exercise of public authority<sup>105</sup> and determine the appropriate boundary between two conflicting values: the legitimate sphere for state cultural heritage protection on the one hand, and the protection of economic interests from state interference on the other. International economic courts scrutinize cultural policies to determine whether they are enacted in the public interest or are a disguised means of protectionism, and whether the state has struck a proper balance between the means employed and the aim sought to be realized.

Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good. When should economic interests yield to the protection of cultural heritage? At their core, cultural heritage disputes involve a society's fundamental values that define its cultural identity. The protection of cultural heritage can be thought of as a public interest, but it also encapsulates the common interest of humankind, transcending borders and stressing the common bonds

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102 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, adopted by the UNESCO General Conference, Paris, 19 November 1968, para. 8(d)(e)(f) and (h).

103 Natasha Affolder, 'The Private Life of Environmental Treaties' (2009) 103 *AJIL* 510–525, 510 ff (noting that mining and similar development activities threaten more than one-quarter of all cultural heritage sites).

104 See Christopher Koziol, 'Historic Preservation Ideology: A Critical Mapping of Contemporary Heritage Policy Discourse' (2008) 1 *Preservation Education and Research* 41–51, at 42.

105 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021 (holding that the Tribunal 'has to exercise a form of internationalized judicial review of administrative action.').

that link the international community as a whole.<sup>106</sup> At the same time, economic freedoms can also promote the free flow of ideas, cultural diversity, and equality of opportunities, as well as social and economic welfare.<sup>107</sup>

Have arbitral tribunals paid any attention to cultural heritage? Are they imposing standards of good cultural governance? Are they contributing to the emergence of customary law requiring the protection of cultural heritage in times of peace? Or, rather, are they ‘expropriating’ states of certain fundamental aspects of cultural governance?<sup>108</sup> The critical assessment of such jurisprudence may help in detecting common patterns, eventually leading to the coalescence of general principles of law and requiring a balance between the protection of cultural heritage and economic interests.

## 6 Conclusions

Since antiquity, trade and investment on the one hand and cultural production on the other have characterized human endeavor. These areas of human activity have thus inevitably intersected: not only have trade and foreign investment facilitated interaction among different civilizations but cultural goods have also been traded for millennia. Therefore, there can be mutual supportiveness between the safeguarding of cultural heritage and the promotion of trade and foreign investment.

At the same time, however, cultural heritage is increasingly threatened with destruction by changing economic factors, including foreign investments in the extractive sector, industrial activities, and the exploitation of natural resources. In parallel, the ubiquity of certain cultural products can affect other countries’ ability to produce and market their own cultural expressions – which ultimately reflect their identity, language, and history.<sup>109</sup> By protecting their cultural identity, states ultimately protect their own existence. Cultural products play

106 Valentina Vadi, ‘Public Goods, Foreign Investments, and the International Protection of Cultural Heritage’, in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods—Normative Perspectives on Human Rights, Culture, and Nature* (Leiden: Brill 2014) 231, 231 (considering cultural heritage as a public good that is worthy of protection).

107 See Barnali Choudhury, ‘International Investment Law as a Global Public Good’ (2013) 17 *Lewis & Clark LR* 481–520 (considering foreign direct investments as public goods that are worthy of protection); Petros C. Mavroidis, ‘Free Lunches? WTO as Public Good, and the WTO’s View of Public Goods’, (2012) 23 *EJIL* 731–742 (considering the promotion of free trade as a global public good).

108 See Kyla Tienhaara, *The Expropriation of Environmental Governance* (Cambridge: CUP 2009) 3.

109 Hahn, ‘A Clash of Cultures?’, 518.

a vital role in the functioning of societies, the transmission of values, and the development of active citizenship.<sup>110</sup> The predominance of foreign cultural expressions risks constraining, instead of empowering imagination.

As the introduction of a cultural exception within the WTO was prevented by the United States in 1994, and most international investment agreements do not include such a clause, France, Canada, and other states sought to create a safe haven for cultural policies by adopting the UNESCO Convention on Cultural Diversity. The CCD expressly acknowledges states' right to adopt cultural policies and to strike a balance between market openness and cultural heritage preservation. Rather than conceiving cultural products as goods like any other, the CCD recognizes that such goods have both cultural and economic values and can be subject to different policies from other goods.

As most cultural heritage law instruments lack enforceable substantive provisions and a dispute settlement mechanism, most cultural heritage disputes have been adjudicated by international economic courts. The cultural heritage-related jurisprudence of international economic courts serves as an unexpected bridge between different legal regimes and opens the door to further questions about the objectives and limits of international economic law, the effectiveness of international cultural heritage law, and the unity or fragmentation of international law.

First, the linkage between cultural heritage on the one hand and trade and investment on the other can change not only our understanding of international economic law but also its current development and future direction. In fact, 'the linkage phenomenon calls for a reconsideration of the basic nature of international economic law.'<sup>111</sup> It challenges the dominant theories of economic efficiency in international economic law, rather revealing the link between international economic law and international law. Rather than stressing the economic element of the field, the linkage phenomenon highlights the legal nature of international economic law: it reveals that 'principles of justice' should underlie international economic law as any other field of law.<sup>112</sup> Contemporary international economic law is undergoing a process of thorough reevaluation. The debate on the linkage between cultural heritage on the one hand and trade and investment on the other can be a crucial part of this examination.<sup>113</sup>

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110 Id. 518–9.

111 Garcia, 'The Trade Linkage Phenomenon', 206.

112 Id.

113 Id. 208.

Second, the linkage issue also helps ascertain whether the current legal architecture provides adequate protection to cultural heritage and/or whether amendments may be advisable. Despite decades of legal protection of cultural heritage in many states, widespread noncompliance by individuals and corporations and lack of enforcement by states has been the norm rather than the exception. International cultural heritage law remains fragmented in a series of international conventions and customs. More importantly, there is no World Heritage Court to adjudicate cultural heritage-related disputes.<sup>114</sup> In the absence of a designated world heritage court, questions remain as to whether cultural heritage protection is taken into account in the jurisprudence of international courts and tribunals such as international economic courts that lack a specific mandate to ascertain the adequate protection of cultural heritage. Therefore, examining such jurisprudence confirms the need to strengthen international cultural heritage law.

At the same time, the review by international economic courts of domestic measures can improve good cultural governance and the transparent pursuit of legitimate cultural policies. Most governments will have to consider the impact of cultural policies on foreign investment and international trade before the enactment of such measures to avoid potential claims and subsequent liability. Whether this can promote the rule of law or rather cause a regulatory chill is a matter of debate.<sup>115</sup>

Finally, the critical assessment of cultural heritage-related jurisprudence may also help detect common patterns, leading to the coalescence of general principles of law and/or customary law requiring the protection of cultural heritage in international law. This outcome would be notable because states are bound by general principles of law irrespective of their consent. This would facilitate the consideration of cultural concerns in the future adjudication of analogous disputes at the international level.

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114 The establishment of an international cultural heritage court is a complex institutional choice that states confront. See generally Suzanne Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55 *Harvard International LJ* 151; Joshua Paine, 'International Adjudication as a Global Public Good?', (2019) 29 *EJIL* 1223–1249, 1229 (noting that 'Creating and maintaining an international tribunal ... typically depends upon the contribution of a large number of states, both in funding the tribunal and in accepting the sovereignty costs involved, such as possibly being exposed to litigation if there is some degree of compulsory jurisdiction.')

115 Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford: Hart Publishing 2018); Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 *EJIL* 1147–1168.

**PART 2**

*When Cultures Collide: Cultural Heritage, Trade  
and Foreign Direct Investment*



# Introductory Note

The second part of the book explores the complex interplay between cultural policies and economic development in practice by examining the jurisprudence of international economic courts. After mapping the legal framework governing cultural heritage on the one hand and free trade and foreign direct investment on the other in part I, the book now examines the disputes in the economic and cultural context adjudicated before investment treaty arbitral tribunals and the WTO adjudicative bodies.

In the light of the increasing global economic interdependence and the growing tension between the protection of cultural heritage and the promotion of trade and investment, it is of crucial importance to examine how this interaction takes place in practice. The recent proliferation of cultural heritage cases has brought such tension between economic globalization and cultural governance to the forefront of scholarly debate and public scrutiny because of their public policy implications. Therefore, the jurisprudence of international economic courts offers a fertile field of analysis.

Adjudication is a mode of governance and has a fundamental importance with regard to the concrete implementation of legal regimes. While the primary function of adjudication is resolving a given dispute thus benefitting the parties to the same proceedings, adjudication also incidentally produces certain public goods. In particular, it provides 'one forum for debate over social values' and produces 'publicly available judgments that clarify or develop international law ... on an essentially universal scale.'<sup>1</sup> More importantly, 'in issuing their decisions, international courts shape fundamental norms about the sovereignty of states as well as the daily lives of countless individuals.'<sup>2</sup>

The interplay between the protection of cultural heritage and the pursuit of economic interests in international law has been approached adopting a variety of perspectives and methods. Yet, most have approached the relevant issues focusing on the relevant treaty provisions, leaving the critical assessment of relevant jurisprudence aside. Furthermore, when cultural heritage-related cases have been examined, they have been considered from a mere economic law standpoint, leaving cultural policy arguments aside.

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1 Joshua Paine, 'International Adjudication as a Global Public Good?', (2019) 29 *EJIL* 1223–1249, 1226.

2 Suzanne Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55 *Harvard International LJ* 151–209, 152.

Therefore, the time is ripe for a comprehensive investigation of the burgeoning jurisprudence in the field. As a comprehensive critical analysis of cultural heritage cases heard by international economic courts is yet to be written, this analysis fills a significant gap in contemporary legal studies. It critically assesses the relevant cases using both economic and cultural considerations. The underlying hypothesis of this research is that development should be conceived as a broad concept, inclusive of not only mere economic growth, but also human flourishing and well-being, to which cultural elements are crucial.

A number of questions arise in this context. First, is it legitimate for the state to adopt protectionist cultural policies? What are the limits, if any, to state intervention in cultural matters? Second, if the state adopts cultural policies, how do we set the boundaries between legitimate regulation (which is not compensable) and violation of treaty provisions (which is compensable)? To what extent do international economic law obligations collide with states' cultural policies? Third, how have adjudicators dealt with these crucial policy issues? Have international economic courts paid any attention to cultural heritage and if so, how have they balanced economic interests and the cultural policies of host States? What type of reasoning have such courts adopted? What values and interests are at the heart of their thinking and practice? This book aims to provide a fresh approach to these questions, offering an in-depth analysis of the relevant jurisprudence.

One might expect the embryonic field of cultural heritage law to be overwhelmed by the long-established and sophisticated field of international economic law—not least, given that international economic courts have limited jurisdiction and so cannot adjudicate on the violation of other norms of international law outside the realm of international economic law unless given the mandate to do so. However, this book shows that arbitrators have increasingly taken cultural concerns into consideration in deciding cases brought before them, refusing to limit themselves to purely economic standards of valuation. Nonetheless, concerns remain that unlike bodies with, for example, responsibilities for human rights, international economic courts are ill-suited to the task of protecting cultural entitlements. The next chapters verify whether international adjudicators take cultural concerns into account, and more generally, what impact cultural policies have on the structure of international law.

In scrutinizing the relevant cases, the methodology is multilayered and has three strands: (1) empirical/exploratory; (2) doctrinal; and (3) evaluative. The first empirical strand involves an impressive amount of detailed research of the corpus of cases. These cases are identified by ascertaining whether disputes

brought before international economic courts involved various elements of cultural heritage. A multiplicity of techniques are employed to detect relevant cases. One such tool is the use of some large databases that are already in digital form; keywords are used to identify the relevant cases. Cases are identified as relevant because of the inherent interest of the cases or the circumstances surrounding them which are of relevance to the interplay between the protection of cultural heritage and the promotion of free trade and foreign direct investment. Outlier cases (that is, those which are atypical) are scrutinized too, because they reveal additional information.

Much more difficult is detecting those cases that despite not making formal reference to cultural concerns, still reflect fundamental cultural choices. These cases are detected using the available literature, qualified newsletters, and newspapers. Take, for instance, cultural differences in attitudes toward risk arising from food. As noted by Voon, although 'disputes in this field are not typically framed in terms of culture, consumers' perception and tolerance of risk in connection with food safety often has cultural foundations.'<sup>3</sup> For instance, 'the culture and attitudes of European citizens have tended to favor traditional foods and minimal processing ... In contrast, Americans have been more willing to accept new technologies.'<sup>4</sup> In the *EC-Hormones* case, the WTO panels and AB held that the EU had violated certain provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)<sup>5</sup> in restricting the trade of meat treated with growth hormones.<sup>6</sup> Only ten years after the AB ruling have the parties eventually settled the dispute, 'demonstrating the extreme difficulty involved in resolving conflicts arising from deeply held cultural beliefs.'<sup>7</sup> A cultural understanding of such disputes is also demanded by parallel developments at the UNESCO level, where certain types of food have been considered forms of intangible cultural heritage.

The second doctrinal strand of the adopted methodology examines the relevant jurisprudence on the basis of textual reading, explanation, and exegesis. The cases are scrutinized, discerning the facts of the controversy, the legal issues that the court decides, and the reasoning used by the court. The analysis aims at understanding the inner logic of the decision. In this regard, particular

3 Tania Voon, 'Culture, Human Rights, and the WTO', in Ana Filipa Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (Oxford: OUP 2013).

4 Id.

5 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 15 April 1994, 33 ILM 1144.

6 WTO Appellate Body report, *EC-Measures Concerning Meat and Meat Products* (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, circulated 16 January 1998, adopted 13 February 1998.

7 Voon, 'Culture, Human Rights, and the WTO'.

attention is paid to critical issues such as the standard of review, that is, the intensity of the scrutiny of the tribunal in reviewing state measures.

The third evaluative aspect of the work is based on the adoption of both cultural and economic law concepts. Almost invariably cultural heritage-related disputes involve a balance between the protection of cultural heritage and economic interests; albeit in some circumstances the arguments for protecting cultural heritage may be supported by economic reasoning. Traditionally scholars have adopted a single track—that is, they have used the traditional categories of cultural heritage law or economic law. Yet, because of their complexity and multidimensional nature, each case is assessed in light of both cultural and economic standards.

By bringing together the two aforementioned themes, the book is uniquely placed to assess whether different international economic ‘courts’ are adjudicating analogous cases in a similar fashion or whether there are significant divergences. The critical assessment of such jurisprudence may help detect common patterns, leading to the coalescence of general principles of law and/or customary law requiring the protection of cultural heritage in international law. While some research has been done with regard to the existence of such a principle in wartime,<sup>8</sup> the parallel question as to whether such a principle exists in times of peace has received limited scholarly attention. Finding out whether such a principle also exists in peacetime would be significant because general principles and customary international law are binding on states, irrespective of their adherence to specific treaties.

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8 Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: CUP 2001).

# Cultural Heritage in International Investment Law and Arbitration

The morning glory  
Twined round the bucket:  
I will seek elsewhere for water<sup>1</sup>



## 1 Introduction

The protection and sustainable use of cultural heritage may foster resilience and economic development, enabling individuals and communities to respond to major social and economic changes.<sup>2</sup> In parallel, the expansion of foreign direct investments facilitates the interaction between different societies and the free flow of ideas.<sup>3</sup> Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good. As a result, there can be mutual supportiveness between the promotion of foreign direct investment (FDI) and the protection of cultural heritage.

However, this is not always the case. Although economic globalization and international economic governance have spurred a more intense dialogue and interaction among nations—potentially promoting cultural diversity and providing the funds to recover and preserve cultural heritage—these phenomena can also jeopardize cultural heritage. Foreign direct investments in the extractive industries have the ultimate capacity to change cultural landscapes. In parallel, foreign investments in the cultural industries can induce cultural homogenization.

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1 Fukuda Chiyo-Ni, 'The Morning Glory', in Fukuda Chiyo-Ni, *Il Colore dell'Acqua*, M. Contrini and L. Cerrisi (eds) (Roma: La Ruota 2019).

2 Amartya Sen, 'How Does Culture Matter?' in Vijayendra Rao and Michael Walton (eds), *Culture and Public Action* (Stanford University Press 2004) 37–58; Amartya Sen, *Development as Freedom* (Oxford: OUP 1999).

3 Barnali Choudhuri, 'International Investment Law as a Global Public Good', (2013) 17 *Lewis & Clark LR* 481–520 (conceptualizing the promotion of foreign direct investments as a public good worth of being protected.)

The law of foreign investment is one of the oldest and most complex areas of international law and has gained pre-eminence in the field. More than three thousand international investment agreements (IIAs) govern foreign investments and provide foreign investors with direct access to international arbitration. States have signed such treaties to attract foreign investment and accord adequate legal protection to their investors. Rare in international law, these treaties give private parties standing to arbitrate disputes under international law and then enforce any award in their favor before domestic courts. Investment treaties provide extensive protection to investor rights in order to encourage foreign investment and foster economic development. While investment treaties differ in their details, their scope and content have been standardized over the years, as negotiations have been characterized by an ongoing sharing and borrowing of concepts.<sup>4</sup>

At the substantive level, investment treaties broadly define the notion of FDI, which typically includes ownership in businesses operating outside the country of origin of the investor, and they provide protection against discrimination, fair and equitable treatment, full protection and security, and assurances that the host country will honor its commitments regarding the investment. Other common provisions in investment treaties concern the repatriation of profits and the prohibition of currency controls that are worse than those in place when the treaty was signed. Investment treaties generally guarantee compensation in the event of nationalization, expropriation, or indirect expropriation, and clarify what level of compensation will be owed in such cases.

At the procedural level, most IIAs provide investors with direct access to an international arbitral tribunal. In so doing, they create a set of procedural rights for the direct benefit of investors. This is a major novelty in international law, as customary international law does not provide such a mechanism. The rationale for internationalizing investor–state disputes lies in the intended depoliticization of such disputes. The home country is no longer involved in litigating international disputes on behalf of its affected citizens; the host country is no longer subject to the political and/or military pressures of the so-called gun-boat diplomacy. The affected investor is no longer subject to the vagaries of diplomatic protection. Such protection entitles the home state to file a claim against the host state for wrongs committed against the citizens of the former state; nonetheless, it is traditionally perceived to be a right of the home state rather than a duty of the same. Arbitral awards shape the relationship between the state on the one hand, and private individuals on the other. Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.

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4 Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009).

When countries pursue economic growth, their policymakers may have an incentive to lower cultural standards to promote economic activities. If states nonetheless maintain a high level of cultural heritage protection, disputes may arise as foreign investors can claim that such policies affect their economic interests thereby breaching investment treaty provisions. Given the extraordinary increase of FDI flows in recent years, the privileged regime created by international investment law within the boundaries of the host state has increasingly determined a tension between investors' rights and cultural heritage protection. In some cases, foreign investors have claimed that cultural policies negatively affected their investment, thereby amounting to indirect expropriation. In other cases, the investors alleged discrimination and/or violation of the fair and equitable treatment standard. In sum, there is a variety of potential conflict areas between investor rights and state cultural policies.

This chapter contributes to the existing literature by examining several arbitrations that have emerged in the past few years. This recent jurisprudence highlights that arbitral tribunals are increasingly taking cultural concerns into account. Yet, the interplay between the protection of cultural heritage and the promotion of FDI in international investment law and arbitration continues to pose three main problems: (1) an ontological problem concerning the essence of international investment law and international law more generally; (2) an epistemological problem concerning the mandate of arbitral tribunals; and (3) a normative problem concerning the emergence of general principles of international law requiring the protection of cultural heritage in times of peace.

With regard to the ontological problem, two main questions arise: Is international investment law a self-contained regime, or is it part of general international law? Is general international law a fragmented system, or are there tools to enhance its unity? With regard to the epistemological problem, arbitral tribunals have limited jurisdiction: they have a limited mandate to assess state compliance with international investment law. They do not have a specific mandate to ascertain the adequate protection of cultural heritage unless the applicable law provides otherwise. Therefore, the key question is whether they can consider cultural concerns in the adjudication of investment disputes, and if so, to what extent. As to the normative problem, ascertaining the existence of general principles of international law requiring the protection of cultural heritage would strengthen the existing protection of cultural heritage at the international law level.

To address these questions, the chapter unfolds as follows. First, it highlights the diaspora of cultural heritage-related disputes before arbitral tribunals. Second, it discusses several recent arbitrations, examining them on the basis of the select jurisdictional requirements (the notion of investment) and claims of action (expropriation, compensation, fair and equitable treatment, full protection and security, non-discrimination, and

performance requirements). Third, the chapter critically assesses the resulting jurisprudence. The chapter thus examines whether arbitral tribunals consider cultural interests when adjudicating investment disputes. Finally, some conclusions are drawn.

## 2 The Diaspora of Cultural Heritage-Related Disputes before Arbitral Tribunals

As cultural heritage-related disputes often lie at the heart of state sovereignty, states have not been able to agree on establishing dedicated courts and tribunals. The absence of a World Heritage Court determines a sort of ‘diaspora’ of cultural heritage-related disputes before other courts and tribunals which may lack the mandate to adjudicate on the violation of cultural heritage law. With the notable exception of the ICJ, which has general jurisdiction,<sup>5</sup> and the International Criminal Court, which has the mandate to adjudicate on the damages or the destruction of cultural sites,<sup>6</sup> other courts may not have the mandate to adjudicate on the eventual violation of cultural heritage law. This raises the question as to whether cultural heritage receives adequate consideration in adjudication before such tribunals.

Due to the structural imbalance between the vague and nonbinding dispute settlement mechanisms provided by the international instruments adopted by UNESCO and the highly effective and sophisticated dispute settlement mechanisms available under international investment law, a growing number of investment disputes related to cultural heritage have been brought before arbitral tribunals.

The next sections examine and critically assess several recent arbitrations. Given the impact that arbitral awards can have on cultural governance and the growing number of investment arbitrations, scrutiny of this jurisprudence is particularly timely and important. Such study illuminates the way that international investment law responds to cultural concerns in its operation, thus contributing to the ongoing investigation of the role of international investment law within its broader matrix of international law. Although this jurisprudence

5 United Nations, Statute of the International Court of Justice, 18 April 1946, 3 Bevans 1179. *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 15 June 1962, Merits, 1962 ICJ Reports 6; *Case Concerning Certain Property (Liechtenstein v. Germany)*, 10 February 2005, Preliminary Objections, 2005 ICJ Reports 6; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 11 November 2013, Judgment, 2013 ICJ Reports 281.

6 Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, UNTS 2187, No. 38544, Article 8(2)(e)(iv).

is not homogenous, it can be scrutinized according to the taxonomy of select jurisdictional requirements (the notion of investment) and claims brought by foreign investors, including expropriation, compensation, fair and equitable treatment, full protection and security, non-discrimination, and performance requirements.

### 3 The Notion of Investment

International investment agreements are agreements concluded between states for the promotion and protection of reciprocal investments. Addressing the question as to whether certain economic activities relating to cultural heritage amount to a foreign investment is crucial for establishing an arbitral tribunal's subject-matter jurisdiction. Foreign individuals or companies are entitled to the substantive and procedural protections afforded by international investment treaties provided that such treaties classify them as 'investors' or their economic activities as 'investments.' If a given economic activity constitutes a protected investment, the investor will benefit from the substantive protections of the applicable IIA.

In order to ascertain whether cultural activities constitute a form of protected investment under a given IIA, one has to look at the specific text of the applicable treaty, as IIAs generally provide slightly different definitions of investment. If the parties have opted to resolve their dispute at the International Center for the Settlement of Investment Disputes (ICSID), then the ICSID Convention will be also applicable.<sup>7</sup> In this situation, the adjudicators must determine whether a given economic activity constitutes an investment under both the applicable IIA and the ICSID Convention.

With regard to the ICSID Convention, such an instrument does not provide a definition of investment.<sup>8</sup> Rather, it stipulates that ICSID jurisdiction extends 'to any legal dispute arising directly out of an investment.'<sup>9</sup> In practice, this has meant that commentators and arbitral tribunals have elaborated a number of criteria for defining the concept of investment.<sup>10</sup> Most notably, the leading test was articulated by *Salini v. Morocco*, which involved a dispute arising from the

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7 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), 18 March 1965, 17 U.S.T. 1270, Article 25(1).

8 Alex Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 *Chicago JIL* 287–309, 293.

9 ICSID Convention, Article 25(1).

10 Grabowski, 'The Definition of Investment Under the ICSID Convention', 293.

construction of a highway. The Salini test includes four elements: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host state's development.<sup>11</sup> These requirements embody a balance between the private interests of foreign companies and the public interest of the host state because they ensure that economic activities are protected as long as they contribute to the economic development of the host state.

While the ICSID Convention does not provide any definition of the term 'investment,' contemporary investment treaties tend to include broad and open-ended definitions of investment resting on the assumption that 'foreign investment tends to spur economic development.'<sup>12</sup> Yet, the quantitative tendency toward amplifying the definition of investment in IIAs has not necessarily lent more clarity to its qualitative understanding. To raise the quality of protected investments, several IIAs now require foreign investments to be made or owned 'in accordance with' or 'in conformity with' the laws of the host state, thus incorporating a 'legality requirement' in the definition of investment.<sup>13</sup> Whether the legality requirement should be presumed when the applicable treaty lacks such provision is contentious. Therefore, with regard to the notion of investment, the clarification of this concept has been left to the interpretation of arbitral tribunals.

In *Malaysian Historical Salvors v. Malaysia*, the arbitration centered on the question as to whether a salvage contract for the finding, identification, and recovery of an ancient shipwreck constituted an investment thus receiving protection under the UK–Malaysia BIT.<sup>14</sup> Malaysian Historical Salvors (MHS), a British salvage company, entered into a contract with the Malaysian Government to locate and salvage the cargo of the *Diana*, a vessel licensed by the East India Company that mysteriously sank in the Straits of Malacca on 5 March 1817.<sup>15</sup>

11 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

12 Barton Legum, 'Address at the ICSID, OECD, and UNCTAD Symposium: Defining Investment and Investor', 12 December 2005, at 2, available at <http://www.oecd.org/dataoecd/51/10/36370461.pdf>.

13 Michael Polkinghorne, 'The Legality Requirement in Investment Arbitration', (2017) 34 *Journal of International Arbitration* 149–168.

14 Agreement for the Promotion and Protection of Investments Malaysia–United Kingdom (Malaysia–UK BIT) 21 May 1981, 1989 U.K.T.S. No. 16.

15 The *Diana* vessel was used as one of the country's trading ships and exported cotton and opium to Canton, where the goods would be exchanged for silks, tea, and blue-and-white porcelain to bring back to India. See Dorian Ball, *The Diana Adventure* (Groningen: Kemper 1995) 29–35. For more information on the Indian trade, see K.N. Chaudhuri,

Under the terms of the contract, which was on a ‘no finds, no pay’ basis, all the costs of the salvage and its risks would be borne exclusively by the salvage company. Artifacts directly related to Malaysian history and culture would be retained by the government for study and exhibition in the National Museum, while the other recovered items would have been auctioned in Europe. The Malaysian Government would receive the sale proceeds, while paying a percentage of the sum to the company.<sup>16</sup> The salvage efforts took almost four years; when MHS found and salvaged the sunken vessel, it recovered nearly 24,000 complete pieces of Chinese blue-and-white porcelain. Divers discovered plates with fascinating patterns, featuring a splendid display of flowers, peacocks, and dragons.<sup>17</sup>

The dispute arose with regard to the proceeds of the auction and the number of items which Malaysia withheld from sale. As MHS contested the number of the salvaged items which were withheld from sale, the company commenced arbitration proceedings against the Malaysian government in Kuala Lumpur. The award dismissed the claim, and every challenge failed.

The claimant thus filed a Request for Arbitration at the ICSID in Washington DC, contending that there was a violation of the UK–Malaysia BIT. In particular, the claimant argued that its performance under the contract fell within the meaning of investment and that, accordingly, it was protected under the BIT. Substantially, the investor contended that the respondent had violated several investment treaty provisions, including the prohibition of unlawful expropriation.<sup>18</sup> For its part, the respondent objected to jurisdiction over the dispute, arguing that the contract was not an investment and that the subject matter of the agreement was purely contractual.<sup>19</sup>

This line of argument was upheld by the sole Arbitrator who dismissed the claim on jurisdiction.<sup>20</sup> The Arbitrator considered that the nature of the claimant’s activities was largely similar to that of a commercial salvage contract, and concluded that, under ICSID practice and jurisprudence, ‘an ordinary

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*Trade and Civilisation in the Indian Ocean: An Economic History From the Rise of Islam to 1750* (Cambridge: CUP 1985); K.N. Chaudhuri, ‘The Historical Roots of Capitalism in the Indian Ocean: A Comparative Study of South Asia, the Middle East, and China During the Pre-Modern Period’, in Sugata Bose (ed.), *South Asia and World Capitalism* (Delhi: OUP 1990) 87.

16 *Malaysian Historical Salvors SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, 11.

17 Ball, *The Diana Adventure*, at 142 and 149.

18 *Malaysian Historical Salvors v. Malaysia*, Award on Jurisdiction, paras 38–40.

19 *Id.* para. 41.

20 *Id.* para. 112.

commercial contract [could not] be considered as an investment.<sup>21</sup> Of all the hallmarks defining the notion of investment (economic profit, duration, assumption of risk, and contribution to the economic development of the host state), the Arbitrator paid particular attention to the final criterion: whether the contract made a significant contribution to the economic development of the state. He ultimately held that the salvage contract did not materially benefit the Malaysian public interest, rather bringing benefits of a cultural and historical nature to the public.<sup>22</sup> Finally, the arbitrator held that a significant contribution to the economic development of the host state is necessary in order for an economic activity to be considered an investment under the ICSID Convention, otherwise any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as investment.<sup>23</sup> The Arbitrator thus concluded that the contract was not an investment within the meaning of Article 25(1) of the ICSID Convention.<sup>24</sup>

The award raised some debate. First, the fact that the salvage contract was not easily recognizable as an investment weighed heavily in assessing whether there existed an investment at all. A salvage contract may seem an unthinkable type of investment, *vis-à-vis* more traditional investments such as oil exploration. Still, the notion of investment has evolved through time. Second, the salvage of ancient shipwrecks can contribute to the social, cultural, and economic development of host states.<sup>25</sup> Third, there is no minimum threshold for qualifying an economic activity as an investment. The fact that traditionally investment disputes have involved conspicuous investments does not exclude the possibility that smaller investments are protected by BITs. As an Arbitral Tribunal stated, ‘the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small.’<sup>26</sup>

Some of these criticisms were upheld by the *ad hoc* Annulment Committee, which annulled the award.<sup>27</sup> MHS challenged the award on the ground that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction,

21 *Malaysian Historical Salvors v. Malaysia*, Award on Jurisdiction, para. 112.

22 *Id.* para. 132.

23 *Id.* para. 132.

24 *Id.* para. 146.

25 Valentina Vadi, ‘Investing in Culture: Underwater Cultural Heritage and International Investment Law’ (2009) 42 *Vanderbilt Journal of Transnational Law* 853–904, 886.

26 *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, at 51.

27 *Malaysian Historical Salvors, Sdn, Bhd v. The Government of Malaysia*, Decision on the Application for Annulment, 16 April 2009.

which it possessed over the dispute. The Claimant contested the overly restrictive notion of investment adopted by the Tribunal on three grounds. First, on the basis of the *travaux préparatoires* of the ICSID Convention, the claimant highlighted that the drafters of the ICSID Convention decided against defining the notion of investment and setting any monetary floor for this concept. Second, the Claimant challenged the elevation of the hallmarks of an investment to the level of jurisdictional conditions. Third, the Claimant contested the introduction of a further jurisdictional requirement of contribution to the economic development of the host state and the quantitative assessment of such contribution. The Respondent countered that the ICSID annulment is a narrowly circumscribed remedy and that the Tribunal had not manifestly exceeded its powers.<sup>28</sup>

The majority of the *ad hoc* Annulment Committee established that a salvage contract is a form of investment on the basis of the broad definition of investment provided by Article 1 of the UK–Malaysia BIT. Such treaty defines ‘investment’ as ‘every kind of asset’ and includes in the definition ‘claims to money or to any performance under contract having a financial value’ and ‘business concessions ... including concessions to search for, cultivate, extract or exploit natural resources.’<sup>29</sup> Therefore, the majority of the Committee reached the conclusion that the Arbitrator exceeded its powers by failing to exercise jurisdiction and that he manifestly did so because he did not take into account the BIT mentioned above, elevated certain criteria to jurisdictional requirements, and did not consider the *travaux préparatoires* of the ICSID Convention.

In fact, the salvage activities had an economic rationale—thus constituting a type of human activity in which the profit sought was economic or monetary in nature. The project had a certain duration, as the salvage took years of research and development. It also involved an element of risk, as the contract was made on a ‘no finds, no pay’ basis, which is a well-established practice in marine salvage under which all the costs and risks of the salvage are borne exclusively by the salvage company. Finally, the operation had significance for the host state development. In fact, the conservation and exhibition of several cultural resources at a museum could contribute, albeit indirectly, to the country’s cultural flourishing and sustainable development. Therefore, the Annulment Committee concluded that the Tribunal exceeded its powers by failing to exercise jurisdiction with which it was endowed by the UK–Malaysia

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28 *Malaysian Historical Savors, Sdn, Bhd v. Government of Malaysia*, Decision on Application for Annulment, para. 44.

29 Malaysia–UK BIT, Article 1.

BIT and the ICSID Convention, because it did not consider the definition of investment provided by the same BIT.

In other interesting cases, arbitral tribunals declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard important cultural concerns. In 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the ICSID.<sup>30</sup> The investors contested decisions made by the domestic Land Management Agency about whether the claimants' property was located within the protected area inhabited by the Ngöbe Buglé Indigenous peoples.<sup>31</sup>

The Ngöbe have traditionally relied on subsistence activities such as farming, fishing, and hunting in their land, which originally extended from the Pacific Ocean to the Caribbean Sea.<sup>32</sup> Nowadays, they predominately live in the Comarca Ngöbe Buglé, an area of Western Panama that is specifically designated to protect their cultural and political autonomy.<sup>33</sup> The 1997 law establishing the Comarca Ngöbe Buglé recognized the right of Indigenous persons to collective ownership of land and prohibited private property within these zones.<sup>34</sup> In the region, only land that has been privately held before 1997 can be sold to private parties, and Comarca's authorities retain a right of preferential acquisition of any privately owned land for sale.<sup>35</sup> Human rights scholars have interpreted this and similar laws to constitute 'one of the foremost achievements in terms of the protection of Indigenous rights in the world.'<sup>36</sup>

30 *Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID ARB/15/14, Award, 12 October 2018.

31 *Id.* para. 14.

32 Cindy Campbell, 'Protecting the Ngäbe Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development' (2014) 2 *American Indian Law Journal* 547–588, 547.

33 *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, ICSID ARB/15/14, Motivación de la Decisión sobre las Excepciones Preliminares de la Demandada en Virtud de la Regla 41(5) de las Reglas de Arbitraje del CIADI del 27 de Enero de 2016, para. 22; *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantor Anbadi c. República de Panamá*, ICSID ARB/15/14, Laudo, 12 October 2018, para. 206.

34 IACtHR, *Kuna Indigenous People of Madungandí v. Panama*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (ser. C) No. 284, para. 59, Judgment, 14 October 2014; *Álvarez y Marín Corporación y Otros c. Panamá*, Laudo, para. 208.

35 *Álvarez y Marín Corporación y Otros c. Panamá*, Laudo, para. 209.

36 James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, UN Human Rights Council, The Status of Indigenous Peoples' Rights in Panama, A/HRC/27/52/Add.1, 3 July 2014, para. 13.

The investment at the heart of the dispute comprised ‘four farm properties situated along the Panamanian coast, which the investors planned to develop as an eco-tourist project.’<sup>37</sup> The investors bought these properties, supposedly belonging to the Comarca, from an intermediary. Because the press questioned the legitimacy of the acquisition, the National Authority for Lands Administration located two of the claimants’ properties outside this special zone.<sup>38</sup> Reportedly, Indigenous peoples disliked the Report and ‘this led to the invasion of these properties.’<sup>39</sup> The claimants alleged that Panama’s treatment of their investment constituted an indirect expropriation and a breach of the fair and equitable treatment as well as the full protection and security standards.<sup>40</sup> Panama denied having violated the treaties and raised several jurisdictional objections, arguing mainly that the investments had been unlawfully acquired.

The Arbitral Tribunal declined jurisdiction over the case on the basis of the investors’ lack of compliance with domestic law.<sup>41</sup> Although neither of the two treaties invoked by the investors contained an explicit legality requirement, the Tribunal held that such a requirement should be deemed implicit in all investment treaties, so that only investments acquired legally could benefit from a treaty’s protection.<sup>42</sup> The Tribunal noted that the law establishing the Comarca and the Panamanian Constitution aimed at protecting Indigenous peoples’ cultural, economic, and social well-being.<sup>43</sup> It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.<sup>44</sup>

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37 Zoe Williams, ‘Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections’, *Investment Arbitration Reporter*, 13 April 2016, 2.

38 *Álvarez y Marín Corporación S.A. y Otros c. República de Panamá*, Motivación de la Decisión sobre las Excepciones Preliminares, para. 26.

39 Id. para. 27.

40 Id. para. 28.

41 *Álvarez y Marín Corporación y Otros c. Panamá*, Laudo, para. 296 (‘*El Tribunal ha decidido que no merecen protección ius-internacional aquellas inversiones en las que el inversor, al momento de realizarlas, haya incurrido en un incumplimiento grave de la legislación nacional.*’).

42 Id. para. 118 (noting that ‘*el requisito de legalidad, aunque no expresado explícitamente en los Tratados, forma parte implícita del concepto de inversión protegida.*’)

43 Id. paras 318–319.

44 Id. para. 327 (‘*Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.*’).

More recently, in *Cortec v. Kenya*,<sup>45</sup> an Arbitral Tribunal established under the 1999 Kenya–UK BIT held that it lacked jurisdiction to hear a dispute concerning a mining project that did not comply with domestic environmental law. The Tribunal found that to be protected under international investment law, the mining license at issue had to substantially comply with domestic law. Hence, the Tribunal determined that the license was not an investment for the purposes of the applicable investment treaty.

Cortec planned to develop a niobium and rare earths mine at Mrima Hill in Kenya from 2007.<sup>46</sup> Mrima Hill is located about 70 kilometers south of Mombasa and hosts forests (*kaya*) which are ‘rich in biodiversity and rare species’ and are sacred for, and revered by, the local Indigenous communities who consider such forests as the sacred abodes of their ancestors.<sup>47</sup> Cortec was initially granted a prospecting license for its project and subsequently granted a mining license for an area that included Mrima Hill. However, following a change of government, the mining license was revoked in 2013.<sup>48</sup> In Kenya’s view, the conditions for the mining license had not been met, as Kenyan law prohibited mining in Mrima Hill. Cortec contended that this revocation of the mining license contravened multiple provisions in the BIT.

According to the government, ‘the license was void *ab initio* for illegality and did not exist as a matter of law.’<sup>49</sup> In fact, under domestic law, ‘a number of key approvals and consents were required and conditions were to be satisfied before [the investors] could be allowed to obtain a valid mining license.’ Some of these requirements arose out of ‘the special protected status of Mrima Hill as a forest reserve, nature reserve, and national monument.’<sup>50</sup> The same Kenyan *Mining Act* has prohibited all prospecting and mining at Mrima Hill since 1997.<sup>51</sup> Even domestic courts ruled that the mining license was ‘void *ab initio* on the basis ... that the mining of Mrima Hill was by statute prohibited’ and that, in any event, the claimants had not complied with requirements under Kenyan law.<sup>52</sup>

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45 *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 October 2018.

46 *Id.* para. 1.

47 *Id.* para. 42.

48 *Id.* para. 2.

49 *Id.* para. 4.

50 *Id.* para. 5.

51 *Id.* para. 43.

52 *Id.* para. 7.

The Arbitral Tribunal concluded that the applicable BIT ‘protects only lawful investments.’<sup>53</sup> In order to be protected, a mining license must be in compliance with the domestic law that establishes and governs it.<sup>54</sup> Instead, Cortec’s mining license was procured by the claimants’ successful lobbying but was void from the outset because it breached Kenyan law.<sup>55</sup> The Tribunal held that such a breach of domestic law could not be waived by politicians.<sup>56</sup> Since there was no mining license, there was no basis for Tribunal jurisdiction under the BIT.<sup>57</sup>

In 2019, Cortec sought an annulment of this award, arguing that regulatory compliance was not a jurisdictional issue as there was no legality requirement in the UK–Kenya BIT. According to the claimant, the reading of a legality requirement into the BIT and the resulting conclusion (that there was no investment because the mining license was nul and void) amounted to an extra-jurisdictional exercise of the Tribunal’s powers. In parallel, the company also claimed that the Tribunal failed to exercise jurisdiction over Cortec’s investments.

The *ad hoc* Annulment Committee dismissed each of these arguments.<sup>58</sup> For the Committee, reading an implicit legality requirement into the BIT is tenable; the Committee thus upheld the Tribunal’s finding that the mining license was not a protected investment because it failed to comply with domestic law. As stated by the *ad hoc* Committee, ‘while international law protects property rights, the existence and scope of those rights are determined by municipal law; and in this case no such rights existed to protect.’<sup>59</sup>

In conclusion, the *Cortec* Tribunal found that, even in the absence of a legality requirement in the text of the applicable BIT, the legality of the investment is a jurisdictional prerequisite for its protection under international investment law. While the jurisprudence of arbitral tribunals remains divided,<sup>60</sup> the

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53 Id. para. 9.

54 Id. paras 222, 319, and 322.

55 Id. paras 11, 222, and 364–365.

56 Id. para. 105.

57 Id. para. 328.

58 *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021.

59 Id. para. 143.

60 See e.g. *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 5.29 (noting that the respondent challenged the lawfulness of the claimant’s behaviour only after the commencement of the proceeding, and not when the investment was made).

Annulment Committee upheld the line of interpretation supporting the existence of implicit legality requirements.

In *South American Silver Limited (SAS) v. Bolivia*, the Bermudan subsidiary of a Canadian company had acquired ten mining concessions near the village of Malku Khota in the Bolivian province of Potosí.<sup>61</sup> The area of the concessions was inhabited by Indigenous communities, which accused the company of polluting the environment and disrespecting sacred spaces. Resulting tensions between the local communities and the investor culminated in violent clashes. Consequently, the Bolivian government intervened and issued a decree reversing the ownership of the mining concessions to Bolivia. SAS claimed that the reversion constituted unlawful expropriation under Article 5 of the Bolivia–United Kingdom BIT.

On jurisdictional grounds, Bolivia alleged that the claimant had violated both domestic and international law protecting the rights of the Indigenous communities that lived in the area, and that such violations operated as a jurisdictional or admissibility bar.<sup>62</sup> The Tribunal noted that the treaty did not contain a legality requirement of the investment. However, the parties seemed to agree that ‘the requirement of legality of the investment is implicit in the international investment arbitration system and therefore operates even when a treaty provision is absent.’<sup>63</sup>

Nonetheless, the Tribunal noted that ‘none of the alleged violations have the legal consequence, under the laws of Bolivia or international law, of depriving SAS of the ownership of ... the corresponding assets, or of eliminating the existence of the investment.’<sup>64</sup> In the Tribunal’s view, ‘the Respondent has not shown that the alleged violations go to the essence of the investment such that it must be considered illegal.’<sup>65</sup> According to the Tribunal, the investment remained lawful and thus it was still protected under the BIT.

To sum up, assuming the existence of implicit legality requirements in all IIAs can favor the interpretation and development of investment law in a manner

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61 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Claimant’s Statement of Claim and Memorial, 24 September 2014, para. 9.

62 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015, para. 4.

63 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 456.

64 *Id.* para. 463.

65 *Id.* para. 470.

that is compatible with domestic law and, albeit indirectly, general international law.<sup>66</sup> In addition to requiring compliance with international treaties (as incorporated by the domestic law of the host State), such a legality requirement has also been interpreted as broadly as to include compliance with customary international law, general principles, and peremptory norms of international law.<sup>67</sup> For instance, the *Phoenix* Tribunal held that ‘jurisdictional requirements ... cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ... protection should be granted to investments made in violation of the most fundamental rules of protection of human rights.’<sup>68</sup> As Moloo and Khachaturian further point out, ‘in the investment law context, requiring that foreign investors be subjected to basic international legal principles when they are themselves asserting international legal rights against the host state is hardly unreasonable.’<sup>69</sup>

Finally, as mentioned, IIAs are agreements concluded between states for the promotion and protection of *reciprocal* investments. Addressing the question as to whether certain economic activities relating to cultural heritage amount to a *foreign* investment is crucial to establishing an arbitral tribunal’s subject-matter jurisdiction. In *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, the investors filed an investor–state arbitration claim under the France–Peru BIT relating to the proposed development of property in a protected historical district.<sup>70</sup> The investors had acquired oceanfront land on the periphery of

66 See e.g. *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 138 (noting that although the Energy Charter Treaty does not include a legality requirement, it does not protect ‘all kinds of investments, including those contrary to domestic or international law.’); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101 (affirming the principle that investments made in contravention of the laws of the host state cannot be protected by a BIT); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

67 Eric De Brabandere, ‘Human Rights and International Investment Law’, in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham: Edward Elgar 2019) chapter 20.

68 *Phoenix Action, Ltd. v. Czech Republic*, Award, para. 78.

69 Rahim Moloo and Alex Khachaturian, ‘The Compliance with the Law Requirement in International Investment Law’ (2011) 34 *Fordham International Law Journal* 1473–1501 (discussing the presence of an implicit obligation that an investment must accord with domestic and international legal principles for the claims related to that investment to be admissible.).

70 *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015.

Lima and planned to develop a tourism business.<sup>71</sup> However, a few years later, the National Institute of Culture adopted a resolution precluding any form of construction on the property due to the historical significance of the place. In fact, the parcels of land were adjacent to the *Morro Solar*, the site of the 1881 battle of San Juan between Peruvian and Chilean forces during the War of the Pacific.<sup>72</sup> According to the investor, the resolution deprived the investment of any value.<sup>73</sup> Peru raised several objections to the claims, contending that the corporate restructuring by which a French national acquired shares in Gremcitel, a Peruvian company, was an abuse of process.<sup>74</sup> In Peru's view, the hurried transfer of shares, which allegedly made the investor the majority shareholder of Gremcitel, was carried out for the sole purpose of attracting the BIT protection at a time an otherwise domestic dispute was foreseeable.<sup>75</sup>

The Tribunal considered it 'now well-established ... that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate as such, including where this is done with a view to shielding the investment from possible future disputes with the host state.'<sup>76</sup> It added, however, that corporate restructuring with the purpose of seeking treaty protection when a dispute is anticipated may constitute an abuse of process.<sup>77</sup> In the Tribunal's opinion, the Claimants could foresee that the Resolution was forthcoming, and it thus declined to exercise jurisdiction.<sup>78</sup>

#### 4 Expropriation

International investment treaties provide, *inter alia*, for protection against unlawful expropriation. This raises two questions: whether a state action constitutes expropriation, and if it does, whether the expropriation is unlawful. Treaty provisions lack a precise definition of expropriation, and their languages encompass a potentially wide variety of state activities that may interfere with foreign investments. IIAs usually clarify that expropriatory measures are lawful if adopted: (1) for a public purpose; (2) on a non-discriminatory basis; (3) in accordance with due process of law; and (4) on payment of compensation.

71 Id. paras 11–18.

72 Id. para. 7.

73 Id. para. 65.

74 Id. para. 69.

75 Id. para. 85.

76 Id. para. 184.

77 Id. para. 185.

78 Id. paras 191 and 197.

Failure to satisfy any of these requirements will imply that the expropriation is unlawful and thus requires compensation and damages.

Expropriation includes both direct and indirect expropriation. Direct expropriation is usually done through formal transfer of title or overt seizure of property. Indirect expropriation indicates measures that do not directly take investment property but interfere with its use, depriving the owner of its economic benefit.<sup>79</sup> While the concept of direct expropriation coincides with the notion of taking, the precise boundaries of indirect expropriation remain unclear.<sup>80</sup> Under this rubric, regulation aimed at protecting cultural heritage may be classified as a form of indirect expropriation if it unduly affects the economic interests of foreign investors. While the difference between an illegitimate expropriation and a legitimate regulatory measure is easy to distinguish in theory, it is hard to identify in practice.

#### 4.1 *Direct Expropriation*

The most severe form of interference with property, expropriation has traditionally involved the direct taking of property of a foreign investor.<sup>81</sup> Direct expropriation thus involves transfer of property, nationalization of an enterprise, or transfer of ownership to the state. Several cultural heritage-related arbitrations have involved direct expropriation claims.

The case of *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica* involved a particularly beautiful natural area including over thirty kilometers of Pacific coastline, as well as numerous rivers, springs, forests, and mountains in Costa Rica.<sup>82</sup> In addition to its geographical and geological features, the property was home to a dazzling variety of flora and fauna indigenous to the tropical forest habitat. Costa Rica directly expropriated the property of American investors to enlarge the Guanacaste Conservation Area, which was subsequently added to the World Heritage List. As the investors deemed that the compensation was inadequate, they filed a claim before the ICSID.

The ICSID Tribunal awarded compensation to the investors, based on the property's fair market value. In doing so, the Tribunal restated that international

79 Brigitte Stern, 'In Search of the Frontiers of Indirect Expropriation', in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation* (Leiden: Brill 2008) 29–52, 35.

80 Peter D. Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 *Global Business LR* 189–209, 196.

81 Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law*, 3rd edition (Oxford: OUP 2022) chapter 6.

82 *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, Award, 17 February 2000, ICSID Case No ARB/96/1, 39 ILM (2000) 1317.

law permits the host state to expropriate foreign-owned property for a public purpose and against prompt, adequate, and effective compensation. However, the legitimate public purpose of the state measure does not affect either the nature or the measure of the compensation. The Tribunal expressly noted that ‘the international source of the obligation does not alter the legal character of the taking for which adequate compensation must be paid.’<sup>83</sup>

The Tribunal famously held that ‘Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State’s obligation to pay compensation remains.’<sup>84</sup> Therefore, such a ruling reflects the concept that any direct expropriation requires a public purpose and adequate compensation to be lawful.

In *South American Silver Limited (SAS) v. Bolivia*, the investor alleged that the host state expropriated the company’s mining concessions near the village of Malku Khota in the Bolivian province of Potosí.<sup>85</sup> The company had acquired ten mining concessions in an area inhabited by Indigenous communities since time immemorial. As tensions between the local communities and the company culminated in violent clashes, the Bolivian government reversed the ownership of the mining concessions to Bolivia. The investor claimed that the reversion constituted unlawful expropriation under Article 5 of the Bolivia–United Kingdom BIT. For the company, the government pressed for the nationalization of the project for economic reasons, namely, for appropriating the benefits associated with the discovery of a large deposit of silver, indium, and gallium.<sup>86</sup> For the claimant, the expropriation did not have a public purpose as ‘it b[ore] no logical or proportional relationship with the stated objective of pacifying the area.’<sup>87</sup>

For Bolivia, the reversion of the concessions to state ownership was justified by a public interest: the need to restore public order in the area and to protect the rights of the Indigenous communities.<sup>88</sup> Bolivia noted that according

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83 Id. para. 71.

84 Id. para. 72.

85 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013–15, Claimant’s Statement of Claim and Memorial, 24 September 2014, para. 9.

86 Id. para. 96.

87 Id. para. 144.

88 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013–15, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 31 March 2015 (unofficial English translation) paras 6–7.

to the Bolivian Constitution, Indigenous communities have the right to land and the right to prior and informed consultation and benefit-sharing for the exploitation of the natural resources that are located in their territory.<sup>89</sup> Moreover, they have autonomy and the power to define their development 'in accordance with their cultural criteria.'<sup>90</sup> Bolivia also noted that Indigenous peoples consider Malku Khota as a sacred place, despite the fact that it has been exploited since Spanish colonization, and 'consider themselves ancestral owners of the minerals of the Andean mountains.'<sup>91</sup> Accordingly, Indigenous communities opposed the project perceiving it as contrary to their ancestral beliefs and harmful to the environment on which their survival depended.<sup>92</sup> From its perspective, the government 'did not have any other option but to ... re-establish the public order.'<sup>93</sup>

The Tribunal acknowledged that the claimant's community relations program had 'serious shortcomings', and that the reversion decree thus had a public purpose and social function. Nonetheless, the Tribunal concluded that the host state's annulment of mining concessions amounted to an unlawful expropriation because it failed to compensate the company.<sup>94</sup> The Tribunal found that Bolivia did not breach any other treaty standard of protection, and only awarded the investor its sunk costs.<sup>95</sup>

#### 4.2 *Indirect Expropriation*

Several investment treaty arbitrations have dealt with the question of whether state measures allegedly aimed at protecting cultural heritage may be deemed an indirect expropriation. For instance, in *Southern Pacific Properties v. Egypt*, the dispute arose after Egypt cancelled the development of a tourist residential complex near the pyramids, arguing that it had an obligation to do so under the World Heritage Convention.<sup>96</sup> The claimant contended that the cancellation had resulted in an uncompensated and thus unlawful expropriation not truly based on the WHC.<sup>97</sup> Rather, according to the claimant, Egypt used the WHC as

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89 Id. para. 47.

90 Id.

91 Id. paras 90, 71–2.

92 Id. para. 80.

93 Id. para. 84.

94 Id. para. 610.

95 Id. para. 932.

96 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award on the Merits, 20 May 1992, ICSID Case No ARB/84/3, paras 150–158.

97 Id. paras 150–153.

a 'post-hoc rationalization', since the pyramids had been included in the World Heritage List only *after* the cancellation of the project.<sup>98</sup>

The Arbitral Tribunal held that the WHC 'by itself [did] not justify the measures taken by the Respondent to cancel the project, nor [did] it exclude the Claimants' right to compensation.'<sup>99</sup> In fact, for the Tribunal, only after the pyramids fields were nominated and inscribed on the World Heritage List did the obligations stemming from the WHC become binding on Egypt. Accordingly, only after this listing, 'a hypothetical continuation of the claimant' activities interfering with antiquities in the area could [have] be[en] considered as unlawful from the international point of view.<sup>100</sup>

Experts in international cultural heritage law criticized the award, as the WHC requires protection of cultural sites of outstanding and universal value irrespective of their inscription on any list. The state obligation to protect world heritage rather flows from ratification of the WHC.<sup>101</sup> In fact, states should protect cultural sites because of their outstanding and universal value rather than postponing such protection until the site is inscribed on the World Heritage List. Other international courts have upheld such a line of interpretation, including the *Glamis Gold* Tribunal.<sup>102</sup>

In *Glamis Gold v. United States of America*,<sup>103</sup> a Canadian mining company planned to mine gold on federal land in southeastern California (the Imperial Project). Nonetheless, the area in and around the Imperial Project was used by pre-contact Native Americans as a pilgrimage route. Therefore, the Quechan, a Native American tribe, opposed the project as it would destroy the Trail of Dreams, a sacred path still used for performing ceremonial practices.<sup>104</sup> Although the area was not listed on the World Heritage List, its cultural importance for the tribe was similar to the importance of Mecca or Jerusalem

98 Id.

99 Id. para. 154.

100 Id.

101 Patrick O'Keefe, 'Foreign Investment and the World Heritage Convention' (1994) 3 *International Journal of Cultural Property*, 259–266, 259–261 (referring to Article 12 of the WHC: 'The fact that a property belonging to the cultural and natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.')

102 Patrick J. O'Keefe and Lyndell Prott, *Cultural Heritage Conventions and Other Instruments* (London: Institute of Art and Law 2011); Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 121–123.

103 *Glamis Gold, Ltd. v. United States of America*, Award, 8 June 2009, available at <http://www.state.gov/documents/organization/125798.pdf>.

104 Id. para. 107.

for other believers.<sup>105</sup> The Department of the Interior withdrew the Imperial Project from further mineral entry for 20 years to protect historic properties. However, when permission for the project was granted, the State Mining and Geology Board enacted emergency regulations requiring the backfilling of all open-pit mines to recreate the approximate contours of the land prior to mining.<sup>106</sup>

The investor filed an investment treaty arbitration claiming that state measures amounted, *inter alia*, to an indirect expropriation of its investment in violation of Article 1110 of the NAFTA.<sup>107</sup> According to the claimant, the expropriation began with the federal government's refusal to approve the claimant's plan of operations and continued with the backfilling requirement. In particular, backfilling would be uneconomical and arbitrary, since it would make the mining operation unprofitable and it would not be rationally related to its stated purpose of protecting cultural resources.<sup>108</sup> The claimant argued that whereas taking gold out of the ground destroys any cultural resources on the surface, 'putting the dirt back in the pit actually does not protect those resources' but may lead to the burial of more artifacts and cause greater cultural loss.<sup>109</sup>

In its award, the Arbitral Tribunal held that the complained measures did not amount to an indirect expropriation.<sup>110</sup> To distinguish a non-compensable regulation and a compensable expropriation, the Tribunal established a two-tiered test to ascertain: (1) the extent to which the measures interfered with reasonable economic expectations; and (2) the purpose and character of the governmental actions. First, the Tribunal determined that the claimant's investment remained profitable and that the backfilling requirements did not cause a sufficient economic impact on the investment to constitute an expropriation.<sup>111</sup> Second, the Tribunal considered the measures to be rationally related to their stated purpose.<sup>112</sup> The Tribunal admitted that 'some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling,' but concluded that, without such measures, significant pits and waste piles in the near vicinity would harm the landscape.<sup>113</sup> Therefore, it concluded

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105 Id. paras 103–108.

106 Id. para. 183.

107 Id. para. 359.

108 Id. para. 321.

109 Id. para. 687.

110 Id. para. 360.

111 Id. paras 366 and 536.

112 Id. para. 803.

113 Id.

that there was a reasonable connection between the harm and the proposed remedy.

In the *Glamis Gold* case, the arbitrators took the WHC into account when considering the protection that the US afforded to Indigenous cultural heritage. The Tribunal pointed out that ‘The Convention makes special note that the fact of a site’s non-inclusion on the register does not signify its failure to possess outstanding universal value.’<sup>114</sup> Remarkably, the Arbitral Tribunal also referred to Article 12 of the WHC, which requires States to protect their cultural heritage even if it is not listed in the World Heritage lists provided that it satisfies the requirements for being considered of outstanding and universal value.<sup>115</sup> This is a welcome move as Article 12 of the WHC covers a wide range of cultural sites including those of minorities, Indigenous peoples, and historically disadvantaged sectors of society – heritage that historically has not featured prominently in the lists, despite its outstanding and universal significance.

The relevance of the WHC, irrespective of whether and, if so, when a given site has been inscribed on the World Heritage List, will likely be debated in a pending case concerning a world heritage site that was inscribed on the World Heritage List in 2021. In 2015, Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. initiated a claim against Romania under the Romania–Canada BIT and the Romania–United Kingdom BIT.<sup>116</sup> The claimants planned to develop a gold mine in *Roşia Montană*, a historic mining district which is located in the Apuseni Mountains of Transylvania, Romania, and has been mined intermittently since Roman times.<sup>117</sup> The project envisaged the exploitation of gold and silver deposits at *Roşia Montană* using a conventional open-pit mine with the use of cyanide in the extraction process.<sup>118</sup> However, the state reportedly rejected the claimants’ environmental impact assessment and did not allow exploration at the *Roşia Montană* site. The claimant alleged that the government had breached its treaty obligations by preventing implementation of the project without compensation and effectively depriving the investors of their investment’s value.<sup>119</sup>

114 *Glamis Gold Ltd. v. United States of America*, ICSID Award, NAFTA Chapter 11, 8 June 2009, footnote 194.

115 Federico Lenzerini ‘Article 12: Protection of Properties Not Inscribed on the World Heritage List’ in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (OUP Oxford 2008) 201–18, 205.

116 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Request for Arbitration, 21 July 2015.

117 *Id.* para. 4.

118 *Id.* para. 24.

119 *Id.* paras 7 and 37.

In 2017, Romania applied to UNESCO to have the *Roşia Montană* site listed on the World Heritage List. In 2021, the mining landscape was inscribed on the UNESCO World Heritage in Danger List.<sup>120</sup> In fact, UNESCO noted that the current mining proposal risks affecting the integrity of the property and requested the Romanian government to prevent the extension of active mining licenses on the site. As the arbitration is still pending at the time of writing, it is unclear what effects, if any, the UNESCO inscription will have on the dispute.

In *Gosling v. Mauritius*, British investors planned to build a resort at *Le Morne*, a UNESCO World Heritage site. A rocky mountain overlooking the Indian Ocean in the southwest of Mauritius, *Le Morne* was used as a shelter by runaway slaves, the so-called maroons, through the 18th and the 19th centuries.<sup>121</sup> Protected by the mountain's almost inaccessible cliffs, the maroons formed small settlements on the summit of *Le Morne*. The landscape thus constitutes a symbol of the slaves' fight for freedom and heroic resistance to slavery. As the government denied a building permit to safeguard the site, the investors filed an investment treaty claim, contending that such denial amounted to an indirect expropriation of their investment as no compensation had been paid.<sup>122</sup>

The respondent counterargued that the investors had never acquired the right to develop the area, as no permission had been granted.<sup>123</sup> It also contended to have exercised its police powers in good faith when pursuing 'its paramount policy objective' of inscribing *Le Morne* on the World Heritage List. Moreover, the claimants admitted to knowing this objective before making plans to develop the property.<sup>124</sup> As the state clarified, 'it was impossible for Mauritius to have both the UNESCO inscription of *Le Morne* and the claimants' project' because 'the World Heritage Committee requested that the government not allow more development at *Le Morne*.'<sup>125</sup> Finally, for the government, there was no expropriation, because the area was not deprived of its entire economic value; rather, it retained at least a quarter of its market value.

120 UNESCO, World Heritage Convention, List of World Heritage in Danger, <<https://whc.unesco.org/en/danger/>> (last visited on 18 February 2022).

121 UNESCO, World Heritage Convention, Le Morne Cultural Landscape, <<https://whc.unesco.org/en/list/1259/>> (last visited 18 February 2022).

122 *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd v. Republic of Mauritius (Gosling v. Mauritius)* ICSID Case No. ARB/16/32, Award, 18 February 2020, paras 167–8.

123 *Id.* para. 242.

124 *Id.* para. 209.

125 *Id.* para. 210.

The Arbitral Tribunal held that the investors had never obtained the necessary permits and authorizations and thus did not have any rights to develop the area.<sup>126</sup> Had the claimants acquired development rights, then interference with such rights would have given rise to a justifiable claim for compensation.<sup>127</sup> Nonetheless, as ‘no Investment Certificate was ever issued’ nor did the Claimants acquire development rights, the Tribunal dismissed the claim of indirect expropriation.

In another pending case, *Elitech and Razvoj Golf v. Croatia*, the investors planned the construction of a luxury resort on a hill overlooking Dubrovnik, a World Heritage Site. The project included the construction of golf courses, hotels, and villas. Reportedly, the tourist complex would have significantly changed the city, having a massive size in comparison to the city proper. Local residents opposed the project complaining that it would damage the environment and threaten Dubrovnik’s World Heritage Site status. Therefore, they filed claims before domestic administrative courts that put the project on hold. The company thus filed an investor–state arbitration against Croatia for obtaining compensation under the Croatia–Netherlands BIT.<sup>128</sup> As the case is still in an early phase, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it.

Indirect expropriation claims relating to state measures concerning Indigenous cultural heritage also deserve scrutiny. Among the groups that are often disproportionately affected by the adverse impact of business activities are Indigenous peoples, peasants, and minorities.<sup>129</sup> Indigenous peoples’ cultural values and rights associated with their ancestral lands are particularly at risk.<sup>130</sup> Under human rights law, states are required to adopt appropriate measures to ensure effective protection against rights violations linked to business activities.<sup>131</sup> Nonetheless, investors can claim that such measures constitute a form of indirect expropriation. Therefore, it is worth examining whether, and if so how, arbitrators have considered the rights of

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126 Id. para. 242.

127 Id.

128 *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, pending.

129 United Nations, Economic, and Social Council, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities, 10 August 2017, E/C.12/GC/24, para. 8.

130 Id. para. 12.

131 Id. para. 14.

Indigenous peoples in adjudicating cultural heritage-related indirect expropriation claims.

In *Bear Creek v. Peru*,<sup>132</sup> the claimant, a Canadian company, contended that Peru had unlawfully expropriated its investment.<sup>133</sup> The *Santa Ana* silver mining project was located in a border region and under Peruvian law, 'a foreign national can only gain rights to natural resources in border regions ... for a public necessity.'<sup>134</sup> After the *Santa Ana* project was declared 'a public necessity', the company was authorized to acquire mining concessions.<sup>135</sup>

However, the project was in a region traditionally inhabited by the Aymara peoples, pre-Inca communities who have been in Peru for centuries.<sup>136</sup> For the Aymara, 'the guardian mountains (*Apus*) ... represent extremely important spiritual sanctuaries.'<sup>137</sup> Therefore, some Indigenous communities protested against the project, requiring its cancellation.<sup>138</sup> After the protest became violent,<sup>139</sup> Peru revoked the finding of a public necessity, thereby annulling the legal condition for the claimant's mineral concessions.<sup>140</sup>

The claimant contended that it obtained the communities' support for the *Santa Ana* project, that is, the 'social license' to operate.<sup>141</sup> The company also stressed that it was the state's duty to consult with local communities before granting rights over their lands.<sup>142</sup> For the claimant, Peru's action amounted to an indirect expropriation because it permanently deprived the company of 'its ability to own and operate its mining concessions'.<sup>143</sup> For the company, there was disparity between such deprivation and 'the stated goal of quelling political pressure and social protests'.<sup>144</sup>

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132 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

133 *Id.* para. 113.

134 *Id.* para. 124.

135 *Id.* para. 149.

136 *Bear Creek Mining Corp. v. Peru*, Partial Dissenting Opinion, para. 25.

137 *Id.* para. 16.

138 *Bear Creek Mining Corp. v. Peru*, Award, paras 152, 155, 183, and 186.

139 *Id.* paras 189–190.

140 *Id.* para. 202.

141 *Id.* para. 235.

142 *Id.* para. 246.

143 *Id.* para. 347.

144 *Id.*

The Tribunal acknowledged the ‘strong political pressure’ on Peru due to ‘social unrest.’<sup>145</sup> It also questioned whether the claimant took ‘the appropriate and necessary steps to engage all of the relevant and likely to be affected local communities, and whether its approach contributed significantly to the nature and extent of the opposition that followed.’<sup>146</sup> It then noted that ‘support for the project came from communities that were receiving some form of benefits (*i.e.* jobs and direct payments for land use) and that those communities that ... objected were either not receiving benefits, were uninformed, or both.’<sup>147</sup>

Yet, the Tribunal noted that ‘the ILO Convention 169 imposes direct obligations only on States ... [It] adopts principles on how community consultations should be undertaken, but does not ... grant communities veto power over a project.’<sup>148</sup> Therefore, the Tribunal concluded that the company ‘complied with all legal requirements with regard to its outreach to the local communities.’<sup>149</sup>

Instead, the Tribunal found that Peru’s conduct amounted to an indirect expropriation of the company’s investment.<sup>150</sup> The Tribunal noted that ‘those members of the Indigenous population that opposed the Santa Ana Project have achieved their wishes: the Project is well and truly at an end. However, this does not relieve Respondent from paying reasonable and appropriate damages for its breach of the FTA.’<sup>151</sup>

In his Partial Dissenting Opinion, Arbitrator Professor Sands largely agreed with the conclusions of the Tribunal.<sup>152</sup> In his view, ‘the circumstances which the Peruvian government faced—massive and growing social unrest caused in part by the Santa Ana Project—left it with no option but ... to protect the well-being of its citizens’; however, the government could have adopted ‘other and less draconian options.’<sup>153</sup>

Nonetheless, Arbitrator Professor Sands disagreed with the other members of the Tribunal on how to assess damages, arguing that the amount of damages should be reduced.<sup>154</sup> For the Arbitrator, ‘the project collapsed because of the investor’s inability to obtain a social license’, the necessary understanding

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145 Id. para. 401.

146 Id. para. 406.

147 Id. para. 407.

148 Id. para. 664.

149 Id. para. 412.

150 Id. paras 416, 447–448.

151 Id. para. 657.

152 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, Professor Philippe Sands, QC, 12 September 2017.

153 Id. para. 2.

154 Id. para. 4.

between the company and the local communities most likely to be affected by the project.<sup>155</sup> As the Arbitrator pointed out, ‘the viability and success of a project such as this, located in the community of the Aymara peoples ... necessarily depende[d] on local support.’<sup>156</sup> However, for the Arbitrator, the company ‘did not ... take ... sufficient steps ... to engage the trust of all potentially affected communities’ and this ‘contributed, at least in part, to some of the population’s general discontent with the Santa Ana Project.’<sup>157</sup> The Arbitrator concluded that ‘[t]he Canada–Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.’<sup>158</sup>

Referring to the preamble of the ILO Convention 169, to which Peru is a party, Sands highlighted the fact that the said preamble ‘recognizes the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live.’<sup>159</sup> For him, the preamble also highlights ‘the distinctive contributions of Indigenous and tribal peoples to the cultural diversity ... of humankind.’ For Professor Sands, this preamble encourages any investor to consider ‘as fully as possible the aspirations of Indigenous and tribal peoples.’<sup>160</sup>

Although Article 15 of the ILO Convention 169 imposes the duty to consult Indigenous peoples on governments, rather than investors, ‘the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.’<sup>161</sup> Rather, the Arbitrator pointed out that human rights ‘are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.’<sup>162</sup> He further added that ‘[a]s an international investor, the Claimant has legitimate interests and rights under international law; local communities of Indigenous and tribal peoples also have rights under international law, and these are not lesser rights.’<sup>163</sup>

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155 Id. para. 6.

156 Id.

157 Id. para. 19.

158 Id. para. 37.

159 Id. para. 7.

160 Id. para. 7.

161 Id. para. 10.

162 Id.

163 Id. para. 36.

Analogously, in a pending arbitration, *Cosigo Resources and others v. Colombia*,<sup>164</sup> the claimants contend that the creation of a national park in an area including their gold mining concession amounted to an unlawful expropriation of their investment.<sup>165</sup> Reportedly, ‘the prospect of extractive activity in the area sparked conflict among local Indigenous groups.’<sup>166</sup> Although state authorities had approved the project, the creation of the Yaigojié Apaporis national park led to the suspension of all mining activities in the same.<sup>167</sup>

In its response, Colombia relied on its constitutional and international law obligations to protect biodiversity and Indigenous peoples’ rights, referring to both the 1992 Convention on Biological Diversity<sup>168</sup> and the 1989 ILO Convention 169.<sup>169</sup> The state highlighted the fact that the Amazonian forest is one of the richest areas of the world in biological and cultural diversity and that the establishment of a natural park was intended to protect such values.<sup>170</sup> The respondent then raised a number of jurisdictional and substantive objections. As the case is still in an early phase, it is not possible to foresee whether the case will be settled or how the arbitral tribunal will decide it.

In *Ras al-Khaimah Inv. Authority v. India*, an Emirati investor in an aluminum refinery project served India with a notice of arbitration under the United Arab Emirates–India BIT.<sup>171</sup> The company had signed a Memorandum of Understanding (MoU) with the state of Andhra Pradesh, under which the latter would supply the former with bauxite in order for the investor to operate an aluminum refinery.<sup>172</sup> However, local communities opposed the project, reportedly because the government planned to mine the bauxite on reserved tribal land.<sup>173</sup> After the government cancelled the MoU, the company filed a formal notice.<sup>174</sup>

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164 *Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia*, UNCITRAL, Notice of Demand and Demand for Arbitration and Statement of Claim, 19 February 2016.

165 *Id.* para. 1.

166 *Id.* para. 11.

167 *Id.* para. 12.

168 United Nations Convention on Biological Diversity, 5 June 1992, in force 29 December 1993, 31 ILM 818.

169 *Cosigo Resources, and Others v. Colombia, Respuesta de la República de Colombia a la Solicitud de Arbitraje de las Demandantes*, 16 March 2016, paras 8–9.

170 *Id.* para. 11.

171 Zoe Williams, ‘Emirati Investor Files UNCITRAL BIT Arbitration Against India’, *Investment Arbitration Reporter*, 12 January 2017.

172 *Id.*

173 *Id.*

174 *Id.*

According to an international development scholar, '[t]wo dominant discourses' have emerged with regard to bauxite mining in Eastern India.<sup>175</sup> On the one hand, the 'life-giving discourse' opposes mining because it favors the conservation of 'holistic ecosystems in support of traditional lifestyles.'<sup>176</sup> In fact, bauxite hills have geological features that can be 'life-giving'; because the bauxite ore has a porous structure and the unique ability to store water from the previous monsoon, it 'slowly release[s] it into hill streams' throughout the year.<sup>177</sup> On the other hand, 'treasure chest' discourse considers the exploitation of bauxite hills as pivotal for the economic development of the state.<sup>178</sup> This materialistic vision of mineral extraction builds on an ideology of progress, economic development, and industrialization that has been 'present in top policymaking circles ever since independence.'<sup>179</sup>

Yet, under the 2006 Indian Forest Rights Act (FRA), 'tribal people are the natural owners of minerals available in reserve forests.'<sup>180</sup> Moreover, in the landmark 1997 *Samata* judgment, the Supreme Court of India held that the grant of mining leases to non-tribals, companies, and partnerships in Scheduled Areas, is null and void, unconstitutional, and ineffective.<sup>181</sup> Rather, the Court held that the lands in the scheduled areas should be preserved for the social and economic empowerment of the tribals. Reportedly, the Arbitral Tribunal ruled in favour of India on jurisdictional grounds. However, the award has not been published yet, and it is not possible to examine its reasoning at the time of this writing.<sup>182</sup>

## 5 Compensation Claims

After an expropriation has taken place, compensation must be paid. Investment treaty compensation provisions may be more beneficial to the investor than both domestic and international human rights law. Customary

175 Patrik Oskarsson, 'Diverging Discourses on Bauxite Mining in Eastern India: Life-Supporting Hills for Adivasis or National Treasure Chests on Barren Lands?' (2017) 30 *Society & Natural Resources* 994–1008.

176 *Id.* at 996.

177 *Id.* at 1002.

178 *Id.* at 994.

179 *Id.* at 997.

180 Santosh Patnaik, 'Agitation Brewing Against Move on Bauxite Mining', *The Hindu*, 9 August 2015, <http://www.thehindu.com/news/cities/Visakhapatnam/agitation-brewing-against-move-on-bauxite-mining/article7517531.ece>.

181 Supreme Court of India, *Samata v. State of Andhra Pradesh and Others*, 11 July 1997, AIR 1997 SC 3297, JT 1997 (6) SC 449, 1997 (4) SCALE 746.

182 *Ras-Al-Khaimah Investment Authority v. India*, ad hoc arbitration, Award, 11 May 2022, unpublished (as of 21 September 2022).

compensation rules, uniformly enshrined in investment protection treaties, do not differentiate among the various public purposes of expropriations, but instead pose a single standard: in the case of expropriation, investors must be fully compensated. Several investment treaties further require compensation to be prompt, adequate, and effective, according to the so-called Hull formula.<sup>183</sup>

For instance, in *Santa Elena v. Costa Rica*, concerning the direct expropriation of land to enlarge a world heritage site, the Tribunal awarded compensation to the investors, based on the property's fair market value. In doing so, the Tribunal restated that international law permits the host state to expropriate foreign-owned property for a public purpose and against prompt, adequate, and effective compensation. However, for the Tribunal, the legitimate public purpose of the state measure does not affect either the nature or the measure of the compensation. The Tribunal expressly noted that 'the international source of the obligation does not alter the legal character of the taking for which adequate compensation must be paid.'<sup>184</sup> It thus famously held that '[e]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'<sup>185</sup>

Analogously, in *Unглаube v. Costa Rica*, when an indirect expropriation occurred in the same Guanacaste province a decade later, the Arbitral Tribunal held that the creation of a national park was a legitimate goal; however, the expropriation was unlawful due to the failure to pay compensation.<sup>186</sup> The Unглаubes had purchased land in Playa Grande, a beach on which female leatherback turtles lay their eggs. Given the endangered status of these turtles, the government adopted measures to protect this nesting habitat, creating the Las Baulas National Marine Park.<sup>187</sup> The 1995 law creating the Park indicated that some private lands would be subject to expropriation and considered part of the park.<sup>188</sup> Preliminary steps to expropriate lands began in 2003;

183 The Hull formula is named after the American Secretary of State, Cordell Hull (1871–1955), who described a full compensation standard as 'prompt, adequate, and effective' in a diplomatic exchange of notes with Mexico in 1930.

184 *Compañía del Desarrollo de Santa Elena v. Costa Rica*, Case No. ARB/96/1, Award, 17 February 2000, 39 ILM (2000) 1317, para. 71.

185 Id. para. 72.

186 *Marion Unглаube and Reinhard Hans Unглаube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, paras 210 and 305.

187 Id. para. 37.

188 Id. para. 57.

however, the Unglaubes challenged the measures before national courts. In its 2008 decision, the Supreme Court of Costa Rica ordered the Ministry of Environment and Energy ‘either to proceed with the expropriation’ of the property ‘within a reasonable period of time, or if there were not funds available to do so, to grant the permits ... to private owners to exercise their property rights’.<sup>189</sup> However, three years later, the government had not purchased the property nor had it granted the permits to allow the claimants to enjoy their property rights.<sup>190</sup> The claimants alleged that these facts among others amounted to an indirect expropriation of their property.<sup>191</sup>

The Tribunal held that ‘while there can be no question concerning the right of the government of Costa Rica to expropriate property for a *bona fide* public purpose, pursuant to law, and in a manner which is neither arbitrary nor discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment.’<sup>192</sup> The Tribunal added that if the state had properly provided for and paid compensation, ‘Costa Rica’s legal position would have been unassailable and this dispute might never have occurred.’<sup>193</sup> However, the Tribunal concluded that this had not been the case. Rather, it held that the measures adopted by Costa Rica amounted to indirect expropriation and awarded compensation to the claimants.<sup>194</sup>

A slightly different approach was adopted in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*,<sup>195</sup> which involved the denial of a construction project in front of the Pyramids for understandable cultural reasons. While the Tribunal awarded compensation to the investor, it reduced the amount of such compensation, stating that only the actual damage (*damnum emergens*) and not the loss of profit (*lucrum cessans*) could be compensated.<sup>196</sup> The Tribunal stated that ‘sales in the areas [inscribed on the World Heritage List] ... would have been illegal under ... international law’ and, therefore, ‘[t]he allowance of *lucrum cessans* may only involve those profits which are legitimate.’<sup>197</sup> Furthermore, the fact that ‘the project was located in an area where the claimants should have known there was a risk that antiquities would

189 Id. para. 73.

190 Id. para. 74.

191 Id. para. 97.

192 Id. para. 205.

193 Id. para. 210.

194 Id. para. 298.

195 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, reprinted in (1993) 8 *ICSID Review* 328 ff.

196 Id. para. 157.

197 Id. para. 190.

be discovered' was 'reflected in the method used by the Tribunal to value the claimants' loss.'<sup>198</sup> The Tribunal thus displayed sensitivity to the tenets of the WHC in determining the amount of compensation.

Compensation may also be due in case of breach of other investment treaty provisions. Given that most IIAs lack guidance on how to quantify damages for non-expropriation claims, customary law plays a prominent role in this regard.<sup>199</sup> Under customary international law, if a state breaks an international obligation, it has the duty to repair the harm caused. Reparation 'must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'<sup>200</sup> The three principal forms of reparation are restitution, compensation, and satisfaction.<sup>201</sup> Restitution refers to the reestablishment of the situation that existed before the wrongful act was committed. If restitution is impossible, compensation – that is, 'payment of a sum corresponding to the value which a restitution in kind would bear' – is provided.<sup>202</sup> Satisfaction is a residual remedy and 'may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.'<sup>203</sup> It applies only insofar as restitution or compensation do not provide a remedy.<sup>204</sup>

In investment arbitration, restitution in kind is rarely (if ever) granted; rather, compensation is the primary remedy in practice.<sup>205</sup> After establishing state liability for breach of an investment treaty standard, a number of cultural heritage-related arbitrations centered on the amount (*quantum*) of compensation that host states owed to foreign investors. Compensation aims at 'eliminat[ing] all [the] negative consequences of the wrongful act, through the payment to the injured party of an amount sufficient to cover any financially

<sup>198</sup> Id. para. 251.

<sup>199</sup> Pieter Bekker and Fatima Bello, 'Reimagining the Damages Valuation Framework Underlying Fair and Equitable Treatment Standard Violations' (2021) 36 *ICSID Review-Foreign Investment Law Journal* 339–365, 347.

<sup>200</sup> PCIJ, *Factory at Chorzów, (Germany v. Poland)* Indemnity, Judgment, 13 September 1928, PCIJ Series A No 17, p. 47.

<sup>201</sup> International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chapter IV.E.1, Article 34; UNGA Resolution, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147 (also including rehabilitation and guarantees of non-repetition among the forms of reparation)

<sup>202</sup> PCIJ, *Factory at Chorzów*, Judgment, p. 47.

<sup>203</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 37.

<sup>204</sup> James Crawford, *State Responsibility* (Cambridge: CUP 2013) 527–8.

<sup>205</sup> Christoph Schreuer, 'Alternative Remedies in Investment Arbitration', (2016) 3 *Journal of Damages in International Arbitration* 1–30, at 4.

assessable damage including loss of profits insofar as it is established.<sup>206</sup> As a Tribunal put it, ‘valuation is not an exact science’<sup>207</sup> and the calculation of damages ‘inevitably requires a certain amount of conjecture’; however, such difficulty in calculation ‘cannot ... deprive an investor, who has suffered injury, from his fundamental right to see his losses redressed.’<sup>208</sup> Rather, the specific nature of valuation makes it ‘a highly technical task’, that ‘calls for the input of quantum experts who apply modelling and simulation techniques and who use objective criteria to produce relatively reliable estimates.’<sup>209</sup>

Factors such as contributory fault are often weighted by arbitral tribunals. In *Bear Creek Mining Corporation v. Republic of Peru*, the Dissenting Arbitrator, Professor Philippe Sands, argued that compensation should be reduced because the investor had not obtained the social license to operate, referring to a particular set of interactions between investors and affected communities. Some scholars have argued that ‘tribunals should thoroughly analyse the relationship between the investor and the affected community’<sup>210</sup> and review the investor’s conduct to check whether it constituted ‘reasonable business conduct.’<sup>211</sup>

In some recent arbitrations, arbitral tribunals have admitted counterclaims brought by the host state against the investors. In fact, some broadly-worded BITs permit either an investor or the state to bring an arbitral claim. Also, the investor claimant can always consent to a counterclaim. In some instances, tribunals have thus ordered investors to pay compensation to the host state for environmental damage.<sup>212</sup> Yet, any strictly pecuniary quantification of damages is likely to favor foreign investors at the expense of the competing interests of local communities. In fact, any permanent change to landscape or alteration of traditional cultural practices can constitute an irreparable harm to local communities that is difficult, if not impossible, to quantify.

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206 *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, para. 151. The award was upheld in a subsequent Annulment proceeding. *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Annulment Proceeding, Decision on Ukraine’s Application for Annulment of the Award, 8 July 2013.

207 *Lemire v. Ukraine*, Award, para. 248.

208 *Id.* para. 249.

209 Bekker and Bello, ‘Reimagining the Damages Valuation Framework’, 348.

210 Raúl Zúñiga Peralta, ‘The Judicialisation of the Social License to Operate: Criteria for International Investment Law’ (2021) 22 JWIT 92–128.

211 Catherine Kessedjian, ‘Rebalancing Investors’ Rights and Obligations’ (2021) 22 JWIT 645–649, 646.

212 See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (ordering Burlington to pay USD 41 million in compensation to Ecuador for environmental and infrastructure damage).

In *Lemire v. Ukraine*, the claimant asked for moral damages alleging that ‘the constant rejections [of his bids] ... eroded his image.’<sup>213</sup> The Tribunal acknowledged that ‘moral damages could only be awarded in exceptional circumstances.’<sup>214</sup> Referring to a number of cases,<sup>215</sup> the Tribunal concluded that ‘as a general rule moral damages are not available to a party injured by the wrongful acts of a state, but can be awarded in exceptional cases provided that the state actions imply physical threat, illegal detention or other analogous situations ... [and that] the state’s actions cause a deterioration of health, stress, anxiety, [or] other mental suffering ... and both cause and effect are grave or substantial.’<sup>216</sup> The Tribunal concluded that in the instant case, ‘the gravity required under the standard [wa]s not present.’<sup>217</sup>

In conclusion, these cases show that states may lawfully regulate and/or expropriate private property to protect cultural heritage. This is particularly the case if the cultural heritage in question has outstanding and universal value for humankind as a whole. The issue becomes whether the amount of compensation for the economic loss suffered by the owner should be reduced *vis-à-vis* the public purpose of the measure. While in the *Santa Elena* case, concerning the expropriation of seafront property, the Tribunal ultimately did not take cultural values into account, the SPP Tribunal adopted a more nuanced approach that has been further developed in more recent cases. Furthermore, these cases show that the state’s pursuit of legitimate goals such as cultural heritage protection is not unbounded; rather, policymakers and adjudicators need to achieve an appropriate balance between the promotion of the public interest and the protection of economic freedoms.

## 6 Fair and Equitable Treatment

The fair and equitable treatment (FET) standard is at the heart of investment arbitration, having become the most often invoked provision in the same.<sup>218</sup>

<sup>213</sup> *Lemire v. Ukraine*, Award, para. 315.

<sup>214</sup> *Id.* para. 311.

<sup>215</sup> Mixed Claims Commission (*United States v. Germany*), *Lusitania* cases, 1 November 1923–30 October 1930, UN RIAA vol. VII; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

<sup>216</sup> *Lemire v. Ukraine*, Award, para. 333.

<sup>217</sup> *Id.* para. 339.

<sup>218</sup> See Rudolf Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2014) 12 *Santa Clara JIL* 7–32, 10.

Due to its deliberate vagueness, it constitutes a catch-all provision covering the situations where there is no finding of expropriation or any other breach of investment treaty standards. The FET standard is an absolute standard of treatment, designed to provide a basic safeguard upon which the investor can rely at any time, as opposed to the relative standards embodied in both the national treatment and most favored nation principles, which, in contrast, define the required treatment by reference to the treatment accorded to other investments.

In an attempt to delimit the perimeters of the standard, the United States-Mexico-Canada Agreement (USMCA) states that the minimum standard of treatment owed to foreign investors is expressly tied to customary international law, thus consolidating a position adopted by the NAFTA Free Trade Commission in an interpretation of a similar NAFTA provision.<sup>219</sup> Traditionally, the minimum standard of treatment protected investors only in instances of ‘egregious and shocking’ or ‘manifestly unfair or inequitable conduct.’<sup>220</sup> Accordingly, in the USMCA and former NAFTA context, arbitral tribunals still consider the FET standard to be the customary international law minimum standard of treatment. Therefore, the FET standard has not presented much of a viable claim in the NAFTA context.

For instance, the *Glamis Gold* Tribunal held that ‘the customary international law minimum standard remains as apparently articulated in the 1926 *Neer* award: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards.’<sup>221</sup>

Outside the NAFTA milieu, arbitral tribunals have broadened the notion of the standard significantly. The standard has exceeded the customary minimum standard of treatment and comprises various additional requirements,

219 USMCA, Article 14.6(2). See also NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, at B.2.

220 Mexico–United States Claims Commission, *L. Fay Neer and Pauline Neer (USA) v. United Mexican States*, 15 October 1926 (1926) 4 RIIA 60–62, para. 4 (holding that ‘the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.’).

221 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22.

such as transparency, consistency, non-arbitrariness, due process, good faith, and the protection of legitimate expectations. Under this broader conceptualization, the FET standard has figured prominently in a number of investment arbitrations.

For instance, in *Railroad Development Corporation (RDC) v. Guatemala*, a Dominican Republic–Central America–United States Free Trade Agreement (CAFTA)<sup>222</sup> arbitration, the ICSID Tribunal found that Guatemala breached the minimum standard of treatment under Article 10.5 of CAFTA as its conduct was ‘arbitrary, grossly unfair, and unjust.’<sup>223</sup> In 1997, the company won a government bid to operate Guatemala’s rails for fifty years.<sup>224</sup> For the following decade, RDC reopened several rail lines, but did not restore the rail network to the extent the government had envisioned. The dispute commenced when Guatemala’s executive branch declared the contract to be harmful (*lesivo*) and thus ‘not in the interest of the country.’<sup>225</sup> For the government, RDC failed to deliver the promised rehabilitation of Guatemala’s railway system and used railway equipment it should not have used. Before this declaration, the investor contended that it ‘had no reason to believe that it was not adequately protecting Guatemala’s historical and cultural patrimony interest’ in certain trains and rail equipment ‘because the Government never officially declared or designated under its Cultural Patrimony Law’ any of the relevant items.<sup>226</sup> In this case, the company claimed that the *lesivo* declaration was arbitrary, unfair, and unjust, and harmed its investment.<sup>227</sup>

The Tribunal held that ‘the manner in which and the grounds on which Respondent applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment’ by being ‘arbitrary, grossly unfair, and unjust.’<sup>228</sup> In fact, among other things, ‘the railway equipment in question had been used since the initiation of the rail service ... with full knowledge of the Government and without which claimant could not have performed its obligations under contract.’<sup>229</sup>

222 Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), signed on 5 August 2004, in force between the United States of America and Guatemala on 1 July 2006.

223 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 235.

224 *Id.* para. 30.

225 *Id.* para. 35.

226 *Id.* para. 46.

227 *Id.* para. 157.

228 *Id.* para. 235.

229 *Id.* para. 235.

The *Lemire* case also involved several claims related to the fair and equitable treatment standard.<sup>230</sup> After investing in Gala Radio, a radio company in Ukraine, a US investor, Mr Lemire, planned to increase the size and audience of his radio company and participated in several tenders for the awarding of broadcasting licenses.<sup>231</sup> Although Gala Radio ‘presented more than 200 applications for all types of frequencies, [it] was only able to secure a single license (in a small village in rural Ukraine).’<sup>232</sup> The claimant argued that the Ukrainian legal procedure for the allocation of frequencies was in itself unfair and inequitable, and was applied in an arbitrary and discriminatory fashion.<sup>233</sup> As the Ukrainian Law on Television and Broadcasting required the National Council to take into account the objective of freedom of speech, the claimant argued that ‘Since [the competitor] already had a radio network, pluralism could arguably be better served if the new channel was awarded to a different company.’<sup>234</sup>

Although the Arbitral Tribunal did not comment on media pluralism, it acknowledged that ‘informational channels ... are politically more sensitive because they are important elements for the formation of public opinion’ and that the presence of Gala Radio ‘as an independent broadcaster ... would reinforce freedom of speech.’<sup>235</sup> The Tribunal found that the legal and administrative procedures for the issuance of radio frequencies presented some shortcomings which could facilitate arbitrary decision-making and ‘resulted in an arbitrary advantage to local investors with greater political clout.’<sup>236</sup> These shortcomings involved, *inter alia*, the absence of clearly established criteria for the evaluation of the tenders, the absence of reasoning concerning National Council decisions, and the lack of transparency with regard to who were the ultimate owners of radio companies.<sup>237</sup> Since the National Council did not reason or explain its decisions, it was impossible to verify whether Gala’s applications were rejected because its programming concept was worse than that of its competitors.<sup>238</sup>

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230 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010, and *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011.

231 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 420.

232 *Id.*

233 *Id.* para. 42.

234 *Id.* para. 354.

235 *Lemire v. Ukraine*, Award, paras 60 and 179.

236 *Id.* para. 64.

237 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paras 315–16.

238 *Id.* para. 420.

However, if Gala was an ‘average radio station’ as the respondent admitted, the Arbitral Tribunal inferred it ‘should have had an average success rate in its tenders.’ Yet, the record showed that ‘it had a success rate which was much below average.’<sup>239</sup> While the Tribunal acknowledged that Gala Radio was not a ‘large company’, it recognized that ‘throughout its lifetime, Gala Radio ha[d] been a reasonably successful broadcaster’ and ‘had won a number of awards for the quality of its broadcasting.’<sup>240</sup> Therefore, the Tribunal analyzed each particular tender. With regard to the first tender under consideration, the Tribunal found that politically motivated interference with independent and impartial decision-making violated the FET standard.<sup>241</sup> Other tenders were similarly held to be arbitrary and discriminatory because foreign and national companies were treated differently in similar cases.<sup>242</sup> The majority of the Arbitral Tribunal clarified that ‘not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard,’ holding that ‘for this to happen, it is necessary that the state incur a blatant disregard for applicable tender rules, distorting fair competition among tender participants.’<sup>243</sup> The Tribunal concluded that in the instant case, Ukraine ‘acted in blatant disregard of applicable tender rules.’<sup>244</sup>

Cultural heritage-related FET claims have raised three main questions. What type of state representations create legitimate expectations an investor may rely upon? Can an investor rely upon international cultural heritage law as a source of legitimate expectations? Does investment treaty arbitration provide a new means to enforce international cultural heritage law? The next subsections address these questions.

### 6.1 *Legitimate Expectations*

The concept of ‘legitimate expectations’ allows foreign investors to claim compensation in situations where the host state makes specific representations to them, the investors relies on such promises in making their investments, and the state then frustrates the expectations it previously

<sup>239</sup> Id. paras 315–6.

<sup>240</sup> *Lemire v. Ukraine*, Award, paras 206–207.

<sup>241</sup> *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 356.

<sup>242</sup> Id. para. 369 and paras 384–5.

<sup>243</sup> *Lemire v. Ukraine*, Award, para. 43.

<sup>244</sup> Id.

raised.<sup>245</sup> Legitimate expectations are not an independent cause of action. Whether or not the fair and equitable treatment standard protects the legitimate expectations of foreign investors has been answered in various ways.<sup>246</sup> The question is really about the level of protection that should be granted to foreign investors and their investments. While investors prefer strong investment protections, host states are not eager to restrict the exercise of their sovereign powers.

Can investors legitimately expect an absolute protection of their economic interests? In general terms, investors' expectations cannot prevent states from regulating the exercise of individual rights in the pursuit of legitimate public policy objectives. Moreover, in assessing whether legitimate expectations exist, arbitral tribunals must scrutinize the relevant circumstances in the respondent country at the time the investment was made 'including not only the facts surrounding the investment, but also the political, socioeconomic, cultural, and historical conditions prevailing in the host state'.<sup>247</sup>

For instance, in the *Glamis Gold* case, the claimant contended, *inter alia*, that the review process of the Imperial Project violated the fair and equitable treatment standard, as 'numerous other projects with significant and similar cultural characteristics were approved without complete backfilling and despite severe impacts to their cultural resources.'<sup>248</sup> The Tribunal rejected this claim, holding that the acts of the Federal Government and the state of California did not violate the respondent's obligations under Article 1105 of NAFTA.<sup>249</sup> The Tribunal recognized that 'It is not the role of this Tribunal or any international tribunal, to supplant its own judgment of underlying factual material and support for that of qualified domestic agency,'<sup>250</sup> and stated that the cultural review of the claimant's plan of operations was undertaken by qualified professionals. Furthermore, California legislation was of general application.<sup>251</sup> The Tribunal concluded that the claimant's property was impacted because of the high number of cultural artifacts found there.

245 See e.g. *Grand River Enterprises Six Nations Ltd et al. v. United States of America*, Award, 12 January 2011, para. 140.

246 Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 *ICSID Review* 88–122.

247 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 230.

248 *Glamis Gold* Award, paras 639 and 277.

249 *Id.* para. 824.

250 *Id.* para. 779.

251 *Id.* para. 765.

Conversely, if a host state grants specific assurances to investors regarding the exploitation of their investment in the host state, the adoption of measures affecting the economic value of the investment might amount to a breach of fair and equitable treatment. In fact, 'a State may be tied to the objective expectations that it creates in order to induce investment.'<sup>252</sup> For instance, in *MTD v. Chile*, concerning the denial of a zoning modification allegedly necessary for the development of a residential project, the Arbitral Tribunal held that Chile had breached the fair and equitable treatment standard due to the incoherent behavior of its authorities.<sup>253</sup> While the Foreign Investment Commission had approved the investment plan of the investor, the Minister of Urban Development had denied the application, deeming that the project was not in conformity with the zoning policy of Santiago. The Tribunal held that Chile had 'an obligation to act coherently and apply its policies consistently,'<sup>254</sup> and that approval of an investment by the relevant authorities for a project that was against the urban policy was 'a breach of the obligation to treat an investor fairly and equitably.'<sup>255</sup>

In *Crystallex v. Venezuela*,<sup>256</sup> a Canadian company that had invested in one of the largest gold deposits in Venezuela, claimed that the conduct of the host state in relation to the *Las Cristinas* mine amounted to, *inter alia*, a violation of the fair and equitable treatment standard.<sup>257</sup> The state authorities denied the permit that Crystallex needed for the exploitation of the mine because of environmental concerns.<sup>258</sup> Venezuela pointed out that the project could affect the Imataca Forest reserve, a world heritage site and 'a fragile rainforest with an extremely varied biodiversity and a significant Indigenous population.'<sup>259</sup> Yet, the claimant pointed out that the Ministry of Environment had never raised concerns for the environment and Indigenous peoples during the four-year approval process and no study supported such concerns or demonstrated that the project would adversely affect the Imataca region.<sup>260</sup> While Crystallex claimed that it had consulted

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252 *Glamis Gold Award*, para. 766.

253 *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

254 *Id.* para. 165.

255 *Id.* para. 166.

256 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.

257 *Id.* para. 187.

258 *Id.* paras 204 and 378.

259 *Id.* para. 214.

260 *Id.* para. 277.

the relevant Indigenous communities,<sup>261</sup> Venezuela argued that the company had inadequately addressed issues concerning ‘local Indigenous culture and traditions.’<sup>262</sup>

The Tribunal found that Venezuela breached the fair and equitable treatment standard when it denied the environmental permit. In fact, a letter from the state authorities had created legitimate expectations that the project would proceed.<sup>263</sup> Moreover, the Tribunal found that state authorities did not sufficiently elucidate reasons for denial; rather, their reasoning ‘extend[ed] to a mere two and a half pages’ and vaguely referred to ‘serious environmental deterioration’ in the plot.<sup>264</sup> While the Tribunal did not contest the state’s responsibility to raise environmental issues in respect of the Imataca Reserve, it held that the specific way the state put forward such concerns ‘present[ed] significant elements of arbitrariness.’<sup>265</sup>

Analogously, in *Bilcon v. Canada*,<sup>266</sup> involving the rejection of a project to develop and operate a quarry in Nova Scotia, the Tribunal found a breach of the FET standard. The investors planned to mine basalt and build a maritime terminal in Digby Neck, a peninsula adjacent to the Bay of Fundy, a UNESCO biosphere reserve. After conducting an environmental assessment and noting the significant and adverse environmental effect on the ‘community core values’, a panel of experts advised the government to reject the project. Accordingly, Nova Scotia and the Canadian government rejected the investors’ project proposal.<sup>267</sup> The investor claimed that the environmental assessment ‘departed substantially from the expected scientific and technical focus’ of an environmental impact assessment, as it included reference to the Kyoto Protocol,<sup>268</sup> the need to consider traditional knowledge, and sustainable development.<sup>269</sup>

Canada argued that its measures did not breach the FET standard. Rather, it emphasized ‘the importance and uniqueness of the biophysical and human environment in Digby Neck and the adjacent Bay of Fundy.’ In fact, Digby

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261 Id. para. 289.

262 Id. para. 351.

263 Id. para. 588.

264 Id. para. 590.

265 Id. para. 591.

266 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

267 Id. para. 117.

268 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, in force 16 February 2005, 2303 UNTS 162.

269 *Bilcon v. Canada*, Award, para. 201.

Neck, the place where the project would be developed, is an integral part of a UNESCO biosphere reserve, the Bay of Fundy, which hosts many endangered species and ecological assets that are crucial to the economy of the local area.<sup>270</sup> Biosphere reserves are internationally recognized ecosystems for the sustainable use of biological diversity and the safeguarding of the cultural values associated with such areas, nominated by national governments and remaining under sovereign jurisdiction of the states where they are located. Biosphere reserves constitute innovative projects of ‘ecological humanism’ or ‘humanist ecology’ in which human beings, culture, and nature are conceived holistically. Since their inception, biosphere reserves have been governed by soft law instruments. Governments, local communities, and private individuals all participate and collaborate in the management of biosphere reserves in experimenting models of sustainable development.<sup>271</sup> Accordingly, Canada stressed that the law required the environmental assessment to ‘evaluate any change that the project may cause in the environment including ... on ... socio-economic conditions and ... cultural heritage.’<sup>272</sup> Such an inquiry necessarily included ‘consideration of whether the effects of the project would be consistent with the community’s core values.’<sup>273</sup>

The Arbitral Tribunal held that the government’s rejection of the project was in breach of the investors’ legitimate expectations. In the Tribunal’s view, the investors reasonably relied on domestic law and on specific encouragements, at the political and technical level, to pursue the project.<sup>274</sup> For the Tribunal, the panel’s reference to community core values was unprecedented and unique.<sup>275</sup> In its assessment of legitimate expectations, the Tribunal did not consider the broader public policy concerns or weigh the investors’ expectations against the objectives of sustainable development, as demanded by the designation of the Bay of Fundy as a UNESCO biosphere reserve.

On the other hand, reasonable expectations cannot be unilateral.<sup>276</sup> Rather, claimants ‘must demonstrate reliance on specific and unambiguous State

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270 *Id.* para. 130.

271 See generally Agnès Michelot, ‘Les Réserves de Biosphère du Programme sur l’Homme et la Biosphère de l’UNESCO: au Delà des Aires Protégées, un Modèle de Société Durable?’ in Jon Engel, Laura Westra, and Klaus Bosselmann (eds), *Democracy, Ecological Integrity, and International Law* (Newcastle upon Tyne: Cambridge Scholars Publishing 2010) 389–408.

272 *Bilcon v. Canada*, Award, para. 203.

273 *Id.* para. 203.

274 *Id.* paras 447–8.

275 *Id.* paras 450–1.

276 *Un glaube v. Costa Rica*, Award, para. 270.

conduct, through definitive, unambiguous, and repeated assurances, and targeted at a specific person or identifiable group.<sup>277</sup> In the situation where the host state has made no assurance or representation, and there is no stabilization clause in the contract between the investor and the host state, the state's right to regulate cannot be considered frozen or restricted. The protection of investors' legitimate expectations cannot mean that the host state will never be able to modify its legal framework.<sup>278</sup>

In *Parkerings v. Lithuania*, which related to the construction of a parking area in the city of Vilnius, the Tribunal remarked that 'It is each State's undeniable right and privilege to exercise its sovereign legislative power ... Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.'<sup>279</sup> The Tribunal also noted that in countries in transition—that is, emerging from a socialist-type centralized economy toward a market-based economy—investors could not legitimately expect a stable legal framework;<sup>280</sup> rather, legislative changes should be seen as a normal business risk. In this case, Lithuania was transitioning from being a state of the former Soviet Union to becoming a candidate for EU membership. Nonetheless, any transition does not exempt states from a general duty of good faith and transparency. *In casu*, the Tribunal admitted that: 'Even if no violation of the BIT or international law occurred, the conduct of the city of Vilnius was far from being without criticism.'<sup>281</sup> Therefore, the Arbitral Tribunal dismissed all the claims in their entirety, requiring each party to bear its own costs.<sup>282</sup>

In *Gosling v. Mauritius*, a group of British property developers brought a claim against Mauritius, alleging, *inter alia*, breach of the fair and equitable treatment standard under the 1986 UK–Mauritius BIT.<sup>283</sup> Gosling and other investors planned to develop property at *Le Morne*, a world heritage site.<sup>284</sup>

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277 *Id.*

278 *Sergei Paushok et al. v. Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 253; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 291.

279 *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

280 *Id.* paras 335–6.

281 *Id.* para. 464.

282 *Id.*

283 *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd v. Republic of Mauritius (Gosling v. Mauritius)* ICSID Case No. ARB/16/32, Award, 18 February 2020.

284 *Id.* para. 41.

A peninsula of outstanding beauty and cultural and historical significance, *Le Morne* had been a place of refuge for escaped slaves in the 19th century.<sup>285</sup> Because of its natural beauty and significance, Mauritius had pursued its inscription as a cultural landscape on UNESCO's World Heritage List since 2003 and finally obtained it in 2008.<sup>286</sup> To achieve this public objective, the government refused the investors permission to build on the site. The investors, *inter alia*, claimed that the government was in breach of the fair and equitable treatment standard because it 'frustrated their legitimate expectations by failing to honor specific assurances received from Government officials at the highest level.'<sup>287</sup>

The Tribunal noted that 'the level of treatment required to breach the [fair and equitable treatment] standard has evolved.'<sup>288</sup> While the standard 'must be adapted to the circumstances of each case, ... flexibility does not mean that treatment will be determined by the subjective expectations of the investors. To be protected, [their expectations] must rise to the level of legitimacy and reasonableness.'<sup>289</sup> In fact, such a standard must be interpreted 'in a balanced manner,' considering 'both state sovereignty and ... the necessity to protect foreign investment.'<sup>290</sup>

*In casu*, the Tribunal noted that the investors knew of the state's objective to inscribe *Le Morne* on the World Heritage List.<sup>291</sup> The government 'was entitled to change its policy' and had given no assurance that it would allow development of the investor's project while listing of *Le Morne* on the UNESCO World Heritage List.<sup>292</sup> As noted by the Dissenting Arbitrator, Professor Stanimir Alexandrov, 'it is undisputed that the inscription of *Le Morne* as a UNESCO World Heritage Site was in the public interest of Mauritius and its people, and that it was a noble goal consistent with the objective of preserving the history of the place, honoring the dignity of the slaves who lived and died there, creating a symbol of freedom and human dignity, and – last but not least – preserving the physical beauty of *Le Morne*. In sum, [the] [r]espondent was fully entitled to prohibit any development at *Le Morne* ... in the interests of the people of Mauritius – and it did so.'<sup>293</sup>

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285 Id. para. 42.

286 Id.

287 Id. para. 168.

288 Id. para. 243.

289 Id. para. 244.

290 Id. para. 245.

291 Id. para. 249.

292 Id. para. 249.

293 *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TC*

The government never promised or assured the claimants that their proposed development project would be compatible with its overriding policy objective of inscribing *Le Morne* as a UNESCO World Heritage Site. Since there was no documented evidence of such an alleged promise, the Tribunal held that the investors had no legitimate expectations of proceeding with their development project at *Le Morne*.

## 6.2 *International Law as a Source of Legitimate Expectations*

Can investors legitimately expect that international instruments to which a host state is a party will not be violated by the said state? In several investment arbitrations, investors claimed that measures adopted by the host state and affecting their investments were illegal under various international agreements and therefore violated the FET standard. According to this line of argument, if the host state is a party to international agreements, an investor has legitimate expectations that the state will not violate such agreements. If the state breached its international law obligations and deviated from the investor's legitimate expectations, it would also violate the FET standard.

The argument that a state's adhesion to other treaties gives rise to legitimate expectations that the state will not breach such treaties relies on an expansive and evolving interpretation of the FET standard. Under the USMCA and the former NAFTA, it seems that such a claim lacks merit, as the United States, Mexico, and Canada have adopted a restrictive approach to the interpretation of the standard, analogizing it to the minimum standard of treatment under customary international law.

For instance, in *Grand River v. United States*,<sup>294</sup> a Canadian tobacco distribution company owned and operated by Indigenous peoples contended that the Master Settlement Agreement—an agreement between tobacco companies and major tobacco producers in the United States—was being applied to their business without their input. For the company, this allegedly violated the fair and equitable treatment standard by violating customary international law requiring the consultation, if not consent, of Indigenous peoples on measures potentially affecting them.<sup>295</sup> As the individual claimants were members of the Six Nations of the Iroquois Confederacy, they argued that the tobacco business was their traditional activity.

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*Investments Ltd v. Republic of Mauritius (Gosling v. Mauritius)*, ICSID Case No. ARB/16/32, Dissenting Opinion of Arbitrator Stanimir Alexandrov, 14 February 2020, para. 27.

294 *Grand River Enterprises Six Nations, Ltd. v. United States*, Award, NAFTA Tribunal, 12 January 2011.

295 *Id.* para. 182(3).

The Arbitral Tribunal, however, did not find any violation of the fair and equitable treatment standard under Article 1105 of NAFTA,<sup>296</sup> albeit admitting, in passing, that Indigenous peoples should be consulted on matters potentially affecting them.<sup>297</sup> For the Tribunal, NAFTA Article 1105 required a uniform standard of treatment for all foreign investments, rather than admitting specialized procedural rights owing to some categories for investors *qua* Indigenous persons.<sup>298</sup> According to the *Grand River* Tribunal, the fair and equitable treatment standard ‘does not incorporate other legal protections that may be provided to investors or classes of investors under other sources of law.’<sup>299</sup> ‘To hold otherwise’—argued the Tribunal—‘would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the NAFTA Free Trade Commission in its binding directive.’<sup>300</sup> In reaching this outcome, the Tribunal was guided by the NAFTA Free Trade Commission’s statement that ‘determination that there has been a breach ... of a separate international agreement does not establish that there has been a breach of Article 1105.’<sup>301</sup> In another case, the Tribunal similarly held that the applicable law ‘does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.’<sup>302</sup>

The arbitrators did not discuss the role that Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) can play in investor–state arbitration as a tool to defragment international law.<sup>303</sup> Such provision requires adjudicators to consider ‘any relevant rules of international law applicable in the relations between the parties.’ Although Article 31(3)(c) cannot trigger the

296 Id. para. 187 (holding that ‘whatever unfair treatment was rendered [to the claimant] or his business enterprise, it did not rise to the level of an infraction of the fair and equitable treatment standard of 1105, which is limited to the customary international law standard of treatment of aliens.’).

297 Id. para. 210 (noting that ‘It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult Indigenous peoples on governmental policies or actions significantly affecting them.’).

298 Id. para. 213 (arguing that ‘[t]he notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments.’).

299 Id. para. 219.

300 Id.

301 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions.

302 *Bernhard von Pezold v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Ltd. v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 2, para. 57, 26 June 2012.

303 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 31(3)(c).

importation of external norms into a given treaty system or provide the claimants with the capacity to claim for the breach of such external obligations, it enables such external rules to shape an arbitral tribunal's interpretation of a given investment treaty provision.

Beyond the NAFTA context, some tribunals have considered that the protection of legitimate expectations constitutes part of the FET standard. However, it remains uncertain whether arbitral tribunals can consider that legitimate expectations include an expectation that the host state will not breach its international commitments. The argument, if adopted, would impose a powerful constraint on states for which the state did not bargain for in the negotiation of IIAs. However, reference to the host state international obligations could also delimit the reasonableness of investor's expectations.

### 6.3 *A New Tool to Enforce International Cultural Heritage Law?*

Can investment treaty arbitration constitute a new tool to enforce international cultural heritage law? Can it provide investors with an alternative venue to challenge the consistency of domestic regulations with international cultural heritage law? In some exceptional cases, foreign investors have attempted to use international investment law to indirectly protect other values by requiring a state to respect its international law obligations that are critical to the success of the investment.<sup>304</sup>

In *Allard v. Barbados*, a Canadian investor filed an investment treaty claim against Barbados, alleging that the host state's failure to enforce its domestic law implementing international environmental law violated the FET standard under the 1996 Canada–Barbados BIT.<sup>305</sup> The investor acquired wetlands and subsequently developed them into a wildlife sanctuary and ecotourism facility in Barbados.<sup>306</sup> Nonetheless, raw sewage reached the wetlands and such events allegedly forced him to cease operating this business. The investor claimed, *inter alia*, that Barbados denied the investor FET 'by making representations that it would ... uphold its environmental policies, particularly those that reflected a commitment to conservation and protection of the biodiversity of the Sanctuary, and then failing to act in accordance with those representations.'<sup>307</sup>

<sup>304</sup> Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014) 129–131.

<sup>305</sup> *Peter A. Allard v. Barbados*, UNCITRAL, Notice of Dispute, 8 September 2009, para. 16 <http://graemehall.com/legal/papers/BIT-Complaint.pdf>.

<sup>306</sup> *Peter A. Allard v. the Government of Barbados*, PCA Case No. 2012-06, Award, 17 June 2016, para. 33.

<sup>307</sup> *Id.* para. 172.

The Claimant invoked Article 31(3)(c) of the VCLT, which provides that, in the interpretation of a treaty, ‘there shall be taken into account, together with the context ... any relevant rules of international law applicable in the relation between the parties.’ In the claimant’s view, in interpreting the scope of the FET standard, the Tribunal should consider ‘the obligations ... that Barbados assumed in its environmental treaties.’ The claimant emphasized that he did not allege a breach of any treaties other than the BIT but argued that the state’s environmental treaty obligations confirmed the reasonableness of the claimant’s expectations that are protected under the FET standard.<sup>308</sup> Specifically, the claimant referred to Barbados’ obligations under the Convention on Biological Diversity<sup>309</sup> and the Ramsar Convention,<sup>310</sup> in accordance with which Barbados designated the sanctuary as a ‘wetland of international importance.’<sup>311</sup>

With respect to the Claimant’s reliance on the Convention on Biological Diversity and the Ramsar Convention, the Respondent contended the following: (i) the Tribunal did not have jurisdiction to consider alleged breaches of these treaties; (ii) the Tribunal should apply the rule explicitly stated in Article 1105(1) of NAFTA and in all of Canada’s recent BITs that a breach of any other treaty does not amount to a breach of the FET standard; (iii) Barbados ratified the Ramsar Convention in 2006, long after Mr. Allard made his investment; and, (iv) in any event, Barbados complied with its obligations under these treaties.<sup>312</sup>

The Tribunal held that the Claimant had ‘failed to establish that his decision to cease operating the Sanctuary as an ecotourism attraction arose out of any relevant degradation of the environment at the Sanctuary.’<sup>313</sup> It also concluded that, ‘even if it had found that there was a degradation of the environment at the Sanctuary ... (which it did not), it would not have been persuaded that such degradation was caused by any actions or inactions of Barbados.’<sup>314</sup> With regard to the FET standard, the Tribunal held that none of Barbados’ statements constituted specific representations capable of creating legitimate expectations.<sup>315</sup>

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308 *Allard v. Barbados*, Award, para. 177.

309 Convention on Biological Diversity, open for signature on 5 June 1992, in force 29 December 1993, 1760 UNTS 69.

310 Convention on Wetlands of International Importance especially as Waterfowl Habitat, open for signature on 2 February 1971, in force 21 December 1975, 996 UNTS 245.

311 *Allard v. Barbados*, Award, para. 178.

312 *Id.* para. 190.

313 *Id.* para. 139.

314 *Id.* para. 166.

315 *Id.* para. 199.

Unfortunately, the Tribunal did not address the question of whether Barbados' international obligations arising from its environmental treaties confirmed or reinforced the reasonableness of the Claimant's expectations.<sup>316</sup> However, it admitted that '[t]he fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the BIT, although consideration of a host state's international obligations may well be relevant in the application of the standard to particular circumstances.'<sup>317</sup>

When adjudicating cultural heritage-related investment disputes, the question arises as to whether arbitral tribunals can consider other international law in addition to international investment law. A breach of international cultural heritage law cannot provide the basis for an independent claim in investor-state arbitration. Arbitral tribunals cannot rule on violations of international cultural heritage law, unless the relevant investment treaty or contract requires them to do so. If an international investment agreement does not refer to other treaty obligations, it appears difficult to assume that the IIA parties wished to interpret the FET standard in such a wide-ranging manner. In fact, had the IIA parties wished to expand the scope of protection to cover violations of other treaties, they could have included explicit reference to these other instruments.

Yet, when interpreting a treaty, a tribunal can consider other international obligations of the parties according to customary rules of treaty interpretation as restated by the Vienna Convention on Law of Treaties (VCLT).<sup>318</sup> Article 31(3) (c) of the VCLT provides that there shall be taken into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.' Therefore, the host state's obligations under other international treaties can come into play in investment arbitrations by providing interpretive background and informing investment treaty standards.

## 7 Full Protection and Security

Customary international law and most IIAs require full protection and security for foreign investors and their investments. This standard 'requires, *inter alia*, that the host state use due diligence in protecting the investor against

<sup>316</sup> *Allard v. Barbados*, Award, para. 208.

<sup>317</sup> *Id.* paras 243–244.

<sup>318</sup> Vienna Convention on the Law of Treaties, adopted on 22 May 1969, in force 27 January 1980, 1155 UNTS 331.

injuries from host state nationals', take reasonable measures to protect the investments, and compensate investors for any violations of their rights by its nationals.<sup>319</sup> The obligation to afford full protection and security for investments is one of means, not of result, and calls for states to take appropriate measures to safeguard foreign investment.<sup>320</sup>

Foreign investors can thus file claims against a host state contending that it failed to protect their investments against actions of local communities. Arbitral tribunals have adopted diverging approaches when dealing with social protests. Some disputes did not reach the merits phase of the proceedings or were settled. While some tribunals have considered public campaigns leading up to state measures to be a mitigating factor favoring the state, others have approached the role of public protests with caution. Despite its presence in most IIAs, the full protection and security standard has been used sparingly by arbitral tribunals.<sup>321</sup>

Some disputes did not reach the merits phase of the proceedings. For instance, in *Burlington v. Ecuador*, the claimant sought, among other things, to hold Ecuador liable for failing to provide physical protection and security for the company's hydrocarbon concession in two blocks of the Amazonian rain forests.<sup>322</sup> Burlington complained that the opposition of Indigenous communities to oil development had impeded its business and that Ecuador's purported failure to provide physical security violated the standard of full protection and security under the US–Ecuador BIT.<sup>323</sup> In its award, the Arbitral Tribunal dismissed this specific claim on jurisdictional grounds, stressing the importance of notifying states of disputes so that they have the opportunity to remedy a possible breach and thereby avoid arbitration proceedings.<sup>324</sup> Since Burlington failed to give clear notice to Ecuador of its claims for denial of full protection and security, arbitrators ruled that the treaty's mandatory six-month waiting period before the initiation of arbitration had not passed. As a result, the claim was declared inadmissible.<sup>325</sup>

319 George K. Foster, 'Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17 *Lewis & Clark LR* 361–421, at 382.

320 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013–15, Award, 22 November 2018, para. 686.

321 Christoph Schreuer, 'Full Protection and Security' (2010) 1 *JIDS* 1–16, 16.

322 *Burlington Resources, Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5, 2 June 2010, paras 27–37.

323 *Id.* paras 26 and 53.

324 *Id.* para. 315.

325 *Id.* paras 317 and 336.

The case was also subject to parallel consideration by the Inter-American Court of Human Rights. In 2012, the Court ruled that the failure to consult the Indigenous peoples and obtain their free, prior, and informed consent (FPIC), as well as the state's use of force had jeopardized the Indigenous peoples' survival.<sup>326</sup> The finding of the Inter-American Court of Human Rights that the State used unnecessary force against the Indigenous peoples, thereby threatening their life, starkly contrasts with the claim by the investor involved in the parallel investor–State arbitration that the State had not used sufficient force to protect its investment from those Indigenous peoples.<sup>327</sup>

Certain arbitrations were settled in the aftermath of successful public campaigns.<sup>328</sup> For instance, in *Aguas del Tunari S.A. v. Republic of Bolivia*, the Bolivian government had privatized the water sector in the town of Cochabamba.<sup>329</sup> Nonetheless, the contract was terminated after major violent protests.<sup>330</sup> After the so-called 'Bolivian Water War' attracted public attention worldwide, the case was withdrawn.<sup>331</sup>

Other full protection and security claims have not been addressed on the basis of judicial economy. In *Bear Creek Mining Corp. v. Peru*, after Aymara Indigenous peoples' protests determined the withdrawal of the investor's mining concession, the company alleged, *inter alia*, lack of full protection and security.<sup>332</sup> In the claimant's view, the host state attempted to placate political pressure, rather than pursue a legitimate public policy objective.<sup>333</sup> The State responded that the violent social unrest had been due to the Indigenous community's strong opposition to mining activities.<sup>334</sup> For the Aymara, land 'is not only a geographical space but represents a spiritual bond'.<sup>335</sup> The company

326 Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012.

327 Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, A/HRC/33/42, 11 August 2016, para. 61.

328 See e.g. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Order, 28 March 2006 (taking note of the settlement agreed by the parties and discontinuing the proceeding).

329 *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, paras 52–56.

330 *Id.* para. 73.

331 Damon Vis-Dunbar and Luke Eric Peterson, 'Bolivian Water Dispute Settled, Bechtel Forgoes Compensation', *Investment Treaty News*, 20 January 2006.

332 *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, para. 113.

333 *Id.* para. 349.

334 *Id.* para. 367.

335 *Bear Creek Mining Corp. v. Peru*, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment, 10 June 2016, p. 7.

had failed to consult with, and obtain the consent of, all the affected Indigenous communities, as it had been required to do under relevant international human rights law and municipal law.<sup>336</sup> Moreover, its selective and divisive approach to consultation fueled discontent and conflict.<sup>337</sup> Since the Tribunal found that state measures constituted an indirect expropriation, it held that there was no need to examine whether such measures also constituted a breach of the full protection and security standard.<sup>338</sup>

In *South American Silver Mining v. the Plurinational State of Bolivia*, the investor claimed, *inter alia*, that the host state failed to afford full protection and security to the company's investments pursuant to the UK–Bolivia BIT.<sup>339</sup> The company maintained that it attempted to obtain the consent of Indigenous communities and that opposition to the project came from a small group of illegal gold miners. In the company's view, the state failed to provide full protection and security, as it 'did not did not take the necessary measures to prevent an escalation of the social conflict', 'encouraged opposition to the Project', failed to militarize the area surrounding the project when the conflict became unsustainable, and 'granted immunity to opposition leaders'.<sup>340</sup>

Bolivia argued that it had acted in the public interest, attempting to maintain peace in the area by holding mediation meetings and sending the police when the conflict escalated.<sup>341</sup> It added that 'military repression [wa]s not a reasonable solution, as ... incompatible with a free and democratic society'.<sup>342</sup> More fundamentally, the state argued that the opposition of Indigenous peoples to the project was legitimate as the project violated Indigenous peoples' rights. Moreover, the state argued that customary international law recognizes the primacy of human rights over investor protections.<sup>343</sup> It concluded that prosecution of the opposition leaders 'was simply determined to be subject to the Indigenous justice system'.<sup>344</sup>

The Tribunal found that, given the circumstances of the case, Bolivia's conduct had met the full protection and security standard under the treaty. Several

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336 *Bear Creek Mining Corp. v. Peru*, Award, para. 261.

337 *Id.*

338 *Id.* para. 544.

339 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 182.

340 *Id.* para. 677.

341 *Id.* para. 680.

342 *Id.*

343 *Id.* para. 196 (citing the *Sawhoyamaya v. Paraguay* Judgment of the Inter-American Court of Human Rights and Article 103 of the Charter of the United Nations) and para. 680.

344 *Id.* para. 682.

meetings were held ‘for the purpose of resolving the social conflict.’<sup>345</sup> The police were sent to maintain public order. The Tribunal agreed with Bolivia that the militarization of the area was not an adequate measure conducive to resolving the social conflict.<sup>346</sup> Finally, the Tribunal held that there was no evidence that Bolivia had promoted opposition to the project.<sup>347</sup>

In conclusion, the full protection and security standard, which quintessentially aims to ensure the physical security of investors and their investments, has been rarely upheld by arbitral tribunals. On the one hand, arbitral tribunals have found that social protests do not necessarily legitimize state conduct. On the other hand, they have not applied a standard of strict liability, rather requiring due diligence on the part of the host State.

## 8 Non-Discrimination

Equality and non-discrimination are complex notions rooted in international law. Non-discrimination is a central provision of IIAs. It expresses the principle of equality and the idea that ‘like cases should be treated alike (whereas different cases may be treated differently).’<sup>348</sup> The non-discrimination principle is typically reflected in the provisions of national treatment (NT) and most-favored-nation (MFN) treatment. These two standards do not guarantee a specific level of protection but are relative standards that require a state to treat a foreign investor in the same way that a domestic investor or an investor from another country would be treated.<sup>349</sup> The determination of non-discrimination is based on three steps: first, assessing whether the investments being compared are similar; second, scrutinizing whether the treatment they receive is also similar; finally, if the investments are similar but receive a different treatment, then arbitrators must investigate whether the justification for differentiation is reasonable and objective.

The ascertainment of non-discrimination is a crucial element of cultural heritage-related investment disputes; in such disputes, the key question is whether foreign investments are regulated because the activity in question poses certain risks to cultural heritage, or whether they are regulated simply

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345 Id. para. 689.

346 Id. para. 690.

347 Id. para. 692.

348 Andrew D. Mitchell, David Heaton, and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham: Edward Elgar Publishing 2016) 2.

349 Ortino, ‘Non-Discriminatory Treatment in Investment Disputes’, 346–347.

because they are foreign investments.<sup>350</sup> Discrimination and non-discrimination 'are not polar opposites in a static system,'<sup>351</sup> as 'there may be several ways in which the notion of ... discrimination may be understood.'<sup>352</sup>

Difficulties arise in ascertaining discrimination in the cultural sector: while states may have legitimate reasons for adopting cultural policies that differentiate foreign investors from other actors, it may be difficult to distinguish cultural motives from economic protectionism.<sup>353</sup> As Voon highlights, identifying the true motive for a governmental measure can be difficult not only because such a measure may be influenced by a number of factors, but also because the true reasons may diverge from the official narratives.<sup>354</sup> In order to detect discrimination, Voon suggests the use of criteria such as those of efficiency and/or effectiveness of the given regulatory measure.<sup>355</sup> Craufurd Smith analogously argues that proportionality 'could guide the application of [cultural policy] measures and serve to prevent more blatant forms of protectionism.'<sup>356</sup>

Nonetheless, the use of such criteria risks prioritizing economic considerations over cultural concerns. Although proportionality seems to endorse elegant structures of analysis and mathematical precision, it can fail to deliver what it promises.<sup>357</sup> Rather than asking 'what is right and wrong', adjudicators investigate whether something is proportionate.<sup>358</sup> Proportionality – like any conceptual framework – is not a neutral process; rather, it is based on the primacy and priority of individual entitlements over the exercise of public powers.

350 See Howard Mann and Konrad von Moltke, 'NAFTA Chapter 11 and the Environment: Addressing the Impacts of the Investor–State Process on the Environment', IISD Working Paper (1999) 25.

351 Konrad Von Moltke, *Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues* (Paris: OECD 2002) 7.

352 Federico Ortino, 'Non-Discriminatory Treatment in Investment Disputes', in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 344–366, 349.

353 Tania Voon, 'State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?' (2006) 13 *International Journal of Cultural Property* 142–3.

354 Id. 144.

355 Id. 144–5.

356 Rachel Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?' (2007) 1 *International Journal of Communications* 24–55, at 40–1.

357 Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468–93, 482

358 Id. 487.

Moreover, references to proportionality in arbitral jurisprudence remain uncommon and lead to suboptimal results.<sup>359</sup> In *Myers v Canada*, a rare case in which an arbitral tribunal has used elements of proportionality analysis to detect discrimination, a dispute arose out of Canada's ban on the export of polychlorinated biphenol (PCB) waste from Canada to the United States.<sup>360</sup> The claimant, a US company, specializing in the remediation of PCB waste, argued that the ban applied in a discriminatory manner, favoring Canadian operators who were not involved in transborder activities.<sup>361</sup> The Tribunal used the concept of proportionality to assess whether Canada had breached the national treatment provision of the NAFTA. It investigated whether the ban on the export of PCB had a legitimate aim, and whether it disproportionately benefitted nationals over foreign investors.<sup>362</sup> The Tribunal regarded the ability to process PCB within Canada as a legitimate objective in light of the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).<sup>363</sup> However, the Tribunal found that the ban infringed the national treatment provisions because there were other less restrictive ways to achieve the same objective.<sup>364</sup> While the Tribunal did not explain why it used the proportionality analysis, it paid very little attention to the Basel Convention. However, one may wonder whether, by being a signatory to the Basel Convention, the host state was legitimately entitled, and in fact required, to ensure the availability of adequate in-country disposal facilities for PCB.<sup>365</sup> The use of proportionality analysis in detecting discrimination has remained relatively isolated in investment arbitration.<sup>366</sup>

As a valid alternative, reasonableness belongs to the lexicon of treaty interpretation.<sup>367</sup> Its open-endedness makes it particularly fit for use in evolving

359 Valentina Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration* (Cheltenham: Edward Elgar 2018) 99.

360 *SD Myers Inc v. Canada*, UNCITRAL/NAFTA, Partial Award, 13 November 2000.

361 For a discussion of the case, see Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon: Routledge 2012) 145.

362 *SD Myers Inc v. Canada*, Partial Award, para. 252.

363 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), adopted on 22 March 1989, in force 5 May 1992, 28 ILM 656 (1989).

364 *SD Myers Inc v. Canada*, Partial Award, para. 255.

365 Vadi, *Public Health in International Investment Law and Arbitration*, 145.

366 Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration*, 101.

367 See e.g. ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, [2012] ICJ Reports 27, para. 39 (holding that 'if

legal systems because it enables such systems to adapt to emerging circumstances. Reasonableness is a flexible, pragmatic, and contextual standard with a distinct evaluative character that can deliver ‘just results in individual cases.’<sup>368</sup> The reasonableness review does not assess whether the state measure is the most effective or efficient; it does not question whether the adverse economic impact of a given measure on the foreign investment is disproportionate *vis-à-vis* its purported benefits. Rather, it determines whether a given measure is rationally related to its objectives and adequate to achieve them. It also assesses whether such a measure does not unreasonably prejudice the legitimate interests of the foreign investors. Therefore, it avoids the most intrusive prongs of review of the proportionality test. While proportionality is a demanding standard of review, reasonableness accords states more latitude in the implementation of their international obligations and accommodates some legal pluralism.<sup>369</sup>

Moreover, ‘[i]n the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors in like circumstances.’<sup>370</sup> To detect whether a state action is discriminatory, arbitral tribunals first consider whether two circumstances are like; if they are similar, arbitrators will assume that their likeness requires the same treatment. Therefore, any state conduct that treats similar situations differently is considered to be *prima facie* discriminatory. However, such measures can be justified if there are reasonable grounds to differentiate the treatment

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procedural rights are accorded, they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds.’); *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Judgment, 23 July 1968, ECtHR, Series A No. 6, p. 31 (‘following the principles which may be extracted from the legal practice of a large number of democratic States, [the Court] holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.’); *Observer and Guardian v. United Kingdom*, Judgment, 26 November 1991, ECtHR, Series A No. 216, para. 73 (defining discrimination as ‘different treatment, without an objective and reasonable justification, of persons in similar situations.’); *Karlheinz Schmidt v. Germany*, Judgment, 18 July 1994, ECtHR, Series A No. 291-B, para. 24 (holding that ‘a difference of treatment is discriminatory if it has no objective and reasonable justification.’); *Belli and Arquier-Martinez v. Switzerland*, Judgment, 11 March 2019, <https://hudoc.echr.coe.int/eng?i=001-188649> (visited on 24 April 2022), para. 90 (holding that ‘According to the Court’s case-law, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification’).

368 Vadi, *Proportionality, Reasonableness, and Standards of Review in International Investment Law and Arbitration*, 184.

369 Id.

370 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, para. 170.

of investments.<sup>371</sup> Reasonableness can legitimize distinctions between investors. As an Arbitral Tribunal put it, '[o]nce unequal treatment has been proved, the State has to show the existence of reasonable grounds for such treatment; otherwise, it would be a discriminatory measure violating the national treatment standard.'<sup>372</sup>

The open-endedness of the reasonableness criterion is particularly suited to ascertain non-discrimination in the cultural domain. Cultural policies often present internal tensions, as different tools are available in order to achieve a given legitimate cultural objective. For instance, in order to preserve linguistic diversity, states may encourage expression, creation, and dissemination in as many languages as possible. On the other hand, in order to protect a certain language from extinction, states might restrict the dissemination of other languages. The appropriate cultural policy is thus contingent on a number of factors.

### 8.1 *Direct Discrimination*

Discrimination can be direct or indirect. Direct or formal discrimination denotes openly discriminatory language in state measures. It occurs when a measure explicitly discriminates on the basis of the nationality of the investor.<sup>373</sup> Indirect or material discrimination occurs when the use of apparently neutral criteria affects a particular group of people. This section focuses on direct or formal discrimination in cultural governance.

Cultural policies often use language that is openly discriminatory. If a measure makes distinctions on the basis of origin, such direct differentiation constitutes a factor pointing toward illegal discrimination. However, the respondent has the opportunity to justify the measure by proving its legitimate policy objective and the rational/reasonable link between the measure and the objective under scrutiny. While the complainant seeks to show protectionism, the respondent can try to demonstrate that the measure was adopted to protect a genuine cultural interest.

For instance, since most East European countries gained their independence after the fall of the Soviet Union, they have limited newspapers and broadcasts

371 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 307 (holding that 'any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.')

372 *Renée Rose Levy de Levi v. The Republic of Peru*, ICSID ARB/10/17, Award, 26 February 2014, para. 215.

373 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 349.

in foreign languages in order to reverse the effects of historical Russianization.<sup>374</sup> These countries now face an additional challenge—the challenge of contemporary patterns of linguistic erosion due to economic globalization. In fact, globalization is ‘characterized by the dominance of a few so-called international languages over the rest.’<sup>375</sup> Can foreign broadcasters challenge national policies that purport to preserve national language and music?

In the *Lemire* case, a US investor challenged the fact that a tender for a radio channel required it to broadcast in Ukrainian only. The claimant argued that the 100 percent Ukrainian language content requirement favored national vis-à-vis foreign investors. It was no surprise that the foreign investor who was participating in the bidding process was not awarded the license. The Arbitral Tribunal dismissed the arguments in support of cultural freedom brought by the investor that ‘we should allow the audience to determine what it wants’ and that ‘since Ukraine is seeking the status of a country with a market economy, it should not introduce Ukrainian culture by force.’<sup>376</sup> Instead, the Arbitral Tribunal held that this condition of the bidding process ‘was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media’, arguably contributing to the preservation and diffusion of Ukrainian culture.<sup>377</sup>

In the UPS case,<sup>378</sup> United Parcel Service of America (UPS), a US company providing courier and package delivery services both throughout Canada and worldwide, claimed that Canada’s Publications Assistance Program (PAP) – a policy designed to promote the wider distribution of Canadian periodicals – was discriminatory to foreign investors.<sup>379</sup> This policy ‘provide[d] financial assistance to the Canadian magazine industry but only on the condition that any magazines benefitting from the financial assistance [we]re distributed through Canada Post [an institution of the Government of Canada], and not through companies such as UPS Canada.’<sup>380</sup> The investor did not challenge the cultural policy measure as such (that is, the financial assistance to

374 UNDP, *Cultural Liberty in Today’s Diverse World* (New York: UNDP 2004) 65.

375 UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue* (Paris: UNESCO 2009) 85.

376 *Lemire, Joseph Charles v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 407.

377 *Id.*

378 *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007, 46 ILM 922 (2007).

379 *Id.* paras 8 and 156–160.

380 *Id.* para. 80.

the Canadian magazine industry) because the measure arguably fell within the cultural exception clause set out in Article 2106 and Annex 2106 of the NAFTA.<sup>381</sup>

Rather, the investor challenged the design and implementation of the cultural policy. According to UPS, the preferential treatment received by Canada Post 'ha[d] nothing to do with protecting cultural industries and so f[ell] outside the scope of the cultural industries exception'.<sup>382</sup> UPS maintained that the cultural industries exception 'applie[d] only to cultural industries themselves, not to their delivery mechanism, and that there [wa]s no connection between the program's objective and Canada Post's involvement.'<sup>383</sup>

Canada objected, arguing that the PAP was a part of a larger Canadian cultural policy and therefore fell within the cultural industries exception outlined in Article 2106 and Annex 2106 of NAFTA.<sup>384</sup> According to Canada, this cultural policy had 'two main purposes: (1) to connect Canadians to each other through the provision of accessible Canadian cultural products; and (2) to preserve and develop the Canadian publishing industry'.<sup>385</sup> Against this background, Canada also added that in any case Canada was not breaching the national treatment standard as Canada Post and UPS were not in 'like circumstances'.<sup>386</sup> According to Canada, Canada Post has played an essential role in the cultural life of Canadians, 'through its provision of an accessible, effective system of national communication' to all addresses in Canada (the so-called 'universal service obligation').<sup>387</sup> In so doing, Canada Post has assisted in the formation 'of a literate, educated, and aware citizenry, providing inexpensive, reliable, and timely delivery of newspapers, books, and information'.<sup>388</sup> Accordingly, Canada deemed that 'delivery through Canada Post [wa]s the best and most effective means of meeting its policy objectives,' which '[we]re not governed solely by commercial considerations'.<sup>389</sup>

The Tribunal upheld Canada's argument that PAP was exempted from review under NAFTA by virtue of the cultural industries' exception which removed from the scope of the NAFTA any measure adopted or maintained 'with respect

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381 North American Free Trade Agreement (NAFTA), 17 December 1992, in force 1 January 1994 (1993) 32 ILM 289.

382 *UPS v. Canada*, Award on the Merits, para. 157.

383 *Id.* para. 159.

384 *Id.* para. 137.

385 *Id.* paras 146–9.

386 *Id.* para. 138

387 *Id.* para. 140.

388 *Id.* para. 57.

389 *Id.* paras 155 and 161.

to cultural industries.<sup>390</sup> The Tribunal noted that the language of the cultural exception was intentionally broad and that ‘it was clearly understood by the Parties ... that a Party’s ability to pursue its domestic cultural policies would be virtually unimpaired by these trade and investment instruments.’<sup>391</sup> The Tribunal acknowledged that not every measure that appears to refer to some cultural objective would fall within the cultural exception clause; there is indeed a ‘point in which the cultural connection is sufficiently tangential that a tribunal could say this is outside the cultural exemption.’<sup>392</sup> However, it determined that the involvement of Canada Post was ‘rationally and intrinsically connected to assisting the Canadian publishing industry,’<sup>393</sup> as delivery through Canada Post was ‘the best and most effective way’ to reach even the remotest areas and thus strengthen Canada’s cultural identity.<sup>394</sup>

Finally, the Tribunal concluded that the PAP did not breach the national treatment provision of NAFTA Chapter Eleven because UPS Canada and Canada Post were not ‘in like circumstances.’<sup>395</sup> As the Canadian market for publications was characterized by a high percentage of home-delivered subscription sales as opposed to newsstand sales, the PAP aimed to achieve the widest possible distribution of Canadian publications at affordable prices throughout the country. While Canada Post was capable of delivering to individual readers across the country, UPS Canada had a different delivery capacity.<sup>396</sup>

## 8.2 *Indirect Discrimination*

In most cases, state measures do not openly discriminate against foreign investors, albeit some may result in *de facto* or indirect discrimination. It is generally accepted in international investment law that the policy objective pursued by the measure under scrutiny may be taken into consideration to ascertain whether two investments are similar or whether the regulatory purpose may justify differential treatment that would be otherwise discriminatory.<sup>397</sup>

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390 *UPS v. Canada*, Award on the Merits, para. 167.

391 *Id.* para. 162.

392 *Id.* para. 167.

393 *Id.* para. 168.

394 *Id.* para. 166.

395 *Id.* para. 173.

396 *Id.* paras 175–6.

397 Ortino, ‘Non-Discriminatory Treatment in Investment Disputes’, 350–351.

For instance, in *Parkerings v. Republic of Lithuania*,<sup>398</sup> Parkerings, a Norwegian enterprise, filed a claim before an ICSID Tribunal, claiming that Lithuania breached the MFN clause by allegedly preferring a Dutch competitor.<sup>399</sup> Parkerings had concluded an agreement with the Municipality of Vilnius for the construction of parking facilities.<sup>400</sup> The investor's project submission included an excavation under the Cathedral of the city's Old Town, a World Heritage site.<sup>401</sup> Cultural heritage impact assessments, which were required by law, revealed that the project could have jeopardized such monuments.<sup>402</sup> Because of technical difficulties and the growing public opposition due to the cultural impact of the investor's project, the municipality terminated the agreement and subsequently signed another contract with a Dutch company to complete the project; the successful contractor would not excavate beneath the Old Town.<sup>403</sup>

Was it legitimate for the Municipality of Vilnius to prefer another contractor in order to limit the perceived risk of endangering world heritage? The Tribunal dismissed the claim of discrimination, finding that Parkerings and the Dutch competitor were not in *like* circumstances.<sup>404</sup> The project presented by Parkerings included excavation works under the Cathedral.<sup>405</sup> Not only did the Tribunal pay due attention to cultural heritage matters, but it also stated that compliance with the obligations flowing from the World Heritage Convention (WHC)<sup>406</sup> *justified* the refusal of the project,<sup>407</sup> concluding that 'The historical and archaeological preservation and environmental protection could be, and in this case were, a justification for the refusal of the [claimant's] project.'<sup>408</sup> Although the Tribunal did not establish a hierarchy of various obligations under international law, it did reach a clear balance between the various provisions.

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398 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007.

399 *Id.* para. 203.

400 *Id.* para. 204.

401 *Id.* paras 378 and 380.

402 *Id.* para. 388.

403 *Id.* para. 284.

404 *Id.* para. 396.

405 *Id.* para. 392.

406 Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, 1037 UNTS 151, 11 ILM 1358.

407 *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, para. 385 and paras 381–382.

408 *Id.* para. 392.

In *Empresas Lucchetti v. Peru*,<sup>409</sup> a Chilean company owning a pasta factory constructed close to a protected wetland, *Pantanos de Villa*, complained that, notwithstanding its compliance with all the environmental requirements, its license was revoked and that the measures adopted by Peru, *inter alia*, discriminated against the foreign company and indirectly expropriated its investment. As the Tribunal found that it lacked jurisdiction over the dispute, there was no award on the merits.

In conclusion, there are several ways in which the notion of discrimination may be understood. In cultural governance, direct or formal discrimination is not uncommon and can be justified on cultural policy grounds (e.g. to preserve a minority language such as Welsh in the UK, Sanskrit in India, or Native American languages in the US). Similarly, if a measure that has a disparate impact on foreign investors is justified on cultural policy grounds, it does not constitute indirect or material discrimination.<sup>410</sup> Exceptions provisions of IIAs can expressly provide justification for such measures on cultural policy grounds. Although these exceptions are uncommon in elder treaties, arbitral tribunals 'have given relevance to public policy justifications' even in the absence of such clauses in the applicable treaties.<sup>411</sup> In doing so, they have attempted to strike the appropriate balance between restraining governmental conduct in order to protect foreign investments on the one hand, and allow host states enough regulatory space to pursue cultural policies on the other hand.

### 8.3 Positive Measures

The notion of positive or affirmative action refers to state measures that seek to address historical injustices that a human group has experienced.<sup>412</sup> Under human rights law, states can treat groups differently in order to remedy factual inequalities between them; in certain circumstances, a failure to do so may in itself result in discrimination.<sup>413</sup> In other words, the equality principle not only permits but, in certain circumstances, even requires, states to adopt

409 *Empresas Lucchetti, SA, and Lucchetti Peru, SA v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005.

410 Ortino, 'Non-Discriminatory Treatment in Investment Disputes', 351.

411 *Id.* 360.

412 Miguel Alfonso Ruiz, 'Discriminación Inversa e Igualdad', in Amelia Varcárcel (ed.), *El Concepto de Igualdad* (Madrid: Editorial Iglesias 1994) 77–93.

413 European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of Discrimination* (Strasbourg: Council of Europe 2021) para. 40.

affirmative action in order to uphold the equality principle.<sup>414</sup> In examining state practice across the world, it seems that an increasing number of states has gradually endorsed positive measures to further compelling state interests.<sup>415</sup>

Critics see affirmative action as unfairly affecting ‘those who are not biased themselves and who have enjoyed no personal benefit from discrimination’, while patronizing those who would benefit from affirmative action. They oppose the idea of attempting to end discrimination by discriminating, arguing that two wrongs do not make a right.<sup>416</sup> Attachment to formal equality concepts has sometimes prevented the adoption of positive action.<sup>417</sup> International economic courts have tended to remain attached to the ‘traditional version of the equality paradigm’, that is, formal equality, based on individual rights.<sup>418</sup>

Yet, positive action is an important tool in the fight against discrimination. It does not merely redress historical injustice, but can change attitudes, facilitate integration, and help to overcome hidden barriers.<sup>419</sup> It departs from formal equality in order to achieve substantive equality. It involves the use of special and temporary measures to enable certain groups to overcome structural inequality and fully participate in society.<sup>420</sup>

The question as to whether positive measures comply with the principle of non-discrimination in international investment law remains open to debate. For the time being, three arbitrations have raised the issue of government’s ability, under domestic and international law, to implement measures

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414 Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195, Article 1(4) and Article 2(2); Convention on the Elimination of All Forms Discrimination Against Women, open for signature on 18 December 1979, in force 3 September 1981, 1249 UNTS 13 (1981), Article 4(1); Human Rights’ Committee, CCPR General Comment No. 18: Non-discrimination, adopted 10 November 1989, para. 10 (‘the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.’).

415 See generally Ockert Dupper, ‘Affirmative Action in Comparative Perspective’ in Ockert Dupper and Kamala Sankaran (eds), *Affirmative Action. A View from the Global South* (Stellenbosch: Sun Press 2014) 7–42.

416 Louis Menand, ‘The Changing Meaning of Affirmative Action’, *The New Yorker*, 20 January 2020 (reporting these criticisms).

417 Colm O’Cinneide, ‘Positive Action and the Limits of Existing Law’ (2006) 13 *Maastricht Journal of European and Comparative Law*.

418 Daniela Caruso, ‘Limits of the Classic Method: Positive Action in the European Union after the New Equality Directive’ (2003) 44 *Harvard International Law Journal* 331.

419 Dupper, ‘Affirmative Action in Comparative Perspective.’

420 See generally Erica Howard, Elvira Dominguez Redondo, and Narciso Leandro Xavier Baez (eds), *Affirmative Action and the Law—Efficacy of National and International Approaches* (Abingdon: Routledge 2020).

designed to address past social injustices. In *Foresti v. South Africa*, a group of Italian investors and a company incorporated in Luxembourg challenged South Africa's Black Economic Empowerment (BEE) policies, which were designed to alleviate the effects of racial discrimination from the apartheid era.<sup>421</sup> In 2004, South Africa adopted the *Petroleum Resource Development Act* (MPRDA) to 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.'<sup>422</sup> To achieve this objective, the Act eliminated all old order mineral proprietary rights requiring companies to apply for new order temporary mineral concessions.<sup>423</sup> Additionally, the MPRDA contained many BEE provisions requiring companies who wished to obtain new order rights to grant 26 percent ownership to historically disadvantaged South Africans.<sup>424</sup> The investors alleged that not only did companies never recover their proprietary rights through the conversion process, but the additional regulatory requirements effectively deprived their investment of its economic value.<sup>425</sup> In the claimants' view, this amounted to unlawful indirect expropriation and discrimination in breach of relevant investment treaty provisions.<sup>426</sup> The Tribunal never reached a decision on the merits as the claim was discontinued.<sup>427</sup>

In *John Andre v. Canada*, a US-based businessman lodged a notice of intent to arbitrate, alleging losses arising from legislative measures affecting his business in Northern Canada.<sup>428</sup> The claimant used to have 360 caribou hunting licenses (called 'caribou quota tags') and organized hunting camps for tourists and hunters who would travel from locations outside Canada to the aboriginal land in Canada's North West Territories (NWT).<sup>429</sup> In 2007, the government of NWT decided to grant only seventy-five caribou quota tags per outfitter.<sup>430</sup> Outfitters with commitments to clients would be required to buy

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421 *Piero Foresti, Laura de Carli and Others v. Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award, 4 August 2011.

422 *Mineral and Petroleum Resources Development Act*, Section 2(d) (S.Africa).

423 *Foresti v. South Africa*, Award, paras 54–55.

424 *Id.* para. 56.

425 *Id.* paras 69–72.

426 *Id.* para. 66.

427 *Id.* paras 79 and 111.

428 *John R. Andre v. Government of Canada*, Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement, 19 March 2010, para. 8.

429 *Id.* para. 12.

430 *Id.* para. 51.

caribou quota tags from their competitors.<sup>431</sup> The claimant complained that the relevant authorities cut the number of hunting licenses in a discriminatory manner.<sup>432</sup> As many of the local outfitters only used seventy-five to one hundred caribou quota tags or less per year, the claimant alleged that the government developed a strategy to minimize the negative effect on local outfitters and maximize the negative effects on the investor.<sup>433</sup> Moreover, special provisions benefitted Aboriginal hunters. The investor thus claimed to have been discriminated against on the basis of his US nationality.<sup>434</sup> It is unclear whether the case was settled; the facts underlying the dispute nonetheless highlight several different clashes: the clash between international investment law and domestic regulatory autonomy; the clash between an international economic culture and local Indigenous culture; and the clash between the conservation of endangered species and traditional cultural practices.

In *Grand River v. United States*,<sup>435</sup> a Canadian tobacco company owned and operated by Indigenous peoples contended that tobacco control measures adopted by the United States had been applied to their business without their input. For the company, this allegedly violated international customary law requiring the consultation, if not consent, of Indigenous peoples on regulatory matters potentially affecting them.<sup>436</sup> The Arbitral Tribunal admitted, in passing, that Indigenous peoples should be consulted on matters potentially affecting them.<sup>437</sup> Nonetheless, for the Tribunal, NAFTA required a uniform standard of treatment for all foreign investments, rather than admitting specialized procedural rights owing to some categories for investors *qua* Indigenous persons.<sup>438</sup>

Yet, mainstream policies at both national and international levels already embrace techniques for redressing inequality that conventional approaches are incapable of capturing. Such positive measures 'seem no longer at odds with tradition, but rather placed on a continuum of plausible institutional choices.'<sup>439</sup> At the national level, states have adopted cultural policies addressing historical

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431 *Andre v. Canada*, Notice of Intent to Submit Claim to Arbitration, para. 51.

432 *Id.* para. 35.

433 *Id.* para. 51.

434 *Id.* para. 35.

435 *Grand River Enterprises Six Nations, Ltd. v. United States*, NAFTA Tribunal, Award, 12 January 2011.

436 *Id.* para. 182(3).

437 *Id.* para. 210.

438 *Id.* para. 213.

439 Caruso, 'Limits of the Classic Method', 331.

injustice.<sup>440</sup> Under international human rights law, ‘the enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them ... The protection of these rights is directed to ensure the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’<sup>441</sup> Multilateral environmental agreements that protect certain species often include aboriginal exemptions, thus protecting Indigenous peoples’ hunting practices and ways of life as expressing their cultural identity.<sup>442</sup> Nonetheless, the question as to whether positive cultural measures can be considered to be compatible with non-discrimination in international investment law remains open.

## 9 Performance Requirements

Performance requirements are host state regulatory measures that impose certain obligations on investors to act in ways considered beneficial for the host economy. The most common requirements relate to local content, joint ventures, technology transfer, and employment of nationals. Performance requirements aim to ensure that FDI in the host state will contribute to domestic development, and can be vital tools of state policy.<sup>443</sup> From an economic perspective, however, the case for the imposition of performance requirements upon foreign investors remains controversial; a growing number of IIAs prohibit a broad range of these measures.<sup>444</sup>

<sup>440</sup> See e.g. Supreme Court (United States), *Regents of the University of California v. Bakke*, 438 US 265 (1978); *Grutter v. Bollinger*, 539 US 306 (upholding the admission program of the University of Michigan Law School); *Fisher v. University of Texas (Fisher I)* 570 U.S. 297 (2013); *Fisher v. University of Texas (Fisher II)* (2016) (upholding the admissions policy of the University of Texas at Austin, which incorporated a limited program of affirmative action to increase ethnic diversity among its students.).

<sup>441</sup> UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, paras 7 and 9.

<sup>442</sup> Convention on Conservation of Migratory Species, 23 June 1979, 19 ILM 11, Article 3(5); Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 UNTS 105, Article 7; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72, Article III(13)(b).

<sup>443</sup> See generally David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Cheltenham: Edward Elgar 2015).

<sup>444</sup> Alexandre Genest, *Performance Requirement Prohibitions in International Investment Law* (Leiden: Brill 2019).

In *Lemire v. Ukraine*, the Ukrainian Law on Television and Radio Broadcasting required that at least 50 percent of the general broadcasting of each radio company should be comprised of music produced in Ukraine including any music where the author, the composer, and/or the performer was Ukrainian.<sup>445</sup> The claimant argued that the 50 percent local music requirement amounted to a performance requirement prohibited under Article 11.6 of the US–Ukraine BIT.<sup>446</sup> In the claimant’s opinion, the high level of the requirement caused significant damages, because the program concept of his radio company was based entirely on hits.<sup>447</sup> As there were too few music hits in Ukrainian music, the radio station had to continuously replay the same few Ukrainian songs.<sup>448</sup> Thus, the claimant alleged a loss of advertising revenue.<sup>449</sup>

In the opinion of the respondent, however, local music requirements were justified on ‘public policy grounds’ due to ‘the State’s legitimate right to organize broadcasting.’<sup>450</sup> In the Annex to the BIT, both states reserved the right to make or maintain limited exceptions to the national treatment principle with regard to radio broadcasting stations.<sup>451</sup> More importantly, Ukraine claimed that in all jurisdictions, radio and TV are special sectors subject to specific regulations. There are two reasons for this: first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licenses to prospective bidders; second, when regulating private activity in the media sector, states can, and frequently do, pursue a number of public policy objectives: thus, media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities, and other similar factors.<sup>452</sup>

The Arbitral Tribunal upheld Ukraine’s line of argument. To start with, it considered that the local music requirement applied to all broadcasters in Ukraine.<sup>453</sup> Then, it recognized that ‘[a]s a sovereign state, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State’s own cultural policy. The promotion of domestic music may validly reflect a

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445 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 227.

446 US–Ukraine BIT, Article 11.6.

447 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 499.

448 *Id.* para. 503.

449 *Id.* para. 499.

450 *Id.* paras 218 and 227.

451 *Id.* para. 242.

452 *Id.* para. 251.

453 *Id.* para. 218.

State policy to preserve and strengthen cultural inheritance and national identity. The high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.<sup>454</sup>

The Arbitral Tribunal investigated international society's prevailing ideas about ways to protect national culture, acknowledging that 'the desire to protect national culture is not unique to Ukraine.' The Arbitral Tribunal also considered that many other countries adopt similar cultural policies.<sup>455</sup> For instance, France requires that radio stations broadcast at least 40 percent French music, and Portugal has a 25–40 percent Portuguese music quota.<sup>456</sup> Therefore, the Tribunal held that this requirement could not be deemed to be unfair.<sup>457</sup>

The Tribunal then asked whether the ban on performance requirements was applicable to a cultural restriction like the 50 percent Ukrainian music requirement. To answer this question, the Tribunal applied two different interpretation criteria to Article 11.6 of the BIT: textual interpretation and teleological interpretation.<sup>458</sup> Looking at the ordinary meaning of Article 11.6 of the BIT, this provision clearly prohibited local law requirements that 'goods or services ... [should] be purchased locally.'<sup>459</sup> While the Ukrainian law did not specify that radio stations should purchase local songs, in practice Ukrainian music was produced and commercialized locally.<sup>460</sup> With regard to the object and purpose of Article 11.6 of the BIT, the Arbitral Tribunal held that it was 'trade-related: to avoid that states impose local content requirements as a protection of local industries against competing imports.'<sup>461</sup> Since the objective of the Law on Radio Broadcasting was 'not to protect local industries and restrict imports, but rather to promote Ukraine's cultural inheritance,' it was deemed to be 'compatible with Article 11.6 of the BIT.'<sup>462</sup>

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454 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 505 (internal references omitted).

455 *Id.* para. 506.

456 *Id.*

457 *Id.*

458 *Id.* para. 508.

459 *Id.* para. 509.

460 *Id.* para. 509.

461 *Id.* para. 510.

462 *Id.* para. 511.

## 10 Critical Assessment

These arbitrations took place in different locations and concerned facts taking place in the Americas, Africa, Asia, and Europe respectively. They were conducted by different arbitral tribunals under different international investment treaties, and concerned different matters and claims. One may legitimately wonder whether there is any commonality between these awards. One may also question the relevance of discussing previous awards, given the fact that there is no binding precedent in international (investment) law.

Nonetheless, the study of previous awards is useful because patterns of consistent use can and do influence subsequent awards. In fact, investment arbitrations – while not binding on each other – have become an important source of international investment law. Moreover, these awards have increasingly referred to cultural heritage protection while delimiting jurisdictional grounds, clarifying substantive standards of protection, and even quantifying damages.

The examined jurisprudence shows a tension between state obligations under investment treaty provisions and state cultural policies. In fact, most IIAs allow investors to challenge cultural policies that they believe violate their rights before international arbitral tribunals.<sup>463</sup> Arbitral tribunals can find state measures to be indirect expropriation or violations of the fair and equitable treatment that states owe to investors. Indigenous protests against certain investments near cultural resources have resulted in claims of violation of the full protection and security standard under applicable IIAs.

What is the relevance of these and similar arbitrations to international investment law, international cultural heritage law, human rights law, and international law more generally? From an international investment law perspective, these cases illustrate how arbitral tribunals have dealt with cultural concerns. Arbitral tribunals have demonstrated some qualified deference to state regulatory measures aimed at protecting cultural heritage when the host state has raised such cultural concerns.<sup>464</sup> However, arbitral tribunals have adopted a more cautious stance when cultural arguments were presented by the claimants or by the communities affected by the given investment through

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463 August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 *Asia Pacific LR* 3–26, 8.

464 *Glamis Gold Ltd v. United States*, Award, 8 June 2009, 48 ILM 1035.

friend-of-the-court (*amicus curiae*) briefs.<sup>465</sup> Arbitral tribunals are not legally obligated to consider *amicus curiae* briefs; rather, they have the ability to do so should they deem it appropriate.

At the procedural level, arbitral tribunals constitute an uneven playing field: while foreign investors have *locus standi* – that is, the right to act or be heard – before these tribunals, local communities do not have direct access to these dispute-settlement mechanisms. Rather, their arguments need to be espoused by their home state. Nonetheless, for a variety of reasons, states do not always adequately represent local communities.<sup>466</sup> In fact, the cultural entitlements of local communities often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there is structural inequality between investors and local communities that governments may not mitigate.

From an international cultural heritage law perspective, cultural heritage-related investment disputes can affect the implementation of international cultural heritage law. Arbitral tribunals can contribute to good cultural governance by expressing the need to govern cultural phenomena according to due process and the rule of law.<sup>467</sup> As Pulkowski points out, ‘cultural policies are no longer part of a sovereign *domaine réservé*.’ Rather, ‘states must justify their domestic cultural policies ... at the international level.’<sup>468</sup> The possibility of such disputes can prevent institutions from adopting protectionist or opportunistic behavior. If private property is expropriated—whether directly or indirectly—compensation must be paid.<sup>469</sup> While states have the right to protect cultural heritage, they must treat foreign investors fairly and equitably.

At the same time, the interplay between the promotion of FDI and the protection of cultural heritage highlights the power imbalance between the two fields of international law, and makes the case for rethinking and strengthening the current regime protecting cultural heritage. Even if there is no inherent

465 *Grand River Enter. Six Nations Ltd. v. United States*, UNCITRAL/NAFTA Chapter 11, Award, 12 January 2011.

466 William Shipley, ‘What’s Yours is Mine: Conflict of Law and Conflict of Interests Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration’ (2014) 11 TDM 1.

467 Valentina Vadi, ‘Global Cultural Governance by Arbitral Tribunals: The Making of a Lex Administrativa Culturalis’ (2015) 33 *Boston University International Law Journal* 101–138.

468 Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: OUP 2014) 11.

469 *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID ARB No. 09/20, Award, 16 May 2012 (with regard to indirect expropriation); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award, 17 February 2000, ICSID Case No. ARB/96/1, 39 ILM (2000) 1317 (with regard to direct expropriation).

tension between these two subfields of international law in theory, tensions often arise in practice. While international investment law is characterized by binding, timely, and effective dispute settlement mechanisms, there is no dedicated specialized international court empowered to adjudicate violations of international cultural heritage law.

From a human rights law perspective, the interplay between international investment law and human rights law exposes the disparity between the two areas and gives reasons for revising the current regime protecting human rights.<sup>470</sup> While development analysts consider extractive projects as anti-poverty measures and advocate FDI as a major catalyst for development,<sup>471</sup> 'for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.'<sup>472</sup> In particular, rising investment in the extractive industries can have a devastating impact on the livelihood of Indigenous peoples.<sup>473</sup>

While the international investment regime is characterized by binding, efficient, and effective dispute settlement mechanisms to assess the eventual breach of investor's rights under IIAs, the human rights system is characterized by diverse mechanisms for assessing violations of human rights. Human rights mechanisms usually require the exhaustion of internal remedies, which is often time-consuming.<sup>474</sup> Even where regional human rights courts exist, enforcement of their rulings can be challenging.<sup>475</sup> In other words, Indigenous peoples' rights face far more erratic enforcement than investors' rights.<sup>476</sup> Even if Indigenous peoples affected by a given investment can raise human rights issues through *amicus curiae* briefs, arbitral tribunals have no duty to admit such submissions or to consider these briefs in their awards. To sum up, investor–state arbitrations

470 Kleinfeld, 'The Double Life of International Law', 1757.

471 See OECD, *Foreign Direct Investment for Development* (Paris: OECD 2002) at 3.

472 Lila Barrera Hernández, 'Indigenous Peoples, Human Rights, and Natural Resource Development: Chile's Mapuche People and the Right to Water' (2005) 11 *Annual Survey of International and Comparative Law* 1–29, 6.

473 See generally Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor–State Disputes and The Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73–100 (describing how the alteration of the natural landscape affects Indigenous peoples' relationship with land, their lifestyle, and worldview).

474 Francioni, 'Access to Justice', at 64.

475 Kleinfeld, 'The Double Life of International Law', 1770.

476 *Id.* at 1765.

and human rights adjudication seem to speak two different languages even when they deal with similar issues.

The power asymmetry between the two treaty regimes perpetuates and intensifies 'already-existing power imbalances between [I]ndigenous communities, states, and investors.'<sup>477</sup> Respondent states can raise human rights issues 'as a means of justifying [their] action' before arbitral tribunals.<sup>478</sup> Yet, they rarely raise human rights arguments in investment arbitrations 'to avoid the negative repercussions that could result from investors ... deciding to invest in other states.'<sup>479</sup>

Nonetheless, a state's obligations to foreign investors under international investment law cannot justify violations of other obligations it has under international law. For instance, in the *Sawhoyamaxa* case,<sup>480</sup> the Inter-American Court of Human Rights clarified that the state's investment law obligations did not exempt it from protecting and respecting the property rights of the *Sawhoyamaxa*.<sup>481</sup> These communities claimed that Paraguay had, *inter alia*, violated their right to property by failing to recognize their title to ancestral lands.<sup>482</sup> For its part, Paraguay had attempted to justify its conduct by claiming that the disputed lands belonged to German investors and were protected under the Germany–Paraguay BIT.<sup>483</sup>

However, after noting the linkage between land and the cultural rights of Indigenous peoples,<sup>484</sup> the Court clarified that the investment law obligations of the state did not exempt the state from protecting and respecting the property rights of the *Sawhoyamaxa*.<sup>485</sup> Rather, the Court noted that compliance with investment treaties should always be compatible with the human rights

477 Kleinfeld, 'The Double Life of International Law', 1757.

478 *Id.* at 1774.

479 James D. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77–150, 108.

480 Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement, 29 March 2006, Merits, Reparations, and Costs, para. 248.

481 *Id.* para. 140.

482 *Id.* para. 2.

483 *Id.* para. 115(b).

484 *Id.* para. 118 (noting that '[t]he culture of the members of Indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity:').

485 *Id.* para. 140.

obligations of the state.<sup>486</sup> Moreover, the Court pointed out that the relevant BIT does not prohibit expropriation; rather, it allows expropriation subject to several requirements including the existence of a public purpose and the payment of compensation.<sup>487</sup> For the Court, returning land to dispossessed groups could constitute a public purpose.<sup>488</sup> Therefore, the Court found a violation of Article 21 of the Convention and ordered the government to return the land to the Sawhoyamaya community.<sup>489</sup> The dispute embodies a clash of cultures between different land claims—one reflecting a particular way of life and cultural identity, protected under human rights law, and the other premised on the land's economic value, protected under an investment treaty.<sup>490</sup> The same state measure can simultaneously constitute the expropriation of a foreign investment and the restitution of traditional land to Indigenous peoples.

From an international law perspective, cultural heritage-related arbitrations show that international investment law is not a self-contained regime; rather, it is part and parcel of international law. One may identify underlying processes of investment treaty arbitration that lead to a construction of unity and coherence in international law. As the Arbitral Tribunal in *Asian Agricultural Products Ltd. v. Sri Lanka* put it, bilateral investment treaties are 'not a self-contained closed legal system' but have to be 'envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules whether of international law character or of domestic law nature'.<sup>491</sup> Therefore, while international investment law can contribute to the development of international law, it should also be influenced by the development of the latter. Because of the increased proliferation of treaties, some overlap between different branches of international law is unavoidable. Customary norms of treaty interpretation as restated in the VCLT require adjudicators to consider the context of a treaty, which includes any relevant rules of international law applicable in the relations between the parties.

Arbitral tribunals have increasingly considered the protection of cultural heritage as an essential aspect of state sovereignty. In the *Glamis Gold* case, the Tribunal accorded deference to national cultural policies, recognizing that 'It

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486 IACtHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, para. 140.

487 *Id.*

488 *Id.*

489 *Id.* para. 144.

490 Lorenzo Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 *JIEL* 431–454, 447.

491 *Asian Agricultural Products Ltd v. Sri Lanka (AAPL v. Sri Lanka)*, ICSID Case ARB/87/3, Award, 27 June 1990 (1997) 4 ICSID Reports 245, para. 21.

is not the role of this Tribunal or any international tribunal to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency' and that 'governments must compromise between the interests of competing parties.'<sup>492</sup> In *Parkerings*, the Tribunal took into account the cultural heritage elements of the case, distinguishing the two projects on the basis of their diverse cultural features. In the *Pyramids* case, damages for loss of profits were not awarded because of the unlawfulness of the proposed economic activity under international cultural heritage law. In *Lemire v. Ukraine*, the Arbitral Tribunal acknowledged that, according to the treaty preamble, the main purpose of the BIT was the promotion of foreign investment instrumental to the pursuit of economic development.<sup>493</sup> Accordingly, the Tribunal recognized that 'the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy,' and that, in order to achieve these developmental objectives, the treatment of foreign investors must be balanced against the right of the host state 'to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.'<sup>494</sup>

The *Lemire* Tribunal reaffirmed full respect for Ukraine's cultural sovereignty, stating that 'It certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated,' and acknowledging that 'in all jurisdictions, radio and TV are special sectors subject to specific regulation' as states regulate media companies to guarantee linguistic pluralism and other similar factors.<sup>495</sup> According to the *Lemire* Tribunal, the inherent right to regulate 'extends to promulgating regulations which define the State's own cultural policy.' Moreover, 'the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.'<sup>496</sup>

While acknowledging state cultural concerns, arbitral tribunals have imposed schemes of good governance, requiring respect for investment treaty provisions that prohibit discrimination and require fair and equitable

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492 *Glamis Gold v. United States*, Award, paras 779 and 803.

493 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paras 272–3.

494 *Id.* para. 273.

495 *Id.* para. 240.

496 *Id.* para. 505.

treatment. While not every breach of municipal law amounts to a violation of investment treaty provisions, relevant violations will undergo the scrutiny of arbitral tribunals. Such an assessment can contribute to good cultural governance as demanded by the relevant UNESCO instruments: in fact, 'unrestricted state sovereignty may be detrimental to the very cause of cultural diversity.'<sup>497</sup> In this sense, the delimitation of state sovereignty in cultural matters can 'contribute to a better check and balance between the promotion of cultural identity and cultural diversity in any given state.'<sup>498</sup>

To determine whether Ukraine had violated performance requirement prohibitions under the relevant BIT in imposing Ukrainian-language quotas in radio broadcasting, the Arbitral Tribunal adopted a comparative approach and concluded that 'a rule cannot be said to be unfair, inadequate, inequitable or discriminatory when it has been adopted by many countries around the world.'<sup>499</sup> This comparative method may play a positive role in enhancing the coherence of international law. Comparative surveys may help adjudicators to reach results in harmony with general principles of international law or customary international law. More importantly, the fact that economic standards of valuation are not the only ones that are taken into consideration by arbitral tribunals seems to be distinctive. The *Lemire* Tribunal was not driven by a cost-benefit analysis or a review of the efficiency of the national measure; rather, it was interested in the 'normality' of such measure – that is, assessing whether it was a regulatory choice that diverged from the canons commonly accepted by the international community.

The almost universal ratification of international cultural heritage law instruments indicates that the international community perceives the protection of cultural heritage as an important public interest. Human rights law similarly demands the protection of cultural heritage as a key element of cultural identity. This leads to the conclusion that the protection of cultural heritage is a general principle of law if not a norm of customary international law already, and that adjudicators will have to take cultural concerns into account. If cultural heritage protection already belongs to customary international law, the case for such consideration is even stronger.

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497 Christophe Germann, 'Towards a Global Cultural Contract to Counter Trade-Related Cultural Discrimination', in Nina Obuljen and Joost Smiers (eds), *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: Making it Work* (Zagreb: Institute for International Relations 2006) 290.

498 Id. 291.

499 *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 506.

The interaction between international investment law and cultural heritage law demonstrates the gradual emergence of customary norms requiring the protection of cultural heritage in times of peace. This is a significant outcome, as most scholars have pinpointed the existence of customary norms requiring the protection of cultural heritage in times of war. The jurisprudence of arbitral tribunals is thus contributing to the development of international law requiring the protection of cultural heritage. Rather than considering cultural heritage as an exception or as a defense justifying State measures, arbitral tribunals have considered heritage protection as a legitimate objective pursued by the host state when such tribunals have interpreted and applied relevant investment treatment standards.

Nonetheless, cultural values and interests are not necessarily at the heart of arbitral thinking and practice. In most cases, arbitral tribunals are activated by investors to obtain protection for their investments, certainly not for the protection of cultural heritage potentially affected by the investments themselves. In the end, these cases represent a remedy that is available only after an investor files an investor–state claim. There may be cases in which cultural heritage concerns arise, but states prefer to ignore such matters in favor of economic development. Several cases are settled during the cooling-off period that is required before investment arbitration. There is a risk that in such a context, the host state will scale down its cultural policies behind closed doors to avoid expensive arbitration costs. In other cases, the state may adopt cultural policies discriminating against foreign investments, but the investor may decide not to pursue arbitration, deeming it too expensive. Finally, and more importantly, when a tribunal is established for reasons related to the clash between the execution of an investment and cultural heritage protection, arbitrators will adjudicate the compliance of state measures with international investment law. Arbitral tribunals have limited jurisdiction: they must determine whether state conduct complied with its investment treaty obligations. They are not required to rule on the state's compliance with its obligations under international cultural heritage law.

Much remains to be done to successfully accommodate cultural heritage and human rights considerations within international investment law and arbitration. The available jurisprudence shows the need to reinforce the protection of cultural heritage and human rights, for instance by introducing specific reference to cultural concerns in international investment treaties, in order to prevent a culture clash between investors' rights and the host state's preservation of fundamental cultural interests and values. For instance, requiring investors' compliance with domestic laws and regulations in the text of the relevant international investment agreements can reinforce the state's right to

protect its cultural heritage. These provisions can be strengthened by adding the ability for states to file counterclaims in the event that investors seriously violate domestic laws.

## 11 Conclusions

The potential for conflict of norms is inherent in every legal system. Not only does international law not constitute an exception to this notion, but it offers a fertile ground for overlapping norms and conflicting obligations. The multitude of lawmakers and the constellation of courts and administrative bodies are elements which all contribute to the complexity of the system. As Slaughter contends, conflict may be seen as ‘the motor of positive change,’ and the successful management of conflicts may actually strengthen the legal order.<sup>500</sup>

As international cultural heritage law instruments often do not include a dispute settlement mechanism, cultural heritage-related investment disputes have gravitated toward a number of national, regional, and international courts and tribunals. This chapter surveyed a number of heritage-related investment disputes, showing that while international investment law has not developed any institutional machinery for the protection of cultural heritage through investment dispute settlement (after all, international investment law is not intended to protect cultural heritage as such), in recent years, a jurisprudential trend has emerged that takes cultural heritage into consideration. Arbitral tribunals have paid increasing attention to cultural concerns and have often referred to international law principles in their reasoning in order to reconcile the different interests at stake.

It is worth investigating how arbitral tribunals have dealt with cultural heritage disputes precisely because arbitral tribunals are not courts of general jurisdiction like the ICJ. In fact, one could argue that few of the cases examined in this chapter openly dealt with cultural heritage: in some cases, cultural heritage formed part of the factual background; in other cases, cultural heritage was not even implicated in the facts, but merely mentioned in passing. The cases in question, however, all dealt with the interplay between cultural heritage protection and economic freedom. The fact that they did not seem to concentrate on cultural heritage is of no surprise. Nonetheless, what is remarkable is the attention paid to cultural concerns by most arbitral tribunals, as other

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<sup>500</sup> Anne Marie Slaughter, *A New World Order* (Princeton N.J.: Princeton University Press 2004) 209.

international economic institutions have not shown a similar willingness to consider cultural heritage.

The magnetism of arbitral tribunals has had mixed outcomes. On the one hand, the review by an international tribunal of state cultural policies can improve good cultural governance and the transparent pursuit of cultural policies. While each state retains the right to regulate within its own territory, international investment law poses vertical constraints on such a right. Adherence to this international regime adds a circuit of external accountability, forcing states to consider the interests of the investors affected by their policies. The growing importance of such tribunals means that most governments will need to consider the impact of cultural policies on foreign investors and their investments before enacting such measures in order to avoid potential claims and subsequent liability.

On the other hand, from a cultural heritage perspective, one may wonder whether the fact that cultural heritage disputes are adjudicated before arbitral tribunals raises a sort of institutional bias. In the end, such tribunals are of limited jurisdiction; they cannot adjudicate on the eventual violation of international cultural heritage law. The mechanism is mostly triggered by foreign investors; the affected communities are represented by the host state, but have no procedural rights in the context of the proceedings. Arbitrators may not have expertise in international cultural heritage law. Other institutions and regimes, such as the WTO, have dealt with cultural questions from their point of view – often an eminently economic one – prioritizing free trade over cultural concerns.<sup>501</sup>

At the same time, international investment law is not a closed legal system but has to be contextualized within international law and develop in conformity with the latter. In many circumstances, international law is the law applicable to investment disputes according to an applicable arbitral clause or other relevant treaty provision. Even in those cases where the applicable law is the law of the host state, international law permeates national legal systems. Furthermore, according to the principle of systemic interpretation as restated by Article 31(3)(c) of the VCLT, together with the context, any relevant rule of international law applicable in the relationship between the parties should be taken into account. Given the fact that UNESCO has an almost universal membership and that its conventions are widely ratified, this leads to the conclusion that arbitrators will have to take cultural concerns into account. If one deems

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<sup>501</sup> Céline Romainville, 'Cultural Diversity as a Multilevel and Multifaceted Legal Notion Operating in the Law on Cultural Policies' (2016) 22 *International Journal of Cultural Policy* 273–290, at 279.

that cultural heritage protection already belongs to customary international law or to general principles of law, the case for such consideration is even stronger. In fact, as international courts, arbitral tribunals should settle investment disputes 'in conformity with principles of justice and international law.'<sup>501</sup>

In conclusion, because the international community values the legitimate exercise of authority, the preservation of juridical values, and the safeguarding of cultural heritage, the fact that economic standards of valuation are not the only ones that are considered by arbitral tribunals is distinctive. Inward-looking approaches, that is, disregard for broader cultural concerns, may weaken the perceived legitimacy of adjudicative bodies and the coherence of the international legal system. While investor–state arbitration deals with an area at the crossroads between economics and law, the legal and cultural dimension of these disputes cannot be neglected or dismissed in favor of purely economic considerations.

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501 VCLT, preamble.

# Cultural Heritage in International Trade Law

The most beautiful sea  
hasn't been crossed yet.<sup>1</sup>



## 1 Introduction

While economic globalization has spurred a more intense dialogue and interaction among nations – potentially promoting cultural diversity – it can also jeopardize the protection of cultural heritage and associated cultural practices. On the one hand, international trade law enables different states to exchange their cultural goods more easily. Since ancient times, different civilizations have benefitted from intercultural communication and trade, as evidenced by Mesopotamian art found in Egypt, the Phoenician alphabet spread across the Mediterranean Sea, and Arabic numerals and Chinese papermaking shared among diverse cultures across the globe. Contemporary trade regimes facilitate the spread of artworks and cultural items such as music, movies, books, specialty food, traditional medicines, and agricultural practices. International trade law can thus foster cultural diversity.

On the other hand, global trade in cultural products can affect local cultural practices and jeopardize the viability of smaller cultures, because foreign products may gradually replace domestic ones.<sup>2</sup> Not only can cultural identity be eroded, but there is a risk of cultural imperialism.<sup>3</sup> In fact, the transformation of traditional cultural practices into profitable economic activities and commodities can lead to cultural homogenization, if not cultural hegemony. Dominant cultures – which also reflect the global distribution of power – tend to dominate in the global markets.<sup>4</sup>

1 Nazim Hikmet, *Poems* [1973] (New York: Persea 2002).

2 Bruno de Witte, 'Trade in Culture: International Legal Regimes and EU Constitutional Values' in Joanne Scott and Grainne De Búrca (eds), *The EU and the WTO* (Oxford and Portland: Hart Publishing 2001) 238.

3 See generally Herbert Schiller, *Culture, Inc.* (New York: OUP 1989).

4 Thomas L Friedman, *The Lexus and the Olive Tree* (New York: Farrar 1999) 8.

As international trade law is oriented toward opening borders to international commerce and is founded on economic considerations, there is a perceived risk that ‘economic interests may gain priority over all other values, however important, including cultural ones.’<sup>5</sup> International trade law fosters a culture that emphasizes comparative advantage, productivity, and economic development. It can contrast with international cultural heritage law, which emphasizes the importance of defending cultural identity, safeguarding cultural value, and promoting cultural diversity. Therefore, there is a lively debate on how to balance trade and cultural diversity. As economic globalization can jeopardize cultural practices, ‘state intervention is required in order to ensure their ... continuation.’<sup>6</sup> States can certainly adopt a range of different cultural measures as the WTO does not generally require regulatory harmonization. Moreover, international cultural heritage law may require the adoption of such cultural policies. Nonetheless, at the WTO, state cultural policies are considered to be municipal law. In international (trade) law, a state’s domestic law cannot excuse it from fulfilling its international obligations.<sup>7</sup> In other words, state measures safeguarding its cultural heritage would not necessarily grant that heritage privileged status at the WTO. In fact, domestic protectionist measures ‘are precisely the type of measures whose WTO consistency may come into question, requiring review.’<sup>8</sup>

Moreover, WTO members states have brought cultural heritage disputes before the WTO Dispute Settlement Mechanism (DSM), where they have claimed that regulatory measures affecting their economic interests are in breach of the relevant international trade law provisions. Such disputes highlight the emergence of a clash of cultures between international economic governance and the safeguarding of cultural heritage. Panels and the AB have had to find the proper balance between trade and countervailing cultural interests. Decisions that are too liberal on trade may lead to a race to the bottom in the cultural field. Conversely, too lenient a stance on cultural policies will restrict trade in culture unduly. In fact, ‘not all protectionist measures in the name of culture are founded on solid cultural considerations.’<sup>9</sup> Freedom of trade clearly

5 Olaf Weber, ‘From Regional to Global Freedom of Trade in Audio-Visual Goods and Services?’, in Rachael Craufurd Smith (ed.), *Culture and European Union Law* (Oxford: OUP 2004) 353–382, 355.

6 Marilena Alivizatou, ‘Contextualising Intangible Cultural Heritage in Heritage Studies and Museology’ (2008) 3 *International Journal of Intangible Heritage* 43, 46.

7 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 27.

8 Tomer Broude, ‘Mapping the Potential Interactions between UNESCO’s Intangible Cultural Heritage Regime and World Trade Law’ (2018) 25 *International Journal of Cultural Property* 419–448, at 433.

9 Weber, ‘From Regional to Global Freedom of Trade in Audio-Visual Goods and Services?’ 380.

supports cultural exchange and dialogue. Conversely, cultural policies imposing import quotas ‘may ultimately impede a broader freedom of information and of expression, and so curtail the very cultural diversity they seek to achieve.’<sup>10</sup>

In many ways, this jurisprudence has served as a battlefield between the promotion of free trade and the protection of cultural diversity, and as a site of confrontation between international trade governance and cultural sovereignty.<sup>11</sup> Indeed, a number of disputes adjudicated at the WTO have touched upon cultural heritage and cultural rights.<sup>12</sup> However, the literature has rarely addressed what happens when trade and cultural heritage interact at the WTO; whether the WTO is well-equipped to cope with this interplay; and in which key areas cultural heritage and trade intersect.<sup>13</sup>

This chapter therefore aims to discuss select dimensions of the complex interplay between trade and cultural heritage exploring how WTO dispute settlement bodies deal with cultural heritage, specifically examining whether they consider cultural concerns when adjudicating cultural heritage-related disputes. In order to address these questions, the chapter examines several cultural heritage disputes relating to diverse areas of international trade law. Due to space limits, the chapter focuses on a selected range of case studies. It demonstrates that while a number of legal tools can foster the reconciliation of opposing interests under WTO law, much remains to be done to ensure better coherence between theory and practice.

The chapter unfolds as follows. First, it examines the theory of comparative advantage that lies at the heart of international trade law and demonstrates how it can clash with the safeguarding of cultural diversity. Second, the chapter explores the non-discrimination provision of WTO law investigating how it can intersect with state cultural policies. Third, the chapter discusses the possibility of quantitative restrictions in the cultural domain. Fourth, the chapter investigates the general exceptions provision enabling states to protect national treasures of artistic, historic, and archaeological value. Fifth, the chapter addresses

10 Weber, ‘From Regional to Global Freedom of Trade in Audio-Visual Goods and Services?’ 380.

11 Joel Trachtman, ‘International Legal Control of Domestic Administrative Action’ (2014) 17 *JIEL* 753; Wenhua Shan, Penelope Simons, and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing 2008).

12 For a seminal study, see John Morijn, *Reframing Human Rights and Trade—Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Intersentia 2010); Valentina Vadi, ‘Human Rights and Investments at the World Trade Organization’, in Yannick Radi (ed.), *Research Handbook on Human Rights and Investments* (Cheltenham: Edward Elgar 2019) 158–185.

13 See Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: CUP 2007); Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Oxford: Hart Publishing 2013); Valentina Vadi and Bruno De Witte (eds), *Culture and International Economic Law* (London: Routledge 2015).

the question of whether trade restrictions can be justified on public morals grounds. Sixth, the chapter investigates how the illicit trade of cultural artifacts that funds terrorism and violence can be legitimately prevented under the security exception provisions. Finally, the chapter focuses on select emerging areas of interplay between international cultural heritage law and international trade law. The conclusions then sum up the key findings of the chapter.

## 2 The Theory of Comparative Advantage

The theory of comparative advantage is at the heart of international trade law as it expresses the current economic rationale for free trade. After a brief historical overview of the origins and development of this theory, this section demonstrates that it can be incompatible with some features of international cultural heritage law. This is not to say that international trade is necessarily incompatible with cultural diversity, but that existing flexibilities within international trade law need to be interpreted and applied to the full to respect the fundamental cultural choices of the international community.

Already in the 16th century, treatises on the law of nations acknowledged that different nations had different resources, and that international trade could increase mutual advantage, thus fostering peaceful and prosperous relations among nations. For instance, in his treatise on the law of nations, Alberico Gentili (1552–1608), an Italian refugee and Regius Professor at the University of Oxford, viewed commerce as a fact of nature and an expression of human sociability.<sup>14</sup> To him, commerce is inherent in the design of nature because nations are naturally interdependent. Nature has distributed commodities over different regions ‘in order that it may be necessary for [people] to have commerce with one another.’<sup>15</sup> Gentili elaborated the notion of comparative advantage: ‘[h]ere the crops of grain are richest, there grapes grow best ... Thus it is an advantage that men journey over the earth ... This is a wonderful gift of nature.’<sup>16</sup>

Analogously, the Dutch humanist and lawyer Hugo Grotius (1583–1645) adopted a providential view of commerce.<sup>17</sup> In his view, commerce constitutes ‘an instrument of providence’: ‘For God has not willed that nature shall

14 Ileana Porras, ‘Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations’ (2014) 27 *Leiden JIL* 641–660, 651.

15 Alberico Gentili, *De Iure Belli* [1598], John C. Rolfe (transl.) (Oxford: Clarendon Press 1933) Book I, Chapter XIX, p. 88.

16 Id.

17 Ileana Porras, ‘The Doctrine of the Providential Function of Commerce in International Law—Idealizing Trade’, in Martti Koskeniemi, Mónica García-Salmones Rovira, and Paolo Amorosa (eds), *International Law and Religion* (Oxford: OUP 2017) 313–333.

supply every region with all the necessities of life ... it was His will that human friendships should be fostered by natural needs and resources.<sup>18</sup> Commercial activities do not merely benefit merchants; rather, they can benefit the international community as a whole by addressing given needs.<sup>19</sup> By divine design, '[e]ach nation c[an] acquire what it lack[s] by supplying another nation with those gifts of which it ha[s] been given an abundance.'<sup>20</sup>

In his masterpiece, *The Wealth of Nations*, the Scottish philosopher Adam Smith (1723–1790) famously divulged the theory of the absolute advantage, the idea that people 'can increase their income by developing specialised skills and trading the fruits of their labour in the marketplace.'<sup>21</sup> If a tailor focuses on sewing, and a shoemaker focuses on making shoes, 'each can produce more by concentrating on doing what each can do more efficiently.' In Smith's words, 'It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The tailor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor.' Smith then translated this economic insight from the domestic level to the international one. 'What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better to buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.'<sup>22</sup>

The British political economist David Ricardo (1772–1823) went a step further by elaborating the theory of comparative advantage.<sup>23</sup> In his 1817 *Principles of Political Economy*,<sup>24</sup> he asked: if a country is more efficient than another in every productive activity, would both countries benefit from trade? The theory of absolute advantage had no answer to this question. To address this question, Ricardo imagined two countries, England and Portugal, producing two

18 Hugo Grotius, *Mare Liberum*, Robert Feenstra (ed.) (Leiden/Boston: Brill 2009) Chapter I, p. 2.

19 Ileana Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce, and War in Hugo Grotius' *De Iure Praedae*' (2005–2006) 31 *Brooklyn JIL* 741–804, 760.

20 Id. 762.

21 John H. Jackson, *The World Trading System—The Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press 1997) 12.

22 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776] R.H. Campbell and A.S. Skinner (eds) (Oxford: OUP 1976) 456–457.

23 Jackson, *The World Trading System*, 15.

24 David Ricardo, *On the Principles of Political Economy and Taxation* (London: John Murray 1817).

goods, cloth and wine. Instead of assuming, as Adam Smith did, that England was more effective in producing one product and Portugal was more effective in the other, Ricardo assumed that Portugal was more productive in both goods. Ricardo demonstrated that if England specialized in producing one of the two goods and if Portugal produced the other, then total world output of both goods could rise.<sup>25</sup> For Ricardo, the producer with the lower opportunity cost of creating a product had a comparative advantage in creating the product. Accordingly, the ability to produce more is not a measure of efficiency in and of itself. Rather, one must weigh what is given up against what is gained. Regardless of the fact that 'a nation may have an absolute advantage over others in the production of every good, specialization in those goods with the lowest comparative costs, while leaving the production of other commodities to other countries, enables all countries to gain more from exchange.'<sup>26</sup>

The concept of comparative advantage became a key feature of international political economy with the publication of *Principles of Political Economy* by the British philosopher and political economist John Stuart Mill (1806–1873) in 1848.<sup>27</sup> The marvelous intelligibility of his work and the exact and ordered sequence of his reasoning have contributed to the success of the doctrine.

Economic theory in the 20th century has mostly confirmed the theory of comparative advantage as counterintuitive but compelling. The theory of comparative advantage can promote mutual economic interdependence and the intensification of cross-border contacts, thus fostering mutual understanding and peaceful and prosperous relations among nations. This theory is concerned with 'increasing global economic welfare' and optimizing the allocation of the world's resources.<sup>28</sup> It can ensure that citizens have a greater choice of goods at better prices.<sup>29</sup>

Although the doctrine of comparative advantage is clear in economic theory, economists, historians, and lawyers have highlighted some of its limits in practice. In his masterpiece, Mill investigated the distribution of the gains of international trade based on comparative advantage. He posited that nations with the most elastic demands for other countries' goods would benefit more from international commerce. Mill's solution to the perplexing question of

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25 See generally Ricardo, *On the Principles of Political Economy and Taxation*.

26 Raj Bhala, *International Trade Law: Cases and Materials* (Lexis 1996) 5–10.

27 John Stuart Mill, *Principles of Political Economy* (London: John Parker 1848).

28 Asif H. Qureshi and Andreas R. Ziegler, *International Economic Law*, 11 ed. (London: Sweet & Maxwell 2007) 11.

29 Jackson, *The World Trading System*, 17.

who benefits from international trade reveals the limits of the theory of comparative advantage. Indeed, the nations that will benefit most from international trade are those that rely less on the same to satisfy their fundamental needs as they produce substitutes for imported goods.

From an economic perspective, the theory of comparative advantage does not mention how the benefits of economic welfare should be shared.<sup>30</sup> On the one hand, by prioritizing global welfare, the theory of comparative advantage can neglect domestic interests and values. On the other hand, by prioritizing single buyers, it can affect the most vulnerable sectors of societies.<sup>31</sup> In fact, the satisfaction of the immediate private interests may not lead to the highest common good.<sup>32</sup> While competition can benefit global welfare, it can also prevent the development of new industries, determine the decline of whole national industry sectors, and undermine state resilience in adverse times.<sup>33</sup> While Mill cautioned against the long-term negative impact of protectionism, he also highlighted the potential benefits of governmental intervention: when the market fails to solve certain social issues, government activity is justified as long as it benefits society.<sup>34</sup> Arguably, the comparative advantage theory may be too simple to be realistic.<sup>35</sup>

From a historical perspective, by claiming the freedom of the sea and freedom of commerce, Grotius provided an ideological justification for Dutch interloping in the colonial empires of Spain and Portugal.<sup>36</sup> Other theorists may have developed their theory of international trade with the interests of the British Empire in mind.<sup>37</sup> For instance, Ricardo was a member of the British Parliament, John Stuart Mill worked for the East India Company for three

30 Qureshi and Ziegler, *International Economic Law*, 11.

31 See generally Paul Shaffer, Ravi Kanbur, and Richard Sandbrook (eds), *Immiserizing Growth—When Growth Fails the Poor* (Oxford: OUP 2019).

32 For an early articulation of this argument, see Friedrich List, *The National System of Political Economy* [1841] Sampson S. Lloyd (transl.) (London: Longmans, Green & Co. 1885).

33 Jackson, *The World Trading System*, 17.

34 Mill, *Principles of Political Economy*, Book 5.

35 Jackson, *The World Trading System*, 19.

36 Valentina Vadi, *War and Peace—Alberico Gentili and the Early Modern Law of Nations* (Leiden: Brill 2020).

37 But see Dennis Hidalgo, 'Anticolonialism', in Thomas Benjamin (ed.), *Encyclopedia of Western Colonialism since 1450* (Detroit: Macmillan 2007) 57–65 (reporting that in *The Wealth of Nations*, Adam Smith argued that Britain should grant independence to its colonies).

decades and argued in support of what he called a benevolent despotism with regard to colonial governance.<sup>38</sup>

In the past, colonialism exploited the human, natural, and economic resources of colonies to the benefit of the colonizing nations.<sup>39</sup> It promoted the overspecialization of colonies in the monocultural production of agricultural products and the extraction of raw materials.<sup>40</sup> Before the advent of foreign domination, farmers grew a diverse range of food crops, thus diversifying risk and ensuring their subsistence and resilience.<sup>41</sup> Under colonial rule, colonies were coerced into growing a limited range of export commodities for which they received limited, if any, consideration. Yet, the monocultural system harmed the soil after repeated use and left the countries vulnerable to plant diseases. This resulted in serious food shortages, failure to develop value-adding industries, reduced resilience, and consequently, increased dependence on external goods in the colonies. Paradoxically, the colonies had to begin importing food as large plantations drove out the small landowners. Closely connected to agricultural homogenization, cultural homogenization emerged as Western cultural values were imposed on the colonized. In turn, the exploitation of the colonies enabled the continuous expansion of capitalist production in the metropolitan countries.<sup>42</sup>

Therefore, the historical origins of the idea of comparative advantage raise some questions about its viability, as this theory presupposes a sort of political and legal unity, which does not correspond to an international community made of culturally diverse, independent, and sovereign states at different stages of development.<sup>43</sup> When the Indian lawyer and politician Mahatma Gandhi (1869–1948) shed Western clothing for traditional Indian khadi, a type of fabric made from locally grown cotton, it was not just a matter of personal

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38 David Williams, 'John Stuart Mill and the Practice of Colonial Rule in India' (2020) 17 *Journal of International Political Theory* 412–428.

39 Kalim Siddiqui, 'David Ricardo's Comparative Advantage and Developing Countries: Myth and Reality' (2018) 8 *International Critical Thought* 426–452.

40 Damian Ukwandu, 'David Ricardo's Theory of Comparative Advantage and its Implication for Development in Sub-Saharan Africa—A Decolonial View' (2015) 8 *African Journal of Public Affairs* 17–34, 26.

41 See e.g. Charlotte Vekemans and Yves Segers, 'Settler Farming, Agricultural Colonization, and Development in Katanga (Belgian Congo) 1910–1920' (2020) 81 *Historia Agraria* 195–226 at 206.

42 Rosa Luxemburg, *The Accumulation of Capital* [*Die Akkumulation des Kapitals*, 1913] (New York: Monthly Review Press 1968).

43 Matthew Watson, 'Historicising Ricardo's Comparative Advantage Theory, Challenging the Normative Foundations of Liberal International Political Economy' (2017) 22 *New Political Economy* 257–272.

preference: by wearing a garment of India's history, he supported the independence of his country (*swaraj*) not only in theory but also in practice. India had been a world textile leader until the 19th century, when the colonial government began exporting the raw cotton for cloth to British fabric mills, and then reimporting the finished cloth to India. By choosing the traditional garment, Gandhi gave impetus to an essential Indigenous handicraft, provided peasants with a reliable source of income even in times of natural calamity, and strengthened their resilience.<sup>44</sup> The khadi became a key visual symbol of India's battle for independence and economic decolonization.

From a legal perspective, the theory of comparative advantage does not adequately deal with the challenge of cultural diversity. It portrays human beings as consistently rational, self-interested, economic actors (*homo economicus*) 'who desir[e] to possess wealth, and who [are] capable of judging the comparative efficacy of means for obtaining that end.'<sup>45</sup> Such theory fails to grasp the eternal essence of what is human.<sup>46</sup> In fact, the pursuit of self-interest is not the only, or even the principal, driver of human behavior. Rather, spiritual, social, and cultural factors also drive human activity.<sup>47</sup> The *homo economicus* model ignores the inner conflicts that real-world individuals may experience between personal goals and societal values. Interactions between people do not always have to be categorized as economic, as between buyers and sellers; in fact, people may also interact for various political, social, and cultural reasons.

There is a real danger that international economic policies based on the theory of comparative advantage unnecessarily impact upon cultural choices. In fact, some cultural policies can be seen as protectionist, when examined solely from an economic perspective. Commercial diversification can sometimes be a tool used to help people safeguard their cultural identity. In some cases, states may prefer safeguarding their cultural values, irrespective of economic considerations. In this vein, several states have gradually abandoned agricultural models based on monoculture to cultivate their cultural and biological diversity, achieve food security, and reduce environmental risks associated

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44 Lisa Trivedi, *Clothing Gandhi's Nation: Homespun and Modern India* (Bloomington and Indianapolis: Indiana University Press 2007) 86.

45 John Stuart Mill, 'On the Definition of Political Economy, and on the Method of Investigation Proper to It,' in *Essays on Some Unsettled Questions of Political Economy*, 2nd ed. (London: Longmans, Green, Reader & Dyer 1874) essay 5, paras 38 and 48.

46 Sergio Caruso, *Homo Oeconomicus. Paradigma, Critiche, Revisioni* (Florence: Firenze University Press 2012).

47 Elizabeth Anderson, 'Beyond *Homo Economicus*: New Developments in Theories of Social Norms' (2000) 29 *Philosophy & Public Affairs* 170–200, at 171.

with climate change.<sup>48</sup> The diversification of agricultural production is also perceived to be an element of stability, resilience, and security *vis-à-vis* crisis and change.

Already in the 16th century, Alberico Gentili affirmed the state's right to regulate trade and investments for security reasons under the law of nations.<sup>49</sup> If free trade is a fair interest (*ius commerciorum aequum est*), public safety or state security (*tuitio salutis*) is a paramount interest.<sup>50</sup> In fact, Gentili acknowledged that in some cases, trade can clash with the public interest, and that traders cannot 'set themselves as authorities on justice.'<sup>51</sup> As Gentili put it, 'let trade ... give way to sovereignty, man to nature, money to life.'<sup>52</sup> In fact, 'it is contrary to nature and contrary to the law of nations for private individuals to seek their own advantage at the expense of others.'<sup>53</sup> Therefore, in the case of conflict, priority must be given to the fundamental needs of the state (*cedat regno mercatura*).<sup>54</sup> States can forbid the importation of harmful goods or commodities that are contrary to the country's religion or public morals.<sup>55</sup> For Gentili, 'strangers have no right to argue about these matters, since they have no license to alter the customs and institutions of foreign peoples.'<sup>56</sup> Gentili highlighted that 'it is lawful to diminish the advantages of private individuals, provided some great gain is won for human society.'<sup>57</sup> For Gentili, conflicts of norms should be settled by giving precedence to norms protecting the common good.

In conclusion, the theory of comparative advantage that underpins freedom of trade has the potential to make a significant contribution to economic growth and poverty reduction. However, not all countries and all sections of the population will benefit from international trade. International trade and economic openness are necessary but insufficient for sustainable development. International trade law thus incorporates mechanisms to ensure some flexibility, such as general exceptions. Rather than being seen as anomalies, these exceptions indicate areas where economic considerations

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48 See generally Hope Johnson, *International Agricultural Law and Policy* (Cheltenham: Edward Elgar 2018).

49 Vadi, *War and Peace*, 297.

50 Gentili, *De Iure Belli*, Book I, Chapter 21, pp. 101–102.

51 Id. Book I, Chapter 3, p. 18.

52 Id.

53 Id.

54 Vadi, *War and Peace*, 298.

55 Gentili, *De Iure Belli*, Book I, Chapter 19, pp. 89–90.

56 Id. p. 90.

57 Id. Book I, Chapter 21, p. 102.

mix and mingle with other important concerns, including cultural values. Such exceptions can bridge the gap between international trade law and other subfields of international law and enable states to pursue important cultural objectives.

### 3 Non-Discrimination

Non-discrimination is central to international trade law. The principle prohibits discrimination based on the origin of products and the nationality of persons. It aims at ‘preventing and correcting state failures in granting privileges and undue protection to domestic products and nationals’ as well as ensuring equality of opportunity, that is, ‘the potential to operate successfully on markets on equal terms and unimpaired by unfair restrictions.’<sup>58</sup>

Non-discrimination essentially consists of Most Favored Nation Treatment and National Treatment. The MFN treatment ensures that trading opportunities are equal to those accorded to the most-favored nation; in other words, it is a way to ensure that trading opportunities are equal for all states.<sup>59</sup> National treatment requires treating products of other member states as one’s own. National treatment applies to imported goods: once they enter the market, they should be treated the same as domestic goods.<sup>60</sup>

Central to the non-discrimination provision is the equality requirement that like products should be treated alike. Therefore, international trade law prohibits direct discrimination. However, in some circumstances, consistent treatment is not sufficient to guarantee equality. Accordingly, international trade law prohibits both discriminatory treatment and discriminatory outcomes. When considering discrimination claims, international trade courts generally follow a three-step test. First, they investigate whether there is a

58 Thomas Cottier and Matthias Oesch, ‘Direct and Indirect Discrimination in WTO Law and EU Law’, Sanford Gaines, Birgitte Egelund Olsen, and Karsten Engsig Sørensen (eds), *Liberalizing Trade in the EU and the WTO: A Legal Comparison* (Cambridge: CUP 2012) 141–175, 141, and 146.

59 General Agreement on Tariffs and Trade (GATT 1947), 30 October 1947, 55 UNTS 194, as incorporated in the Marrakesh Agreement, Annex 1A General Agreement on Tariffs and Trade 1994 (GATT 1994), Article I; General Agreement on Trade in Services (GATS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 ILM 44 (1994), Article 2; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197, Article 4.

60 GATT Article III; GATS Article 17; and TRIPS Agreement Article 3.

difference in treatment. Second, they check whether there is a difference in the outcome. Third, if a *prima facie* case of discrimination is established, they examine whether the difference in treatment or outcome is justified. After introducing the notion of non-discrimination in WTO law, this section distinguishes direct from indirect discrimination. It then investigates the concept of likeness and concludes by examining possible legitimate distinctions justifying cultural policy measures.

### 3.1 *Direct and Indirect Discrimination*

The prohibition of discrimination covers both direct and indirect discrimination. Direct or *de jure* discrimination refers to measures that openly discriminate against goods originating in a specific country. It can be relatively easy to identify. The Italian tractors case provides a classic example of explicit discrimination, where a consumption subsidy was paid only on the purchase of Italian farm tractors.<sup>61</sup>

Indirect or *de facto* discrimination refers to measures not explicitly referring to origin but in fact privileging domestic goods or goods originating from certain countries only. It includes measures that look origin-neutral but have the effect of imposing an unjustifiable disadvantage on foreign products. Since discrimination often occurs covertly, indirect discrimination is not always easy to identify. Traditional ways of ascertaining less favorable treatment focus on economic criteria. For instance, under the diagonal test, one compares the treatment accorded to the foreign goods with that enjoyed by the domestic goods and asks whether any imports receive less favorable treatment than any like domestic products.<sup>62</sup>

In *Japan—Alcoholic Beverages*,<sup>63</sup> the panel found that an origin-neutral tax amounted to a violation of national treatment. Tax rates differed depending on the type of alcoholic beverage. The same rates were applied to both imported and Japanese beverages. However, the majority of domestic products fell into categories with low taxes, while whiskeys and brandies imported from the former European Economic Community (EEC) were taxed more than domestic products.<sup>64</sup> Japan then adopted a new tax system, but again the panel held that

61 See *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60 (credit facilities were reserved exclusively to the purchasers of Italian tractors thus discriminating against foreign tractors).

62 Lothar Ehring, 'De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – or Equal Treatment?' *Jean Monnet Working Paper* 12/01 (2001) 6.

63 Panel Report, *Japan—Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 November 1987, BISD 34S/83.

64 *Id.* para. 5.9.

vodka was taxed more than shochu, a distilled beverage, which is essentially a Japanese product.<sup>65</sup> Similarly, in *Korea—Alcoholic Beverages*, the panel noted that the tax regime benefitted ‘almost exclusively domestic producers’ as there was ‘virtually no imported soju’ while less than 1% of domestic production faced the higher tax.<sup>66</sup> Analogously, in *United States—Malt Beverages*, the panel held that a wine tax that favored wine made from a grape type growing only in Mississippi afforded protection to domestic production.<sup>67</sup>

In the adjudication of these beverage-related cases, no consideration was paid to the cultural differences that may characterize different markets. Rather, adjudicators identified discrimination on the basis of rational choice, efficiency, and economic rationale. Yet, as Mavroidis put it, ‘likeness can never be presumed, since different consumers in different markets may react in different ways to the same pair of goods.’<sup>68</sup> In fact, certain goods inevitably express cultural value. For instance, in 2013, UNESCO formally recognized Japanese cuisine (*washoku*) as an item of intangible cultural heritage as it plays an important role in the daily fabric of Japanese culture and social life.<sup>69</sup> Eating locally and enjoying a traditional diet is part and parcel of food education (*shokuiku*), included in school curricula since the 1990s, which highlights the cultural linkage between agriculture, the environment, and society.<sup>70</sup>

In the *US—Malt Beverages* case, the panel attempted to introduce a new definition of likeness, granting states some leeway to adopt policies on the basis of alcohol content. As Article III(1) of the GATT states that internal taxes and regulatory measures should not be used ‘to afford protection to domestic production,’ the panel ruled that ascertaining likeness required addressing ‘the question whether the product distinction in question had the aim [and effect] of protecting domestic industry.’<sup>71</sup> Nonetheless, the Appellate Body rejected

65 Panel Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, circulated 11 July 1996, DSR 1996:1, 125, paras 6.24 and 6.27.

66 Panel Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, circulated 17 September 1998, para. 10.102.

67 Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, paras 5.23–5.26.

68 Petros C. Mavroidis, ‘The Gang That Couldn’t Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body’, (2016) 27 *EJIL* 1107–118, footnote 25.

69 Theodore Bestor, ‘Most F(l)avoured Nation Status: the Gastrodiplomacy of Japan’s Global Promotion of Cuisine’ (2014) 11 *Public Diplomacy* 59–62, at 60.

70 *Id.* 61.

71 Mavroidis, ‘The Gang That Couldn’t Shoot Straight.’

this 'aim and effects' test and indicated that panels should return to the more traditional definitions of likeness based on economic doctrines.<sup>72</sup>

Nonetheless, this economic approach risks posing undue constraints on the regulatory autonomy of states. Rather, the existence of a legitimate public policy objective on the part of the state should be fundamental to the identification of a comparator. Equality 'can be formulated in different ways, and deciding which concept of equality to use is ... a political choice.'<sup>73</sup> Any finding of discrimination ultimately rests on the conclusion that a particular unequal treatment is unjustified. Distinctions based on national origin, of course, are, of course, illegitimate.<sup>74</sup> Nonetheless, other regulatory purposes could justify distinctions because they are based on morally acceptable grounds.<sup>75</sup> For instance, under a progressive taxation system, people are taxed differently according to their income. Such a system certainly has a disparate impact on particular groups, but this does not necessarily make it unlawful.

Analogously, under international human rights law, some distinctions are generally seen as perfectly legitimate because they are based on morally acceptable grounds. For instance, in *Singh Bhinder v. Canada*, the complainant claimed he had been indirectly discriminated against. However, the Human Rights Committee held that there was no breach of the equality principle as the law was based on legitimate grounds. The case concerned a Sikh worker who was dismissed from his employment with the Canadian Railway because he refused to comply with regulations requiring the use of safety headgear at work. In fact, his religion required him to wear a turban. The Human Rights Committee found that the legislation disproportionately affected Sikh believers. Nonetheless, the Committee found no breach of Article 26 of the International Covenant on Civil and Political Rights (ICCPR) as the domestic law was based on legitimate grounds, namely, safety at work.<sup>76</sup>

Conversely, under international human rights law, the lack of legitimate reasons for differential treatment further confirms the finding of indirect discrimination, even in the absence of discriminatory intent. For instance, in

72 AB Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, -10, -11/AB/R, 4 October 1996.

73 Daniel Moeckli, 'Equality and Non-Discrimination', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP 2018) 148–163, 149.

74 Robert Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test' (1998) 32 *International Lawyer* 619–49, 623.

75 Moeckli, 'Equality and Non-Discrimination', 150.

76 Human Rights Committee, *Singh Bhinder v. Canada*, CCPR/C/37/D/208/1986, 9 November 1989.

*Purohit v. Gambia*, patients alleged that their treatment constituted a violation of various provisions of the African Charter on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights upheld a claim of indirect discrimination as legal remedies – in theory, guaranteed to all under the municipal law – were in practice 'only available to the wealthy.'<sup>77</sup>

Some scholars contend that the aim and effect test would make the general exceptions under Article XX redundant. Nonetheless, Article XX includes a closed list of regulatory purposes and its applicability is subject to the stringent requirements of the introductory part (*chapeau*). As Hudec points out, 'while such burdensome requirements may be appropriate for measures that are explicitly and purposefully discriminatory, it is more difficult to explain why governments must meet such high standards to justify origin-neutral regulatory measures.'<sup>78</sup>

Two transatlantic disputes further illustrate the clash between free trade and cultural concerns in the jurisprudence relating to non-discrimination. In the *EC—Hormones* dispute, the WTO's Appellate Body determined that the EC violated its WTO obligations when it banned the importation of meat and meat products derived from cattle that had received certain growth hormones.<sup>79</sup> In particular, the European ban on meat treated with growth hormones indirectly discriminated against US meat. In fact, the percentage of cattle treated with such hormones 'was significantly lower in the [then] European Communities than in the United States.'<sup>80</sup>

Analogously, the dispute over genetically modified organisms (GMO) centered on the alleged likeness between genetically modified organisms and other organisms. The United States brought a case against the EU, alleging that the EU had imposed a *de facto* ban on GMO imports.<sup>81</sup> The United States claimed that this moratorium unfairly restricted imports of agricultural and food products from the United States and violated the WTO's Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures.<sup>82</sup> The SPS

77 African Commission of Human and Peoples' Rights, *Purohit and Moore v. The Gambia*, Case 241/2001, paras 53–4.

78 Hudec, 'GATT/WTO Constraints on National Regulation', 626.

79 WTO Appellate Body Report, *EC—Measures Affecting Livestock and Meat Products (Hormones)*, WT/DS26/AB/R, 16 January 1998.

80 Panel Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, circulated 18 August 1997, DSR 1998:111, 699, para. 8.205.

81 Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 September 2006.

82 Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493.

Agreement permits countries to regulate food products to protect public health and the environment on the condition that rules are scientifically justified. In this regard, the SPS Agreement encourages member states to base sanitary and phytosanitary measures on internationally accepted scientific standards.<sup>83</sup> Problems have arisen with regard to the interpretation of scientific evidence. While the precautionary approach to risk management is a general principle of EU law, entailing that given products are prohibited until they are proven safe, on the other side of the Atlantic conversely, products must be proven unsafe to be banned.<sup>84</sup> In the view of the United States, genetically modified food is not substantially different from or less safe than conventional varieties. These different approaches to risk and food safety are based on different cultural approaches to food production. Trade experts tend to see safety regulations and cultural concerns as forms of protectionism and technical trade barriers rather than legitimate concerns.

The number of beverage-related cases and the transatlantic trade disputes over the use of growth hormone in beef production and the commercialization of genetically modified organisms show a collision between the conceptualization of food as a commodity and the cultural and social meaning of food. While WTO law requires countries to fight their case on the basis of economic and scientific criteria, for a fair resolution of such disputes cultural concerns must also be taken into account.<sup>85</sup> In fact, food regulation is an area of governance in which the clash between free trade and cultural attitudes is particularly evident.

### 3.2 *The Likeness Test*

As non-discrimination requires that like products be treated alike, ascertaining whether given goods are like is crucial for determining the state's duty to grant equal treatment. Like products are 'products that share a number of identical or similar characteristics'.<sup>86</sup> While the concept of likeness may seem obvious in theory, it can be difficult to detect in practice. For instance, in *EC—Asbestos*, concerning a French ban on fibers containing asbestos, the panel found

83 John Beghin, 'The Protectionism of Food Safety Standards in International Agricultural Trade' (2014) 1 *Agricultural Policy Review* 7–9.

84 David Wirth, 'The World Trade Organization Dispute Over Genetically Modified Organisms: The Precautionary Principle Meets International Trade Law' (2013) 37 *Vermont LR* 1153–1188, 1166.

85 Frans Brom, 'WTO, Public Reason, and Food' (2004) 7 *Ethical Theory and Moral Practice* 417–431.

86 Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 90.

that asbestos fibers and other fibers were like products. It thus found discrimination, albeit holding that such measures were justified under Article XX(b). The Appellate Body reversed the judgment. By focusing on the undisputed health risks of asbestos products, it denied any similarity between such carcinogenic products and their safe substitute products.<sup>87</sup> As the Appellate Body further clarified, 'There can be no one precise and absolute definition of what is *like*. The concept of likeness is a relative one that evokes the image of an accordion. The accordion of likeness stretches and squeezes in different places as different provisions of the WTO Agreement are applied.'<sup>88</sup> Therefore, 'like products' may mean different things in various provisions of the WTO agreements.<sup>89</sup> Ascertaining likeness is necessarily a case-by-case assessment involving an 'unavoidable element of discretionary judgment'.<sup>90</sup>

The relevant jurisprudence has identified four factors of likeness: (1) tariff classification; (2) product properties; (3) end-use; and (4) consumers' tastes and habits.<sup>91</sup> As this is not a treaty-based or closed list, other factors, such as price, may be considered. Certain evidence may be examined under more than one criterion, and there is no hierarchy among the criteria. Tariff classification prepared by an international body is usually considered in the determination of likeness. In this regard, scholars have proposed considering UNESCO conventions as relevant in the process of determining likeness provided that such instruments have a strong ratification rate (as most of such instruments in fact have).<sup>92</sup> Consumer tastes and habits are also particularly relevant to cultural products, as consumers 'perceive local stories and local pictures as different from international audio-visual production'.<sup>93</sup>

In assessing likeness, economic criteria have often prevailed, regarding competitive relationships as necessary and sufficient for likeness.<sup>94</sup> In fact, the

87 Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 100.

88 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R; WT/DS11/AB/R, 4 October 1996, p. 21.

89 Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, paras 96 and 99.

90 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, at 113.

91 Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, 20 May 1996; Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, para. 120.

92 Hahn, 'A Clash of Cultures?', 550.

93 Id.

94 Donald H. Regan, 'Regulatory Purpose and Like Products in Article III:4 of the GATT' in George Bermann and Petros Mavroidis (eds), *Trade and Human Health and Safety* (New York: CUP 2006) 190–223, 192.

Appellate Body rejected the ‘aims and effects’ test, that is, consideration of a regulatory purpose in the course of deciding what products are like.<sup>95</sup> This test, which had been adopted by some panels, aimed to ensure that free trade rules did not prevent legitimate regulation;<sup>96</sup> rather, such test targeted protectionist measures, that is, ‘measures which protect[ed] products from [competition] for economic reasons.’<sup>97</sup> The Appellate Body rejected this test on two distinct albeit related grounds. On the one hand, if adjudicators had to ascertain state protectionist purpose for a violation, countries would be able to get away with covert protectionism. On the other hand, ‘even measures that have no protectionist purpose may impose costs on foreign interests that exceed the benefit to local interests.’<sup>98</sup> Nonetheless, these arguments are based on economic criteria, and ‘the GATT is not just about commerce.’<sup>99</sup>

An important question concerning cultural measures is whether products may be treated differently because of how they have been produced, even if the production method used does not leave a trace in the final product, that is, even if the physical characteristics of the final product remain identical. For instance, while the use of pesticides in agriculture may leave residues on the final products, the organic production of agricultural products does not alter the look and features of such products. Does product similarity needs to be based upon particular qualities of a product, or can it also be based on process and production methods (PPMs)?<sup>100</sup>

On the one hand, consumers may care about the way in which a good was produced. Nonetheless, questions arise as to whether states are entitled to crystallize given consumer habits to consolidate an advantage acquired by domestic producers. For instance, in a seminal case adjudicated by the then European Court of Justice, Germany was found to be in breach of the free movement of goods under Article 30 of the EEC Treaty.<sup>101</sup> The Beer Purity Law (*Reinheitsgebot*) governing the manufacturing of beer provided that beer could be manufactured only from given ingredients. This law was based on a traditional production technique dating back to the 16th century which prohibited

95 *Japan—Taxes on Alcoholic Beverages*, WT/DS8, DS10, & DS11/AB/R, Appellate Body report, 4 October 1996.

96 *United States—Measures Affecting Alcoholic and Malt Beverages*, DS23/R, Panel report, adopted on 19 June 1992, para. 5.71.

97 Hahn, ‘A Clash of Cultures?’, 551.

98 Regan, ‘Regulatory Purpose and Like Products in Article III:4 of the GATT’, 198.

99 *Id.* 200.

100 Cottier and Oesch, ‘Direct and Indirect Discrimination in WTO Law’, 149.

101 ECJ, *Commission of the European Communities v Federal Republic of Germany*, C-178/84, Judgment of the Court, 12 March 1987.

the use of additives and reserved the name ‘beer’ (*bier*) for malted barley, hops, yeast, and water only. The Court found the measure protectionist and unjustifiable on public health grounds. Suitable labels could have ensured the state objectives without impeding trade.

On the other hand, because each country has its production methods, questions arise as to the legality of imposing certain production methods extraterritorially.<sup>102</sup> Nowadays, the Technical Barriers to Trade Committee requires Member states to notify mandatory labelling requirements so that they can be scrutinized under the Technical Barriers to Trade Agreement.<sup>103</sup>

Certain disputes display a cultural character because of the way a given product is produced or consumed. Methods of producing particular goods can carry cultural implications for the communities involved in their production and added economic value for the market. For example, the traditional agricultural practice of cultivating bush vines (*vite ad alberello*) on the island of Pantelleria (Italy) constitutes at the same time a form of intangible cultural heritage and a production technique. Developed by the Phoenicians to produce wine on an island characterized by extreme heat and wind, the technique has characterized the production of sweet wine (*passito*) for millennia. Already protected by a geographical indication, one may wonder whether *passito* can be considered like other products merely because of its alcoholic content.<sup>104</sup>

For the time being, processes and production methods do not affect the likeness of goods under international trade law. If states differentiate the treatment of products manufactured using different processes and production methods (PPM), they are in breach of national treatment or of the most favored nation treatment. While developing countries have traditionally opposed the introduction of PPMs fearing that the adoption of such tools could limit their market access and or justify protectionist policies,<sup>105</sup> one of the main objectives of EU trade policy has been to expand the protection of its regional specialty foods for both economic and cultural reasons.<sup>106</sup>

102 See Ming Du, *The Regulation of Product Standards in World Trade Law* (Oxford: Hart 2020).

103 Agreement on Technical Barriers to Trade (TBT Agreement), 1868 UNTS 120.

104 Tomer Broude, ‘Mapping the Potential Interactions between UNESCO’s Intangible Cultural Heritage Regime and World Trade Law’ (2018) 25 *International Journal of Cultural Property* 419–448, 423.

105 Andrew Mitchell, David Heaton, and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham: Edward Elgar 2016).

106 Martijn Huysman, ‘Exporting Protection: EU Trade Agreements, Geographical Indications, and Gastronationalism’ (2020) *Review of International Political Economy* 1–29.

A successful way to bypass the strictures of the non-discrimination provision and protect products with identifiable specific features linked to their geographical origin or manufacturing skills has been brought forward by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which protects, *inter alia*, geographical indications (GIS).<sup>107</sup> By indicating the product's sources, GIS certify that a product has specific quality, is made according to traditional methods, and comes from a given geographical area.<sup>108</sup> By promoting the safeguarding of local traditional production methods, GIS also protect the cultural identity of local communities, preserve living cultural heritage, and contribute to sustainable development. In fact, they support traditional production methods against cultural homogenization.<sup>109</sup> While the United States have traditionally opposed the protection of GIS, arguing that they constitute a form of protectionism and that they can stifle competition and innovation, the EU has constantly tried to expand the international protection of GIS. Increasingly, GIS have become more and more attractive for developing countries rich in traditional knowledge and agricultural production.<sup>110</sup> Section 5.8.2 expands on the importance of GIS in the nexus between culture and trade.

### 3.3 *Legitimate Distinctions?*

At present, there is no specific cultural exception exempting cultural goods from the non-discrimination standard. Therefore, to legitimately differentiate the treatment of like products, states must rely on the narrow bounds of the general exceptions clause. Under the General Agreement on Trade in Services (GATS), Members remain free to discriminate against foreign services and service providers, subject to scheduling. For services that are scheduled, the general exceptions under Article XIV of the GATS are comparable to those under Article XX of the GATT.<sup>111</sup> Under Article XX of the GATT and XIV of the GATS, states can adopt measures to protect, *inter alia*, public morals, natural resources, and cultural treasures.

107 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197, Articles 22 and 23.

108 TRIPS Agreement Article 22.1.

109 Huysman, 'Exporting Protection', at 4–5.

110 See Sarah Besky, 'The Labor of Terroir and the Terroir of Labor: Geographical Indication and Darjeeling Tea Plantations' (2014) 31 *Agriculture and Human Values* 83–96.

111 The TRIPS Agreement does not contain a provision on general exceptions; rather, Articles 3 and 4 of the agreement only allow for a limited range of exemptions to non-discrimination.

A pivotal dispute assessing the legitimacy of cultural policies under the covered agreements was the *Canada—Periodicals* case. In this case, Canada restricted the publication of split-run magazines marketed in Canada. A split-run magazine has substantially the same content as a foreign publication but contains advertisements aimed at the Canadian market. In Canada's view, unfettered free trade in cultural products with the United States would undermine Canadian values and identity; the massive flow of United States' publications threatened to supplant Canadian culture unless Canada adopted import restrictions.<sup>112</sup> Canada, therefore, prohibited the import of split-run periodicals that contained advertisements directed at the Canadian market which did not appear in the home country edition of that periodical. In 1993, a United States corporation found a way around the import ban, publishing a Canadian edition of *Sports Illustrated* by electronically transmitting the editorial content from its United States edition to a press in Canada. In response, the Canadian parliament imposed a tax on split-run periodicals equal to 80% of the value of all the advertising revenue earned by the edition.<sup>113</sup> The tax made it unprofitable to publish a split-run edition in Canada.<sup>114</sup> The United States subsequently challenged the Canadian measure before a WTO panel, arguing that the Canadian ban violated the prohibition on import bans under Article XI of the GATT and that the tax violated the national treatment provision under Article III of the GATT.<sup>115</sup> For the United States, Canada's claim of cultural sovereignty was merely 'a vehicle for disguised protectionism.'<sup>116</sup>

Canada responded first that the dispute concerned access to advertising services and should be subject to the GATS. Under GATS, Canada had not made any commitment to grant national treatment to advertising services.<sup>117</sup> Second, Canada argued that even if the GATT did apply, split-run magazines were not like Canadian magazines, as their intellectual content made them different. As one commentator pointed out, 'at its heart, this disagreement mirrored an underlying value difference between the United States and Canada; in the view of the United States, there was no essential difference between cultural commodities like magazines or books and other commodities like automotive

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112 Aaron Scow, 'The Sports Illustrated Canada Controversy: Canada Strikes Out in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals' (1998) 7 *Minnesota JIL* 245–85, 247.

113 *Id.* 256.

114 *Id.* 258.

115 *Id.* 261.

116 *Id.* 248.

117 *Id.* 267–8.

parts.<sup>118</sup> Meanwhile, in the view of Canada, cultural products had a specificity that distinguished them from ordinary items of trade. Third, Canada argued that the import ban was inconsistent with Article XI, but claimed that it was still permissible because it satisfied the requirements of Article XX(d), which permits certain GATT-inconsistent measures as long as they are necessary to secure compliance with a GATT-consistent measure.<sup>119</sup>

The panel found that the excise tax applied to goods and ultimately found that both GATT and GATS were applicable.<sup>120</sup> It also accepted the United States' view that split-run periodicals were like Canadian magazines, deeming that the Canadian measures were inconsistent with Article III:2 of the GATT. The panel incidentally dismissed the cultural arguments put forward by Canada, holding that 'the ability of a Member to take measures to protect its cultural identity was not an issue in the present case.'<sup>121</sup> Cultural arguments were not discussed autonomously, but were 'encoded in the determination of what is a like, directly competitive or substitutable product' and 'translated ... into a more technocratic argument about the common characteristics of different products.'<sup>122</sup> The panel highlighted the following: 'despite the Canadian claim that the purpose of the legislation is to promote publications of original Canadian content, this definition essentially relies on factors external to the Canadian market – whether the same editorial content is included in a foreign edition and whether the periodical carries different advertisements in foreign editions.'<sup>123</sup> Finally, the panel held that the import ban was inconsistent with Article XI:1 and unjustified under Article XX(d) as it aimed to entice the placement of advertisements in Canadian periodicals as opposed to foreign periodicals.<sup>124</sup>

The Appellate Body agreed with the panel's conclusion that 'obligations under GATT 1994 and GATS can co-exist.'<sup>125</sup> As the excise tax clearly applied to goods, the Appellate Body determined that it needed to comport with the national treatment requirements of Article III of the GATT.<sup>126</sup> However, it voided the panel's finding that split-run periodicals and domestic periodicals

118 Joel R Paul, 'Cultural Resistance to Global Governance' (2000–2001) 22 *Michigan JIL* 1, 48.

119 Scow, 'The Sports Illustrated Canada Controversy', 261.

120 *Id.* 268.

121 WTO Panel Report, *Canada—Certain Measures Concerning Periodicals*, 15 March 1997, WTO Doc WT/DS31/R, para.5.45.

122 Paul, 'Cultural Resistance to Global Governance', 51.

123 WTO Panel Report, *Canada—Periodicals*, para. 5.24.

124 *Id.* para. 5.1.

125 Scow, 'The Sports Illustrated Canada Controversy', 271.

126 *Id.*

were like products; rather, it deemed them to be directly competitive or substitutable products. Nonetheless, the AB concurred with the panel that the tax afforded protection to domestic products in violation of GATT Article III(2).<sup>127</sup>

Another cultural heritage-related dispute which centered on non-discrimination was the *EC—Seal Products* case. This case dealt with Indigenous hunting practices which are deemed essential to Indigenous peoples' cultural rights. European citizens perceive seal hunting as cruel because of the means by which the seals are hunted. The EU therefore adopted a comprehensive regime governing seal products.<sup>128</sup> The EU Seal Regime prohibited the importation and sale in the EU of any seal product except: (a) those derived from hunting conducted traditionally by Inuit and other Indigenous communities and which contributed to their subsistence;<sup>129</sup> and (b) those that were by-products of a hunt regulated by national law and with the sole purpose of the sustainable management of marine resources.<sup>130</sup> In addition, seal products for personal use could be imported but could not be placed on the market.<sup>131</sup> The EU allowed the exception for Indigenous hunting because of the international law commitments of its member states and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>132</sup>

In response to the EU Seal Regime, Canada and Norway brought claims against the EU before the WTO Dispute Settlement Body, arguing, *inter alia*, that the Indigenous communities condition (IC condition) violated the non-discrimination obligation under Article I:1 and III:4 of GATT 1994. According to Canada and Norway, this condition accorded seal products from Canada and Norway less favorable treatment than that accorded to like seal products of domestic origin, primarily from Sweden and Finland, as well as those of other foreign origins, in particular from Greenland.<sup>133</sup> In fact, the majority of seals hunted in Canada and Norway would not qualify under the exceptions, 'while most if not all of Greenlandic seal products [we]re expected to conform

127 WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, 30 June 1997, UN Doc WT/DS31/AB/R.

128 Council Regulation (EC) 1007/2009 of 16 September 2009 on Trade in Seal Products [2009] OJ (L286) 36.

129 *Id.* Article 3(1).

130 *Id.* Article 3(2)(b).

131 *Id.* Article 3(2)(a).

132 United Nations Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007, A/RES/61/295.

133 WTO Panel, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 25 November 2013, UN Doc WT/DS400/R and WT/DS401/R, para. 7.2.

to the requirements under the IC exception.<sup>134</sup> Therefore, according to the complainants, the regime would *de facto* discriminate against Canadian and Norwegian imports of seal products,<sup>135</sup> as it would restrict virtually all trade in seal products from Canada and Norway within the EU.<sup>136</sup> Moreover, the complainants argued that while the EU measures did not prevent products derived from seals killed inhumanely from being sold on the EU market,<sup>137</sup> they could prevent products derived from seals killed humanely by commercial hunters from being placed on the market.<sup>138</sup>

In this case, the panel found that the seal products produced by Indigenous peoples and those not hunted by Indigenous peoples were like products.<sup>139</sup> The panel acknowledged the existence of several international law instruments, including the United Nations Declaration on the Rights of Indigenous Peoples,<sup>140</sup> and also referred to many WTO countries adopting analogous Inuit exceptions.<sup>141</sup> Despite the reference to these instruments as factual evidence,<sup>142</sup> the panel concluded that the design and application of the IC measure were not even-handed, because the IC exception was available *de facto* to Greenland.<sup>143</sup> Therefore, the panel held that the exception provided for Indigenous communities under the EU Seal Regime accorded more favorable treatment to seal products produced by Indigenous communities than that accorded to like domestic and foreign products.<sup>144</sup> The panel concluded that the same exception violated Articles I:1 and III:4 of GATT because an advantage granted by the EU to seal products derived from hunts traditionally conducted by the Inuit was not accorded immediately and unconditionally to like products originating in Canada.<sup>145</sup>

After establishing this *prima facie* breach of WTO law, the panel examined the possible justification of the EU Seal Regime under the general exceptions clause, examining the question as to whether the seal products' regulation was justified under any of the exceptions contained in Article XX of GATT, and

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134 *EC—Seal Products*, panel report, paras 7.161 and 7.164.

135 *Id.* para. 7.141.

136 *Id.* para. 7.46.

137 *Id.* para. 7.4.

138 *Id.* para. 7.226.

139 *Id.* para. 7.136.

140 *Id.* para. 7.292.

141 *Id.* para. 7.294.

142 *Id.* fn 475.

143 *Id.* para. 7.317.

144 *Id.* para. 8(2).

145 *Id.* para. 8(3)(a).

in particular in Article XX(a) on public morals. The panel noted that ‘animal welfare [was] an issue of ethical or moral nature in the European Union’<sup>146</sup> and therefore found that the EU Seal Regime was necessary to protect public morals. Nonetheless, it determined that the regime had a discriminatory impact that could not be justified under the *chapeau* of Article XX(a) of GATT.<sup>147</sup>

The Appellate Body confirmed that the EU Seal Regime discriminated against like products under Articles I:1 (Most Favored Nation) and III:4 (National Treatment) of GATT. The AB also confirmed that the ban on seal products could be justified on moral grounds under GATT Article XX(a). However, it held that the regime did not meet the requirements of the *chapeau* of Article XX, criticizing the design and implementation of the IC exception for Inuit hunts.<sup>148</sup> The AB noted that the IC exception contained no anti-circumvention clause,<sup>149</sup> and that ‘seal products derived from ... commercial hunts could potentially enter the EU market under the IC exception.’<sup>150</sup> The AB ultimately concluded that the EU Seal Regime was not justified under Article XX(a) of GATT 1994.<sup>151</sup> In short, both the panel and the AB found flaws in the specific implementation of the ban’s exception for Indigenous peoples. Therefore, the EU refined the seal regime to insert anti-circumvention rules and thus comply with the *chapeau* requirements.

In conclusion, a balance between trade liberalization and respect for state sovereignty is expressed in WTO agreements: as a supranational organization, the WTO lacks inherent rule-making powers and has no mandate to govern cultural matters. Therefore, states retain their regulatory powers in the cultural sector. While Member States must fulfill their obligations under the covered agreements, in theory, Article XX of the GATT enables them to adopt measures to protect public morals or national treasures of artistic, historic, or archaeological value.

Nonetheless, in practice, WTO adjudicators have a strong tendency to read states’ obligations broadly, while interpreting general exceptions and policy leeway in an overly restrictive manner. As an exception, Article XX has been construed too narrowly. GATT/WTO panels and the Appellate Body have confronted the issue of culture versus trade at several points, and ‘have consistently

<sup>146</sup> EC—*Seal Products*, panel report, para. 7.409.

<sup>147</sup> Id. para. 7.651.

<sup>148</sup> WTO Appellate Body, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, para. 5.339.

<sup>149</sup> Id. para. 5.327.

<sup>150</sup> Id. para. 5.328.

<sup>151</sup> Id. para. 6.1(d)(III).

confirmed that culture does not have any special status in the GATT/WTO regime.<sup>152</sup> Both panels and the AB tend ‘not to radically alter the delicate and carefully negotiated balance of the WTO Agreements’, but rather ‘follow the conventional analysis’ and ‘concentrate on the core trade-related questions that fall within the DSB’s authority.’<sup>153</sup>

Such jurisprudence reflects the language of rational choice and economic efficiency and has become ‘a key vehicle for transmitting ... economic doctrine.’<sup>154</sup> The dominance of this approach has constrained not just the ability to think creatively ‘in new and imaginative ways’ about the linkage between culture and trade but it has also called into question the cultural sovereignty of states.<sup>155</sup> While the WTO system provides member states with a number of general exceptions in theory, it lacks flexibility toward cultural considerations in practice.

#### 4 Quantitative Restrictions

Article XI of the GATT prohibits quantitative restriction to trade, by providing that ‘no prohibitions or restrictions other than [tariffs] ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation.’<sup>156</sup> Quantitative restrictions are more likely to distort the free flow of trade and affect competition than tariff measures. In fact they ‘impose absolute limits on imports, while tariffs do not.’<sup>157</sup> Because of their protective effect, their prohibition is one of the fundamental principles of the GATT.

The imposition of quantitative restrictions on imports, through direct restriction on the number of foreign goods imported, enables domestic products to avoid direct competition. Quotas also enable the domestic industry to expand and stabilize employment within that industry. Quantitative restrictions on

152 Shin-Yi Peng, ‘International Trade in Cultural Products—UNESCO’s Commitment to Promoting Cultural Diversity and its Relations with the WTO’ (2008) 11 *International Trade and Business* LR 218, 221.

153 Mira Burri Nenova, ‘Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition’ (2008) 12 *JIEL* 17–62, 28.

154 Anne Orford, ‘Theorizing Free Trade’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: OUP 2016) 701–737, at 702.

155 *Id.* 734.

156 GATT Article XI.

157 Panel Report, *Turkey–Textiles and Clothing*, WT/DS34/R, para. 9.63.

imports may convince foreign companies to transfer production to the importing country, thus promoting employment and technology transfers.

At the same time, quantitative measures restrict access to foreign goods enjoyed by consumers in the importing country, and by driving up prices and reducing the range of choice, they reduce welfare. Import restrictions require that the quantities, varieties, and traders be determined in advance. The allocation of licenses can become unfair and opaque. The difference in international and domestic prices caused by quantitative restrictions becomes a rent that profits the license owners.

Despite the general prohibition of quantitative restrictions, Members may introduce or maintain them as exceptions in a limited number of circumstances. These include, for example, the general exceptions set out in GATT Article XX; the national security exception set out in GATT Article XXI; and exceptions described in the Agreement on Agriculture<sup>158</sup> and other WTO agreements. For instance, under GATT Article XX, Members can maintain prohibitions or restrictions necessary to protect public morals or national treasures.

WTO Members have also imposed trade restrictions as a result of international obligations undertaken outside the WTO framework. When a Member applies a quantitative restriction as a result of other international commitments, it must also notify the WTO and specify which WTO provision, in its opinion, permits the exception.<sup>159</sup> For example, Members that have notified measures maintained according to a multilateral environmental agreement have typically indicated Article XX of the GATT as legal justification for the measures.

Similarly, States can impose restrictions on the export of cultural heritage and archaeological goods because of their obligations under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.<sup>160</sup> While the UNESCO Convention does not provide a model law for states to shape their export controls, 'it has served as a legal basis for countries to have their export controls recognized by other countries.'<sup>161</sup> For example, states can impede the illicit import

158 Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410.

159 WTO Committee on Market Access, Notification of Quantitative Restrictions (QRS): A Practical Guide, JOB/MA/101/Rev.2, 28 September 2018, pp. 7–8.

160 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

161 Robert K. Paterson, 'Moving Culture: The Future of National Cultural Property Export Controls' (2012) 18 *Southwestern JIL* 287–294, 288.

and export of cultural property by requiring export certificates and monitoring trade. States generally refer to Article XX(f) of GATT 1994 to justify the imposition of such measures for the protection of national treasures of artistic, historic, or archaeological value.

In the absence of an explicit textual justification for the adopted measure, it can be difficult, if not impossible, for a state to shield its quantitative restriction even if it may be motivated by social/cultural objectives. An example may clarify the issues at stake. In an early case, *Japan—Measures on Imports of Leather*,<sup>162</sup> Japan had established an import licensing scheme to limit the imports of certain leather goods to protect a cultural minority, the Burakumin. Japan explained that a segment of Japanese society had suffered discrimination for centuries due to social exclusion that originated during the Japanese feudal period.<sup>163</sup> Because their ancestors crafted leather products, Burakumin were considered outcasts against the background of prevailing Shintoist values abhorring the perceived impurity of death.<sup>164</sup> Although this minority had already been emancipated from institutional discrimination in the 19th century, ‘this emancipation was only formal as in actual social life, these people continued to lead a destitute life under miserable conditions not too different from those in the feudal or pre-modern days.’<sup>165</sup> Moreover, as these people were mainly employed in the leather industry,<sup>166</sup> Japan adopted the Dowa Special Measures law to improve their conditions. Against this background, Japan explained that the measures at stake ‘constituted more than a minority problem as the phenomenon was unique and relat[ed] to subsistence and survival.’<sup>167</sup>

The GATT panel noted that Japan had not invoked any provision of GATT to justify the maintenance of the quota, and therefore concluded that the import licensing scheme constituted an import quota, which violated GATT Article XI. It also held that ‘the special historical, cultural, and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter in the light of the relevant GATT provisions and these provisions did not provide such a justification for import restrictions.’<sup>168</sup>

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162 *Japan—Measures on Imports of Leather*, Panel Report, 15 May 1984, BISD 31S, 94.

163 *Id.* para. 21(1).

164 *See generally* Christopher Bondy, *Silence and Self: Negotiations of Buraku Identity in Contemporary Japan* (Boston: Harvard University Press 2015).

165 *Japan—Measures on Imports of Leather*, Panel Report, para. 21(1v).

166 *Id.* para. 21(v1).

167 *Id.* para. 22.

168 *Id.* para. 44.

## 5 National Treasures of Artistic, Historic or Archaeological Value

Trade in cultural property constitutes one of the main manifestations of the interplay between culture and trade. While trade in cultural products such as audiovisuals is certainly permissible, the illicit trade in cultural property such as protected antiquities is not. International trade law thus provides a specific exception for state measures protecting national treasures. Nonetheless, the language adopted by the GATT<sup>169</sup> does not correspond to the terminology adopted by UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.<sup>170</sup> Moreover, the Appellate Body has traditionally been reluctant to consider non-WTO law when adjudicating disputes. This section illuminates the aim, scope, and content of Article XX(f) of the GATT and the 1970 UNESCO Convention. It then examines the nexus between Article XX(f) and the 1970 UNESCO Convention in theory, and the application of the exception in practice. The section concludes with some recommendations for improving the coherence of cultural governance and international trade law in the protection of national treasures.

### 5.1 *Aim, Scope and Content of Article XX(f)*

Article XX(f) of the GATT allows WTO Members to adopt and maintain measures ‘imposed for the protection of national treasures of artistic, historic, or archaeological value’ even if the measures are trade restrictive, ‘[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.’<sup>171</sup> Therefore, under specific conditions, WTO Members can prioritize the protection of national treasures over trade liberalization. Nonetheless, the restrictive requirements of the *chapeau* of Article XX can limit the successful application of such provision in practice.

What does ‘protection’ of national treasures mean? Article XX(f) does not explain this term, rather leaving the design and implementation of policies aimed at protecting national treasures to the Member States. Certainly, the

169 General Agreement on Tariffs and Trade, GATT DOC LT/UR/A-1/A/1/GATT/2, signed 30 October 1947 (GATT 1947), as incorporated in the Marrakesh Agreement, Annex 1A General Agreement on Tariffs and Trade 1994 (GATT 1994).

170 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

171 General Agreement on Tariffs and Trade, 15 April 1994, 1867 UNTS 187, Article XX(f).

concept of ‘protection’ differs from protectionism, indicating those state policies that restrict international trade to protect domestic companies against competition. While the legitimate protection of monuments and the prevention of illicit art trafficking benefit the public at large, protectionism affects economic growth and welfare. As protecting monuments and preventing the illicit traffic of cultural objects are relatively uncontroversial cultural policies, distinguishing the protection of archaeological artifacts from protectionist policies is relatively straightforward.<sup>172</sup>

Article xx(f) refers to the notion of ‘national treasure’ instead of ‘cultural goods or objects’, and its terminology differs from that of international cultural heritage law.<sup>173</sup> The adoption of such language reveals an underlying pattern of international economic law, namely its focus on the economy—the relationship between production, trade, and the supply of money. International economic law is intended to govern how Member States conduct trade rather than protecting cultural heritage as such. Moreover, some of its rules have been purposely left vague so that there could be room for compromise.<sup>174</sup>

Therefore, in drafting the exception and balancing the need to afford protection to objects of significant (cultural) value with the practicalities of international trade, the Contracting Parties to the GATT 1947, the predecessor of the GATT 1994, distinguished ‘national treasure’ from ‘cultural property’ by considering ‘national treasure’ a narrow subset of cultural property.<sup>175</sup> In this manner, the term ‘national treasure’ became a common denominator that could be agreed upon by the greatest number of signatory states, be they art-poor but economically wealthy market countries or art-rich but economically poor source countries. The wording of the exception relied on previous

172 Distinguishing other types of cultural policies from protectionism may be more difficult. See e.g. Tania Voon, ‘State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?’ (2006) 13 *International Journal of Cultural Property* 129–160.

173 Compare with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215, Article 1 (listing categories of objects defined as cultural property); the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, Article 1 (listing categories defined as ‘cultural property’); and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, in force 1 July 1998, (1995) 34 ILM 1322 (generally referring to cultural objects).

174 William Kerr, ‘Loopholes, Legal Interpretations, and Game Playing: Whither the WTO without the Spirit of the GATT?’ (2019) 20 *Journal of International Law and Trade Policy* 49–60, 50.

175 Jia Min Cheng, ‘The Problem of National Treasure in International Law’ (2010) 12 *Oregon Review of International Law* 141–174, 152.

international law instruments and has remained unchanged since the inception of the GATT in 1947.<sup>176</sup> It has also inspired subsequent international and regional legal instruments of economic integration.<sup>177</sup> More interestingly, in referring to ‘national treasure’, international economic law avoids any reference to the ‘cultural value’ that the objects should have in order to be protected. The word ‘culture’ was seen as too broad, as basically encompassed all manifestations of human experience. In the view of the Contracting Parties, the vagueness of such a notion would have determined a never-ending stream of disputes.

In order to identify the meaning of ‘national treasure’, it is worth examining the meaning of its components. On the one hand, the term ‘treasure’ evokes wealth such as money, jewels, precious metals, and ‘objects of extraordinary economic value, anchored to a monetary index’.<sup>178</sup> It also recalls the idea of finding a valuable item that was once hidden or buried. For instance, in Roman law, if people found a treasure on their land, they acquired its property (*thesauri inventio*). International economic law does not define what constitutes a treasure. Rather, the definition is left to domestic law and thus varies from state to state, remaining a municipal law issue that can also eventually become an international trade issue.<sup>179</sup>

On the other hand, the mainstream literature emphasizes that the ‘national treasure’ designation does not refer to all cultural objects, but only to those that have an inseparable link to the culture and history of a given country.<sup>180</sup> Nonetheless, the adjective ‘national’ is vaguer than it looks at first sight: in fact, it can refer to where the treasure is located, or to where the artwork was created, or to the nationality of the creator, or the place such artifact represents, or to which it refers. Moreover, it is uncertain whether states may only prevent

176 League of Nations, Convention on the Abolition of Import and Export Prohibitions and Restrictions, Geneva, 8 November 1927, 46 Stat 2461, USTS 811, Article 4(5).

177 Treaty on the Functioning of the European Union (TFEU), opened for signature 7 February 1992, entered into force 1 November 1993, OJC 326 p. 47, Article 36 (referring to ‘the protection of national treasures possessing artistic, historic, or archaeological value’); Protocol on Trade in the Southern African Development Community (SADC) Region, signed 1 August 1996, entered into force 25 January 2001, Article 9(f). But see EU Regulation 2019/880 on the Importation of Cultural Goods (setting out the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity’s cultural heritage and preventing the illicit trade in cultural goods, in particular where such illicit trade could contribute to terrorist financing).

178 Michele Graziadei and Barbara Pasa, ‘The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe’ in Andrzej Jakubowski, Kristin Hausler, and Francesca Fiorentini (eds), *Cultural Heritage in the European Union—A Critical Inquiry into Law and Policy* (Leiden: Brill 2019) 79–112, 101.

179 Cheng, ‘The Problem of National Treasure in International Law’, 144.

180 Andrea Biondi, ‘The Merchant, the Thief & the Citizen: The Circulation of Works of Art Within The European Union’ (1997) 34 *Common Market LR* 1173–1195, 1173 ff.

the export of their treasures, or whether Article XX(f) allows governments to ban the imports of another country's treasures in order to help that country retain its cultural heritage.<sup>181</sup>

Nonetheless, the concept of 'national treasure' is more than the sum of its parts; in its wholeness, the expression acquires a new and different meaning. The qualifiers used for identifying an artifact as a 'national treasure' include such vague notions as 'artistic, historic, and archaeological value'. Such qualifiers can be eventually interpreted as flexible guidelines by international economic courts on a case-by-case basis.

Moreover, such courts could also interpret the provision in an evolutive fashion. Evolutive or dynamic interpretation indicates that a term's ordinary meaning can change over time. Good faith, the object and purpose of the GATT, and 'relevant rules of international law' may require that a term is interpreted evolutively.<sup>182</sup> Evolutive interpretation has shaped the jurisprudence of international courts and tribunals, including international economic courts.<sup>183</sup>

In particular, in interpreting Article XX(g) of the GATT, the Appellate Body has sought guidance from other international law instruments. For instance, in the *Shrimp-Turtle* case, Malaysia, India, Pakistan, and Thailand challenged a measure adopted by the United States to protect sea turtles, an endangered species. The policy required fishermen to capture shrimp without ensnaring sea turtles and restricted imports based on the production process rather than the product itself. In order to justify its import restriction, the United States argued that sea turtles, endangered species, could be considered 'exhaustible natural resources' under GATT Article XX(g). The parties agreed that 'natural resources' were resources found in nature, but they disagreed on the interpretation of the term 'exhaustible' under GATT Article XX(g). For the claimants, exhaustible natural resources referred to finite resources, such as minerals, rather than biological or renewable resources. The AB referred to multilateral environmental agreements to define the scope of 'exhaustible natural resources' in light of the current meaning and rules of international law.<sup>184</sup> Accordingly, the AB concluded that sea turtles were 'exhaustible natural resources' under Article XX(g) of the GATT.

181 Steve Charnovitz, 'The Moral Exception in Trade Policy' (1998) 38 *Virginia JIL* 689–737, footnote 62.

182 VCLT Article 31(3)(c).

183 See, *ex multis*, *Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Belgium v. Netherlands)*, Arbitral Award, 24 May 2005, paras 80–85.

184 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 130.

Similarly, in *United States—Clove Cigarettes*, concerning a measure banning the production and sale of clove cigarettes, as well as other flavored cigarettes in the United States, both parties referred to the World Health Organization Framework Convention on Tobacco Control and its Guidelines for Implementation.<sup>185</sup> In particular, the panel referred to the non-binding Guidelines to support its finding that the United States' ban on clove cigarettes was not more trade-restrictive than necessary to protect public health.<sup>186</sup> In conclusion, since the WTO agreements have been interpreted in light of other international law instruments, they can also be interpreted in light of international cultural heritage law.

## 5.2 *The 1970 UNESCO Convention*

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transport of Ownership of Cultural Property (1970 UNESCO Convention)<sup>187</sup> was adopted in response to the growth of the art market in the 1960s and the destruction of ancient monuments and sites to satisfy market demand.<sup>188</sup> The 1970 UNESCO Convention aims at controlling the market of cultural artifacts, requiring its states parties to regulate the trade in cultural objects and encouraging cooperation among them to prevent the illicit trade of cultural items.<sup>189</sup> Its export and import controls are designed to manage the international movement of cultural items.

Due to the importance attached to cultural heritage, countries that are rich in cultural artifacts bear most of the responsibility for retaining such objects within their borders, monitoring international trade, and preventing the illicit trade of cultural artifacts. Under the 1970 UNESCO Convention, countries that are parties to the same regulate the export of cultural items by instituting a legal export certification program to control the flow of cultural items and to provide an authenticated provenance for such objects.<sup>190</sup> Market countries also have responsibilities: for instance, under the 1970 Convention, states parties prohibit the importation of cultural objects stolen from a museum or

185 Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, 2 September 2011, paras 2.29–2.30.

186 *Id.* paras 7.427–28.

187 The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transport of Ownership of Cultural Property (1970 UNESCO Convention), opened for signature 14 November 1970, in force 24 April 1972, 823 UNTS 231.

188 Patty Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past' (2007) 8 *Chicago JIL* 169–195, 176.

189 1970 UNESCO Convention Article 10(a).

190 1970 UNESCO Convention Article 6.

similar institution<sup>191</sup> and return cultural property without the imposition of custom duties.<sup>192</sup> Moreover, the 1970 UNESCO Convention also encourages further agreements among states parties to address issues of concern.<sup>193</sup>

Because the 1970 UNESCO Convention was ‘the end product of a complicated and difficult compromise’, it comprises some ambiguous language, and there is no common understanding of the Convention’s substantive scope.<sup>194</sup> Thus, most states that are rich in cultural artifacts have focused on regulating the outbound flow of cultural objects, while market countries have only sparsely regulated inbound traffic, interpreting their obligations under the 1970 UNESCO Convention narrowly. This has prevented the smooth operation of the Convention by creating regulatory asymmetries and implementation gaps.

In order to buttress their protection of cultural heritage, some countries have signed bilateral arrangements on the exportation and importation of cultural property pursuant to the 1970 UNESCO Convention. For instance, Cambodia implemented the convention by adopting municipal law governing the import and export of cultural artifacts. Adherence to the convention has enabled Cambodia to successfully seek the return of many missing cultural items.<sup>195</sup> Pursuant to Article 9, the government requested bilateral assistance from the United States, one of the major importers of Cambodian art, to halt the looting and illicit traffic of Khmer artifacts. In 1999, the United States government imposed emergency import restrictions on Khmer sculptural and architectural elements.<sup>196</sup> In 2003, Cambodia and the United States signed a Memorandum of Understanding Concerning the Imposition of Import Restrictions on Archaeological Material from Cambodia, which has been extended and amended several times.<sup>197</sup> The United States has signed analogous Memoranda of Understanding with other countries rich in cultural artifacts such as China.<sup>198</sup>

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191 1970 UNESCO Convention Article 7(b)(1).

192 Id. Article 7(b) (ii).

193 Id. Article 9.

194 Keun-Gwan Lee, ‘Asia’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 835–859, 843.

195 Kérya Chan Sun, ‘Angkor Sites, Cultural World Heritage’, in Barbara Hoffman (ed.), *Art and Cultural Heritage—Law, Policy, and Practice* (Cambridge: CUP 2006) 148–156, 153.

196 Lee, ‘Asia’, 850–1.

197 Id.

198 Memorandum of Understanding between the Government of the United States of America and the Government of the People’s Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art at

### 5.3 *The Linkage between Article XX(f) and the 1970 UNESCO Convention*

For the time being, no dispute has dealt with the interpretation or application of GATT Article XX(f) in the GATT/WTO system. Arguably, for more than 70 years since the exception was penned, states have used the flexibility provided by the exception without abusing it. They have regulated their national treasures without misusing this freedom for adopting disguised protectionist measures. Therefore, the use of this exception has not caused any controversy. Moreover, there is international consensus on the need to protect cultural treasures, as demonstrated by the widespread ratification of the 1970 UNESCO Convention. Regrettably, attempts to stifle the black market in antiquities by trade controls have not prevented the illicit trade of antiques. In parallel, the literature on Article XX(f) remains limited: most scholars focus on other types of general exceptions, and the discussion has been dominated by international trade lawyers.

Despite the scarce literature and jurisprudence, further discussion on GATT Article XX(f) is useful for both practical and theoretical reasons. In practice, as Voon highlights, there is no guarantee that disputes centering on GATT Article XX(f) may not arise in the future. The fact that there is no jurisprudence on this provision does not necessarily entail that cases will not emerge in the future. For instance, the security exception embodied by GATT Article XXI has lain dormant for decades before undergoing a renaissance in the past few years.<sup>199</sup> Similarly, jurisprudence on Article XX(f) might emerge in the future. In fact, for both cultural and security interests, ‘the spirit’ in which Members of the Organization interpret these provisions is the principal guarantee for preventing disputes.<sup>200</sup> A WTO dispute could materialize if the business of a WTO Member that is a non-party to the 1970 UNESCO Convention sought the assistance of their home state in challenging another WTO Member’s export restriction because they wanted to export cultural property for commercial reasons.<sup>201</sup>

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least 250 Years Old, 14 January 2009, <<https://eca.state.gov/files/bureau/ch2009mou.pdf>> (accessed on 3 March 2022).

199 Tania Voon, ‘The Security Exception In WTO Law: Entering a New Era’ (2019) 113 *AJIL Unbound* 45–50.

200 William A. Kerr, ‘Loopholes, Legal Interpretations, and Game Playing: Whither the WTO without the Spirit of the GATT?’ (2019) 20 *Journal of International Law and Trade Policy* 49–60, 49.

201 Tania Voon, ‘National Treasures at the Intersection Between Cultural Heritage and International Trade Law’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *Oxford Handbook of International Cultural Heritage Law* (Oxford: OUP 2020) 507–527, 518.

In addition, if two WTO Members disagreed on the origin or significance of a given treasure, such a conflict could evolve into a WTO dispute.<sup>202</sup>

Moreover, analysis of Article XX(f) can help illuminate the meaning of similar if not identical provisions that have been incorporated in several regional and bilateral free trade agreements. Such incorporation opens up the possibility of further interpretation and application of the scope of Article XX(f) outside the WTO dispute settlement process.

Therefore, discussing how Article XX(f) could be interpreted and applied can contribute to the further development of international economic law, international cultural heritage law, and general international law by illuminating this area at the intersection between culture and trade. Therefore, this section briefly examines how Article XX(f) could be interpreted and applied if a case arose in practice, and examines possible ways to ensure greater coherence between international trade law and international cultural heritage law.

### 5.3.1 Application of the Exception

Although there is no WTO jurisprudence on the interpretation of Article XX(f) of the GATT, it is possible to infer how the exception would be interpreted and applied by relying on the decades-long interpretative practice of other types of general exceptions. This interpretive practice is articulated in three parts.

First, Article XX which governs general exceptions only applies to measures that appear to be inconsistent with another provision of the covered agreements. Measures that treat national and foreign products differently may violate the national treatment obligation under Article III of the GATT. Differentiating goods coming from one country from goods imported from other countries is prohibited under Article I of the GATT, the Most Favored Nation Treatment provision. Quantitative restrictions on imports and exports are prohibited under Article XI of the GATT.

Second, to verify whether Article XX can justify the given measure, the adjudicator must check whether the measure can be provisionally justified under the specific clauses of Article XX. Under Article XX(f), the adjudicator should verify whether the measure was 'imposed for the protection of national treasures'. The text of Article XX(f) does not require a high level of justification: the words 'imposed for the protection of' seem analogous to the words 'relating to' the conservation of exhaustible natural resources that appear in Article XX(g) and have been interpreted by the AB as meaning 'primarily aimed at.'<sup>203</sup>

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<sup>202</sup> Id. 518.

<sup>203</sup> *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Appellate Body Report, adopted 20 May 1996, p. 18.

Therefore, Article xx(f) requires a reasonable or rational linkage between the measure imposed and the protection of the national treasure. Some other general exceptions require a much higher level of connection between the measures adopted and the indicated objective.<sup>204</sup>

Third, the adjudicator must apprise whether the measure also complies with the *chapeau* of Article xx. The WTO Appellate Body has clarified that a balance must be struck between the *right* of a Member to invoke an exception under Article xx and the *duty* of the same Member to respect the treaty rights of the other Members.<sup>205</sup> The *chapeau* is aimed at preventing the abuse or misuse of the exceptions provided for in Article xx by expressing this line of equilibrium between the rights and obligations of Member States. This balance is not fixed and unchanging; rather, the line moves as the kind and shape of the measures at stake vary and as the facts making up specific cases differ.

As mentioned, despite the availability of several general exceptions in theory, Member States have rarely been successful in invoking such justifications in practice. In fact, the interpretation and application of such general exceptions have been ‘notoriously stringent’.<sup>206</sup> Because the *chapeau* forbids discrimination in the application of the general exceptions, this makes it difficult to successfully invoke Article xx.

*In casu*, if a state adopted an export ban on given cultural artifacts deeming these to constitute a national treasure, and another state challenged such measures as a violation of GATT Article XI (which prohibits quantitative restrictions to trade), the adjudicator should follow the above-mentioned consolidated line of reasoning. After noting that a quantitative restriction is a provisional breach of GATT Article XI, the adjudicator should verify whether the measure was ‘imposed for the protection of national treasures’ under Article xx(f). With regard to the *chapeau*, the respondent could argue that the 1970 UNESCO Convention and any subsequent bilateral agreement justify any such discrimination. However, the Appellate Body has adopted a restrictive approach to the issue, and the mere fact that an international treaty requires

204 See e.g. Article xx(a) (referring to measures necessary to protect public morals); xx(b) (referring to measures necessary to protect human, animal or plant life or health) and xx(d) (referring to measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT).

205 *United States—Import Prohibition of Certain Shrimp and Shrimp Products (US—Shrimp)*, WT/DS58/AB/R, Appellate Body Report, adopted 6 November 1998, para. 156.

206 Voon, ‘National Treasures at the Intersection Between Cultural Heritage and International Trade Law’, 517.

regulatory distinctions does not justify such differentiation under Article XX of the GATT.<sup>207</sup>

### 5.3.2 Ensuring Coherence

International economic law is an important part of international law.<sup>208</sup> After early uncertainty, WTO panels and the Appellate Body have accepted that ‘WTO law does not exist in isolation from general international law.’<sup>209</sup> As the WTO constitution and its covered agreements are treaties, which are in turn creatures of international law, they must be interpreted and applied in light of international law.<sup>210</sup> After all, the international trade regime receives validity and legally binding force only by reference to valid and binding rules outside it. In this vein, the Dispute Settlement Understanding (DSU) clarifies that the agreements must be interpreted in accordance with ‘customary rules of interpretation of public international law.’<sup>211</sup> Interpretation can ‘foster a greater understanding’ between international economic law and other fields of international law ‘so that concepts used in one are readily understood in the other and, where relevant, adapted and applied more generally.’<sup>212</sup> It can also ensure the coherence between WTO law and international law.

According to customary norms of treaty interpretation, as restated in the Vienna Convention on the Law of Treaties,<sup>213</sup> and recalled by the DSU, a treaty provision should be interpreted in accordance with its terms and context, and in light of the object and purpose of the treaty.<sup>214</sup> The Appellate Body has interpreted the text of the covered agreements in an evolutive manner considering multilateral environmental agreements (MEAs) to detect the ordinary meaning of such text.<sup>215</sup> For instance, in *US—Shrimp*, the Appellate Body relied on MEAs to interpret ‘exhaustible natural resources’ under GATT Article XX(g) as including living resources such as sea turtles even though not all WTO

207 Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres (Brazil—Retreaded Tyres)*, WT/DS332/AB/R, 3 December 2007, para. 233.

208 Donald McRae, ‘International Economic Law and Public International Law: The Past and The Future’ (2014) 17 JIEL 627–638.

209 Appellate Body Report, *US—Gasoline*, at 16.

210 Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 AJIL 535–578, 538.

211 Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 1226 (1994), Article 3.2.

212 McRae, ‘International Economic Law and Public International Law’, 627.

213 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, p. 331.

214 VCLT Article 31.

215 VCLT Article 31(1).

Members were parties to such MEAs.<sup>216</sup> The Appellate Body has clarified that the GATT 'is not to be read in clinical isolation from public international law'<sup>217</sup> and that GATT Article XX must be read 'in light of contemporary concerns of the community of nations'.<sup>218</sup> As the AB expressly referred to relevant multilateral environmental agreements in several cases, international economic courts might certainly refer to relevant international cultural heritage law. This is even more the case, considering that the 1970 UNESCO Convention is one of UNESCO's most widely ratified treaties.

Regrettably, panels have adopted a restrictive approach to the interpretation and application of the customary rule of systemic integration as expressed under Article 31(3)(c) of the VCLT.<sup>219</sup> Under such rule of treaty interpretation, treaties should be interpreted taking into account 'any relevant rules of international law applicable in the relations between the parties'.<sup>220</sup> Defined as the 'master-key to the house of international law', the principle of systemic integration can ensure the unity of international law.<sup>221</sup>

Nonetheless, panels have prioritized the need for consistent interpretation of the WTO-covered agreements over the need to ensure the consistency of WTO law with general international law.<sup>222</sup> In particular, they have interpreted the 'international law rules applicable in the relations between the parties' as those applicable in the relations between all WTO Members (*inter omnes partes*) rather than the disputing parties (*inter se*).<sup>223</sup> For instance, a WTO panel

216 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, paras 130–132.

217 AB Report, *US—Gasoline*, p. 17.

218 AB Report, *US—Shrimp*, para. 129.

219 See generally Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill 2015); Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279–319.

220 VCLT Article 31(3)(c).

221 This term was introduced by Xue Hanqin, the Chinese Judge at the International Court of Justice, during the ILC debates on the significance of Article 31(3)(c). ILC, Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 420, UN Doc. A/CN.4/L.682, 13 April 2006 (prepared by Martti Koskenniemi).

222 AB Report, *Peru—Additional Duty on Imports of Certain Agricultural Products (Peru—Agricultural Products)* WT/DS457/AB/R, 20 July 2015, para. 5.106.

223 See e.g. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 September 2006, paras 7.68–7.70.

declined to consider an international instrument, the Biosafety Protocol,<sup>224</sup> because it read this provision as requiring all WTO parties to be also parties to the Protocol for it to be considered as an interpretative aid.<sup>225</sup>

In *EC—Large Civil Aircraft*, concerning subsidies in support of large civil aircraft development, the Appellate Body held that ‘[i]n a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member’s international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.’<sup>226</sup> However, it ‘made no statement as to whether the term “the parties” in Article 31(3)(c) refers to all WTO Members, or rather to a subset of Members, such as the parties to the dispute.’<sup>227</sup> In light of these interpretive uncertainties and the current political impasse, the AB is unlikely to further clarify the matter and apply the 1970 UNESCO Convention for systemic integration purposes in the near future.<sup>228</sup>

Nonetheless, the narrow approach to 31(3)(c) of the VCLT has been rejected both by the Study Group on Fragmentation of the International Law Commission and by the International Court of Justice in the *Oil Platforms* case.<sup>229</sup> International cultural heritage law is now a well-developed field of international law that forms part of the international legal order and must be considered when interpreting and applying WTO law.

Of course, when taking into account other international law, due to jurisdictional limits, the WTO courts will not determine whether a particular WTO Member has violated its obligations under a non-WTO legal instrument.<sup>230</sup> In the *Mexico—Soft Drinks* case, concerning certain tax measures imposed

224 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted on 29 January 2000, in force on 11 September 2003, 39 ILM 1027.

225 See Benn McGrady, ‘Fragmentation of International Law or Systemic Integration of Treaty Regimes: *EC—Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties’ (2008) 42 *JWT* 589–618.

226 Appellate Body Report, *EC and Certain Member States—Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paras 844–845.

227 *Id.*

228 Voon, ‘National Treasures at the Intersection Between Cultural Heritage and International Trade Law’, 521.

229 ICJ, *Case Concerning the Oil Platforms (Iran v. United States of America)*, 42 ILM 1334 (2003), Judgment, 6 November 2003, para. 41.

230 Andrés Felipe Celis Salazar, ‘Can WTO Members Rely on Non-WTO Law to Justify a Violation of WTO Law?’ (2007) 10 *International Law: Revista Colombiana de Derecho Internacional* 341–354.

by Mexico on soft drinks, Mexico argued that the panel should decline its jurisdiction alleging that the dispute should be resolved by a NAFTA panel. Nonetheless, the panel upheld its jurisdiction on the basis of the DSU.<sup>231</sup> The Appellate Body similarly held that a panel could not decline to exercise its jurisdiction, absent some legal impediment.<sup>232</sup> Mexico also argued that although its taxes were in breach of Article III, they could be justified under Article XX(d), which permits WTO Members to impose measures that are ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT].’<sup>233</sup> In its view, NAFTA was the GATT-consistent provision with which it was trying to secure compliance. In analyzing Mexico’s defense, the panel nonetheless held that Article XX(d) related to domestic, not international, measures and that, accordingly, the phrase ‘to secure compliance in Article XX(d) d[id] not apply to measures taken ... in order to induce another [WTO] member to comply with its obligations ... under a non-WTO treaty.’<sup>234</sup>

Article 31(3)(c) also includes the principle of evolutionary interpretation.<sup>235</sup> According to this principle, ‘[a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’<sup>236</sup> Adopting an evolutive interpretation of Article XX(f), some scholars have argued that national treasures might include items of intangible cultural heritage or cultural expression, as reflected in the 2003 and 2005 UNESCO Conventions respectively.<sup>237</sup> In this manner, even books, music, and cultural expressions such as food and beverages might fall under the scope of Article XX(f).<sup>238</sup>

For the time being, however, Article XX(f) does not seem to address the interplay between trade liberalization and the protection of cultural industries,

231 Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS 308/AB/R, 6 March 2006, and Panel Report, WT/DS308/R, adopted as modified by the Appellate Body Report.

232 Appellate Body Report, *Mexico—Soft Drinks*, paras 48–49.

233 GATT Article XX(d).

234 Panel Report, *Mexico—Soft Drinks*, para. 8.181.

235 Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between WTO Agreement and MEAs and Other Treaties’ (2001) 36 *JWT* 1088–1090.

236 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, p. 16, para. 53.

237 Voon, ‘National Treasures at the Intersection Between Cultural Heritage and International Trade Law’, 516.

238 Gabriele Gagliani, ‘Interpreting and Applying Article XX(f) of the GATT 1994: National Treasures in International Trade Law’ (2019) 2 *Santander Art and Culture LR* 35–56, 35.

intangible heritage, and cultural expressions.<sup>239</sup> Because Article xx(f) does not mention ‘cultural value’, this concept is covered only to the extent it overlaps with ‘artistic, historic, or archaeological value.’<sup>240</sup> In this vein, the Court of Justice of the European Union (CJEU) found that the protection of cultural diversity did not fall within the scope of the national treasures exception under EU law, holding that the objective of protecting books as cultural objects did not justify restricting imports.<sup>241</sup>

A hypothetical example can clarify the current state of the art. Brunello di Montalcino is one of Italy’s best-known and most expensive wines that has been produced in the vineyards surrounding the town of Montalcino, in Tuscany since the 14th century and has become particularly popular in America. Evidently, Brunello does not belong to the definition of national treasures under GATT Article XX(f). If however, bottles of such wine were to be found in a shipwreck that had been underwater for more than 100 years, then such bottles could be seen as underwater cultural heritage and items of historic value.<sup>242</sup> Going back to the countryside of Montalcino, the remains of *Brunella*, a four-million-year-old fossil whale found there in a vineyard, constitute a national treasure and cannot be traded under domestic law, because of its archaeological value.<sup>243</sup>

In conclusion, international trade law recognizes states’ right to pursue legitimate cultural goals, and the national treasures exception in Article XX(f) of the GATT 1994 constitutes a gateway to import cultural concerns into the citadel of international trade law. This exception has never been invoked before the WTO DSM. WTO Members generally accept restrictions on the trade of cultural property that are designed to protect national treasures. Nonetheless, as noted by Voon, ‘greater attention may need to be paid to ensuring coherence

239 Francesco Francioni, ‘The Evolving Framework for the Protection of Cultural Heritage in International Law’, in Silvia Borrelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Leiden: Brill 2012) 24.

240 Tania Voon, ‘A New Approach to AudioVisual Products in the WTO: Rebalancing GATT and GATS’ (2007) 14 *University of California Los Angeles Entertainment LR* 1–32, 13 (noting that contemporary ‘products of the audiovisual industries are unlikely to be of historic or archaeological value, and they might not be of sufficient artistic value to be described as national treasures.’)

241 Case C-531/07 *Fachverband der Buchund Medienwirtschaft v LIBRO Handelsgesellschaft mbH* [2009] ECJ Rep. I-3717 para. 32.

242 Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 41 ILM 40, Article 1 (defining underwater cultural heritage as ‘all traces of human existence having a cultural, historical, or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.’)

243 See Christian Fraser, ‘Whale Fossil is Found in Vineyard’, *BBC News*, 23 March 2007.

across ... different regimes,' for example by revisiting the approach of WTO bodies to non-WTO law and 'considering more explicit references to relevant UNESCO instruments and their terminology.'<sup>244</sup>

In this regard, institutional cooperation between the WTO and UNESCO might additionally enhance coherence between international trade law and international cultural heritage law.<sup>245</sup> For instance, the World Health Organization (WHO) has an observer status at the WTO's Technical Barriers to Trade and Sanitary and Phytosanitary Committees, the Council for Trade in Services, and the Council for Trade-related Aspects of Intellectual Property Rights.<sup>246</sup> This has enabled the WHO to follow discussions on matters of interest such as the tobacco trade and support tobacco control measures based on the Framework Convention on Tobacco Control.<sup>247</sup> Analogously, UNESCO could obtain observer status in relevant WTO Committees.

WTO Member States might adopt a Declaration for clarifying the contemporary scope of national treasures, ideally aligning the terminology and fine-tuning the aims and objectives of international trade law and international cultural heritage law. An even more ambitious approach could be the adoption of an amendment to the text of Article XX(f) to expand its scope in line with contemporary developments in international cultural heritage law. In the case of access to medicines, the WTO Members modified the rights and obligations in the TRIPS Agreement in order to facilitate access to life-saving medicines.<sup>248</sup> As the protection of cultural heritage is a public good that can benefit countries across the globe, any such amendment could be widely endorsed.

## 6 Public Morals

The term 'exception' is used in international law to indicate a wide range of techniques that provide different legal treatment to certain situations

244 Voon, 'National Treasures at the Intersection Between Cultural Heritage and International Trade Law', 510.

245 *Id.* 527.

246 See WTO, International Intergovernmental Organizations Granted Observer Status to WTO Bodies, [https://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](https://www.wto.org/english/thewto_e/igo_obs_e.htm).

247 WHO Framework Convention on Tobacco Control (FCTC), World Health Assembly Res. 56.1, 21 May 2003, in force 27 February 2005, 42 ILM (2003) 518.

248 See for instance, WTO, Amendment of the TRIPS Agreement: Decision of 6 December 2005, WTO Doc. WT/L/641, 8 December 2005, Protocol Amending the TRIPS Agreement, in force since 23 January 2017.

otherwise governed by a general rule.<sup>249</sup> In WTO law, exceptions allow states to strike a balance between the pursuit of a given policy objective and the promotion of free trade.<sup>250</sup> GATT Article XX and GATS Article XIV provide general exceptions to the core GATT and GATS respective provisions, recognizing that states can pursue valuable objectives, including the protection of public morals, even if the measures are trade-restrictive.<sup>251</sup> Therefore, under specific conditions, WTO Members can prioritize certain societal values and interests over trade liberalization. Article XX of the GATT and Article XIV of the GATS express self-determination, understood as sovereign autonomy and state equality.<sup>252</sup>

GATT Article XX and GATS Article XIV are defenses, to be invoked only when a measure is inconsistent with any provision of the GATT or GATS respectively. Their operation presupposes a prior finding of inconsistency with a primary norm of the GATT.<sup>253</sup> As a panel aptly stated, ‘an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the further and separate assessment of whether such measure is otherwise justified.’<sup>254</sup> To pass muster under a general exception, be it Article XX of the GATT or Article XIV of the GATS, a state measure must come under one of the listed grounds of justification as well as satisfy the requirements of the *chapeau*.<sup>255</sup>

Article XX of GATT is divided into two parts: (a) the *chapeau* and (b) ten specific grounds for justifications. Although a regulatory measure could be provisionally justified under one of the specific justifications, the *chapeau* sets rigid conditions for the Members’ right to regulate. Such conditions are

249 Jorge Viñuales, ‘Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law’, in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford: OUP 2017) Chapter 5.

250 General Agreement on Tariffs and Trade, Agreement Establishing the World Trade Organization, Annex 1A, adopted 15 April 1994, entered into force 1 January 1995, 1867 UNTS 187, Article XX.

251 Gabrielle Marceau, ‘A Call for Coherence in International Law: Praises for the Prohibition against Clinical Isolation in WTO Dispute Settlement’ (1999) 33 *JWT* 87–152.

252 Oisín Suttle, ‘What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Art XX GATT’ (2017) 80 *Modern LR* 569–599, 572.

253 Viñuales, ‘Seven Ways of Escaping a Rule’, 10

254 *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, Appellate Body Report, 17 June 2011, para. 173.

255 *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Appellate Body Report, 20 May 1996, at 22.

exceedingly difficult to meet.<sup>256</sup> The purpose of the *chapeau* is to avoid provisionally justified measures being applied in such a way that would constitute a misuse of the exceptions. According to the AB, the *chapeau* reflects the principle of good faith and the prohibition of the abusive exercise of a right (*abus de droit*).<sup>257</sup> However, rarely have exceptions been successfully invoked by defendants in the adjudication of international trade disputes because of the stringent requirements of the *chapeau*.<sup>258</sup>

### 6.1 *Defining Public Morals*

One of the general exceptions listed under Article XX of the GATT and Article XIV of the GATS concerns public morals which corresponds to the French concept of *bonnes moeurs*. This exception is based on long-established international practice, as recorded in a large number of commercial treaties. There is no definition of public morals in either GATT or GATS: rather, public morals differ from country to country, and ‘what is morally acceptable in one country is not necessarily so in another.’<sup>259</sup> In fact, the concept of morality (*bonos mores*) naturally depends to a certain degree on the particular culture of a country or region. Adopting a broad conceptualization of public morals, this notion includes public order and cultural concerns and can considerably affect the balance the trade regime strikes between trade and cultural values.<sup>260</sup> Therefore, the public morals exception is potentially important for the relations between the trade regime and cultural governance. According to Article XX, nothing in GATT should be construed to prevent measures ‘necessary to protect public morals’ provided that such measures are not applied in a manner ‘which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.’<sup>261</sup>

WTO courts have defined public morals as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’ and akin to

256 Christian Riffe, ‘*Chapeau*: Stringent Threshold or Good Faith Requirement’ (2018) 45 *Legal Issues of Economic Integration* 141–176, at 144.

257 AB Report, *US—Gasoline*, at 22, 25. AB Report, *US—Shrimp*, paras 158–159 (noting that ‘the task of interpreting and applying the *chapeau* is ... the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions.’)

258 Juscelino Colares, ‘A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development’ (2009) 42 *Vanderbilt Journal of Transnational Law* 383–439.

259 Van den Bossche, *The Law and Policy of the World Trade Organization*, 639.

260 Suttle, ‘What Sorts of Things are Public Morals?’ 576.

261 GATT Article XX(a).

‘measures to maintain public order.’<sup>262</sup> The term ‘public order’ is a translation of the French concept of *ordre public*, which generally concerns public policy and refers to peremptory norms from which one cannot derogate without endangering the fundamentals of a given society. Although public morals and public order are distinct concepts, WTO courts consider them overlapping because they ‘seek to protect largely similar values.’<sup>263</sup> For WTO courts, ‘public order’ refers to ‘the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, *inter alia*, to standards of law, security, and morality.’<sup>264</sup>

WTO Members are ‘afforded a certain degree of discretion in defining the scope of public morals with respect to various values prevailing in their societies at a given time.’<sup>265</sup> In fact, ‘the concept of public morals can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values.’<sup>266</sup> The *travaux préparatoires* for Article XX(a) reveal little about what morality is covered. At the time it was adopted, state controls existed on opium, pornography, subversive literature, alcoholic beverages, and firearms. For instance, Norway clarified that its restriction on alcoholic beverages was due to temperance and public morals. Nowadays, the decision of WTO courts to accept animal welfare as a public morals concern is a welcome move, as such a comprehensive approach quintessentially reflects the evolution of international trade law in accordance with ‘the wide diversity of cultural traditions, moral positions, and ethical views among the WTO Members.’<sup>267</sup> For some, public morals include the full range of human rights norms and principles, while others warn that if virtually everything is characterized as public morals, disguised protectionist measures will be allowed under a sort of moral imperialism.<sup>268</sup> Therefore, they suggest that divisive political issues should be agreed upon through negotiations.

262 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, Panel Report, para. 6.465.

263 *Id.* para. 6.468.

264 *Id.* para. 6.467.

265 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, 25 November 2013, WT/DS400/R, WT/DS401/R, para. 7.381; *US—Gambling*, Panel Report, para. 6.461.

266 *EC—Seal Products*, Panel Reports, para. 7.380.

267 Katie Sykes, *Animal Welfare and International Trade Law: The Impact of the WTO Seal Case* (Cheltenham, UK: Edward Elgar 2021) 12.

268 Ming Du, ‘Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization’ (2016) 50 *JWT* 675–704.

Not only have states some margin of appreciation in defining their concept of public morals, but they also have ‘the right to determine the level of protection of public morals that [they] consider appropriate; members may thus set different levels of protection even when responding to similar interests of moral concern.’<sup>269</sup> For instance, several Arab countries ban the production and importation of alcohol or pork as forbidden products (*haram*) under Islamic law (*Sharia*); Israel bans the importation of non-kosher meat under Jewish Law (*Halakha*); the EU has been at the forefront of animal welfare governance.<sup>270</sup>

Nonetheless, to justify a measure on public morals grounds, WTO courts investigate whether (1) the measure designed to protect public morals is capable of protecting it; (2) whether this measure is necessary to protect such public morals; and (3) whether the measure complies with the *chapeau* of Article XX.<sup>271</sup> WTO courts scrutinize the evidence to detect the existence of cultural concerns within a given society and the ‘connection between such concerns ... and ... public morals.’<sup>272</sup> WTO courts have interpreted the term ‘necessary’ as meaning that a measure is justified only if no alternative measure is reasonably available that is consistent or less inconsistent with GATT.<sup>273</sup>

## 6.2 Case Studies

For more than fifty years since the exception was penned,<sup>274</sup> no country challenged measures adopted by other member states to protect public morals until 2004.<sup>275</sup> In the past two decades, however, a growing number of disputes have involved the public morals exception, and this clause has been at the heart of at least three cultural heritage-related disputes: the *EC—Seal Products* case;<sup>276</sup>

269 *EC—Seal Products*, Panel Reports, para. 5.200.

270 Tamara Nachmani, ‘To Each His Own: the Case for Unilateral Determination of Public Morality under Article XX(a) of the GATT’ (2013) *University of Toronto Faculty of LR* 31–60, 38–39; Anne Peters, *Animals in International Law* (Leiden: Brill 2021) chapters 4 and 5.

271 *Colombia—Measures Relating to the Importation of Textiles, Apparel, and Footwear*, AB Report, adopted 22 June 2016, WT/DS/461/AB/R, para. 6.20.

272 *EC—Seal Products*, Panel Reports, 7:384.

273 *United States—Section 337 of the Tariff Act of 1930*, Panel Report, adopted 7 November 1989.

274 Steve Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia JIL* 689–745.

275 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R, adopted 20 April 2005.

276 *EC—Seal Products*, Reports of the Panel, 25 November 2013; *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, 22 May 2014.

*China—Audiovisual Products*,<sup>277</sup> and *Brazil—Taxation*.<sup>278</sup> This section briefly examines these reports, thus illuminating the importance of the public morals exception for reconciling and economic and cultural values at the World Trade Organization.

As Europeans perceive the hunting of seals to be morally objectionable because of how the seals are hunted, the EU adopted a comprehensive regime governing seal products.<sup>279</sup> The EU Seal Regime prohibits the importation and sale in the EU of any seal product except: (a) those derived from hunting conducted traditionally by Inuit and other Indigenous communities and which contribute to their subsistence;<sup>280</sup> and (b) those that are by-products of a hunt regulated by national law and with the sole purpose of sustainable management of marine resources.<sup>281</sup> In addition, seal products for personal use may be imported but may not be commercialized.<sup>282</sup>

The regulation included the exception for Indigenous hunting because of the international law commitments of its member states. The preamble of the EU Regulation on Trade in Seal Products noted that the hunting of seals ‘is an integral part of the culture and identity of the members of the Inuit society, and as such is recognized by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, placing seal products on the market which result from hunts traditionally conducted by Inuit and other Indigenous communities and which contribute to their subsistence should be allowed.’<sup>283</sup> For the Inuit, a group of culturally similar Indigenous peoples inhabiting the Arctic regions in Greenland, Canada, and Alaska, seal hunting is an integral part of their cultural identity and way of life, and contributes to their subsistence. Not only do seals constitute the most important component of Inuit diet, but Inuit income from sealing represents between one-fourth and one-third of their total annual income.<sup>284</sup>

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277 *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Panel Report, 12 August 2009, WTO Doc WT/DS363/R.

278 *Brazil—Certain Measures Concerning Taxation and Charges*, Panel Report, WT/DS472/R, 30 August 2017; *Brazil—Certain Measures concerning Taxation and Charges*, AB Report, 13 December 2018.

279 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 OJ (L. 286) 36.

280 *Id.* Article 3(1).

281 *Id.* Article 3(2)(b).

282 *Id.* Article 3(2)(a).

283 *Id.* preamble, point 14.

284 Xinjie Luan and Julien Chaisse, ‘Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals, and Technical Barriers to Trade’ (2011) 22 *Colorado Journal of International Environmental Law & Policy* 79–121 at 82.

Nonetheless, Inuit groups contested the ban. Although the regulation allowed the sale of seal products derived from hunts traditionally conducted by Inuit, according to Indigenous peoples' representatives, the 'Inuit exemption' would not prevent the market for seal products from collapsing. Since the Inuit people did not export seal products directly, but rather through non-Indigenous exporters, they alleged that the derogation in their favor would remain an 'empty box', inadequate to sustain cultural practices. Furthermore, they emphasized that the EU had adopted the EU Seal Regime without consulting the Inuit. After bringing an unsuccessful claim before the CJEU,<sup>285</sup> they praised the Canadian government for bringing the seal ban to the WTO.<sup>286</sup>

In response to the EU ban, Canada and Norway brought claims against the EU before the WTO Dispute Settlement Body, contending that the EU Seal Regime was inconsistent with the European Union's obligations under the GATT<sup>287</sup> and the TBT Agreement.<sup>288</sup> Specifically, Canada and Norway argued that the IC condition violated the non-discrimination obligation under Articles I:1 and III:4 of the GATT 1994 and did not contribute to the advancement of the EU Seal Regime's animal welfare objective.<sup>289</sup> For Canada, 'the cultural heritage or ethnicity of the hunters [wa]s not a legitimate regulatory distinction because it [was] unrelated to the central objective of the EU Seal regime of responding to concerns about animal welfare.'<sup>290</sup> According to Canada and Norway, such condition accorded seal products from Canada and Norway less favourable treatment than that accorded to like seal products of domestic origin, mainly from Sweden and Finland, as well as those of other foreign origin, in particular from Greenland.<sup>291</sup> In fact, the majority of seals hunted in Canada and Norway would not qualify under the exception, while most, if not all, Greenlandic seal products would satisfy the requirements under the IC exception.<sup>292</sup>

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285 CJEU, *Inuit Tapirit Kanatami and Others v. Parliament and Council*, Case C-583/11, Judgment, 3 September 2015.

286 'Canada Calls for WTO Panel in Seal Dispute with EU', 15 *Bridges Weekly Trade News Digest*, 18 February 2011.

287 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

288 Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120.

289 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, Reports of the Panel, 25 November 2013, 7.247.

290 *Id.*

291 *Id.* para. 7.2.

292 *Id.* paras 7.161 and 7.164.

Therefore, according to the complainants, the regime would indirectly discriminate against Canadian and Norwegian imports of seal products,<sup>293</sup> as it would restrict virtually all trade in seal products from Canada and Norway within the EU.<sup>294</sup> Moreover, the complainants argued that while the EU regulation did not prevent the trade in products derived from seals killed inhumanely,<sup>295</sup> it could prevent the commerce of products derived from seals killed humanely by commercial hunters.<sup>296</sup>

Canada pointed out that seal harvesting provided thousands of jobs in Canada's remote coastal communities, where few economic opportunities existed and it had been a significant aspect of life for centuries. According to Canada, 'the practice of sealing is deeply rooted in the culture and tradition of the communities where the hunt takes place.'<sup>297</sup> Moreover, Canada maintained that the EU's exemption for trade in traditional Inuit seal products would prove to be ineffective, particularly in the face of the collapse of the larger market, and the Inuit would suffer the effects.<sup>298</sup> The trade ban would restrict virtually all trade in seal products within the EU. According to Canada, the solution to this would be the restoration of full market access.<sup>299</sup> In parallel, Norway claimed that since only certain countries have Indigenous peoples, the measure would have an unequal impact and therefore it would not treat all WTO Member states equally.<sup>300</sup>

The key question of the dispute was whether the seal products made by Indigenous peoples and those produced by non-Indigenous peoples were like products.<sup>301</sup> If so, as the EU ban treated the two products differently, there would be discrimination, which was prohibited under GATT Article III. In the assessment of likeness, a key question was whether consumer preferences

293 Id. para. 7.141.

294 Id. para. 7.46.

295 Id. para. 7.4.

296 Id. para. 7.226.

297 Id. para. 7.248.

298 Id. paras 7.314–5.

299 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4, Request for the Establishment of a Panel by Canada, 14 February 2011.

300 See also *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5, Request for the Establishment of a Panel by Norway, 15 March 2011.

301 See e.g. Robert Howse and Joanna Langille 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values' (2011) 37 *Yale Journal of International Law* 367–432 at 402.

would matter in light of the *EC–Asbestos* case.<sup>302</sup> As is known, in that case, the Appellate Body considered asbestos-containing products and similar products without asbestos as different products that the EU could legitimately distinguish and regulate differently because of consumer preferences. As consumers know that asbestos is harmful to health, and thus prefer products without asbestos, it is legitimate for a country to regulate products containing asbestos differently than other products. In *EC–Seal Products*, the EU argued that consumer preferences mattered. Finally, if the panel nonetheless found that there was discrimination, it should examine the question as to whether the seal products regulation was justified under any of the exceptions under Article XX of the GATT, and in particular under Article XX(a) on public morals. Finally, the EU highlighted ‘the importance of seal hunting for the subsistence, cultural identity, and social cohesion of Inuit and Indigenous communities.’<sup>303</sup> For the EU, ‘traditional hunts conducted for subsistence purposes [did] not raise the same moral concerns as commercial hunts conducted solely ... for purely commercial motives.’<sup>304</sup>

The panel found that the seal products produced by Indigenous peoples and those made by other actors were like products.<sup>305</sup> The panel acknowledged the existence of several international law instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 focusing on the protection of Indigenous cultural heritage.<sup>306</sup> It also recognized that seal hunting by Indigenous communities is ‘part of their culture and tradition.’<sup>307</sup> The panel then mentioned that many WTO members have adopted analogous Inuit exceptions.<sup>308</sup> Although the panel considered these sources as ‘factual evidence’,<sup>309</sup> it concluded that the design and application of the exception was uneven because the exception was in fact available to Greenland.<sup>310</sup>

Therefore, the panel held, *inter alia*, that the exception provided for Indigenous communities under the EU Seal Regime accorded more favorable

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302 *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, Appellate Body Report, adopted 5 April 2001, DSR 2001:VII.

303 *EC—Seal Products*, AB Report, para. 7.252.

304 *Id.* paras 7.253–4.

305 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, para. 7.136.

306 *Id.* para. 7.292.

307 *Id.* para. 7.263.

308 *Id.* para. 7.292.

309 *Id.* footnote 475.

310 *Id.* para. 7.317

treatment to seal products produced by Indigenous communities than that accorded to like domestic and foreign products.<sup>311</sup> The panel concluded that the same measure violated Articles I:1 and III:4 of the GATT 1994 because an advantage granted by the EU to seal products derived from hunts traditionally conducted by the Inuit was not accorded immediately and unconditionally to like products originating in Canada.<sup>312</sup>

Finally, the panel examined the question of whether the seal products regulation was justified under any of the exceptions under Article XX of the GATT 1994, and in particular under Article XX(a) on public morals. The panel noted that ‘animal welfare is an issue of ethical or moral nature in the European Union.’<sup>313</sup> Therefore, the panel found that the EU Seal Regime was necessary to protect public morals.<sup>314</sup> Yet, it determined that the EU Seal Regime exceptions somewhat reduced the public morals objective of the regulation by pursuing different legitimate objectives. Thus, the regime had a discriminatory impact that could not be justified under the *chapeau* of Article XX(a) of the GATT 1994.<sup>315</sup>

Immediately after the release of the reports, Canada, Norway, and the EU each appealed certain legal interpretations developed in the panel reports. The Appellate Body confirmed that the EU Seal Regime *de facto* discriminated against like products under Articles I:1 (Most Favored Nation) and III:4 (National Treatment) of the GATT 1994. In particular, the EU Seal Regime was inconsistent with Article I:1 because it did not ‘immediately and unconditionally’ extend the same market access advantage to Canadian and Norwegian seal products that it accorded to seal products originating from Greenland.

The AB also upheld the panel’s finding that the EU Seal Regime was ‘necessary to protect public morals’ thus confirming that the ban on seal products could be justified on moral grounds under GATT Article XX(a). However, it held that the regime did not meet the requirements of the *chapeau* of Article XX of the GATT 1994, criticizing the way the exception for Inuit hunts has been designed and implemented.<sup>316</sup> The AB noted that the IC exception contained no anti-circumvention clause and pinpointed that ‘seal products derived from ... commercial hunts could potentially enter the EU market under the IC exception.’<sup>317</sup> The AB concluded that the EU Seal Regime was not justified

<sup>311</sup> Id. para. 8(2).

<sup>312</sup> Id. para. 8(3)(a).

<sup>313</sup> Id. para. 7.409.

<sup>314</sup> Id. para. 7.409.

<sup>315</sup> Id. para. 7.651.

<sup>316</sup> *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, para. 5.339.

<sup>317</sup> Id. paras 5.327–5.328.

under Article XX(a) of the GATT 1994.<sup>318</sup> Therefore, the EU was given a reasonable period to refine the seal regime in order to comply with the *chapeau* requirements.

Both the Appellate Body and the panel were very careful in noting that the EU was pursuing a legitimate objective; they only censored how the EU was pursuing the selected goal. This case is significant as it shows that states can adopt measures to protect public morals. At the same time, they must ensure that the adopted measures do not discriminate across countries. Ultimately, the flaws found by the panel and the AB were not with the ban itself, but with the specific implementation of the ban's exception for Indigenous peoples. Nonetheless, as countries pursue multiple legitimate public policy objectives all the time, it is increasingly complex to shield state measures.

The public morals exception also came into play with regard to cultural goods in *China—Publications and Audiovisual Entertainment Products*. In this case, the United States alleged that various Chinese restrictions on the importation and distribution of United States films, sound recordings, and publications violated provisions of GATT, GATS, and the Accession Protocol. The challenged measures included prohibiting foreign-owned enterprises from importing the relevant products, requiring publication import entities to be fully state-owned and subject to an approval system under a state plan, and granting trading rights in a discretionary manner.

China attempted to justify diverse measures in the media domain, arguing that its regulations were designed to protect public morals in China by reviewing the content of foreign cultural goods that could potentially collide with significant values in Chinese society. China thus invoked GATT Article XX(a), which embodies the public morals exception, arguing that 'reading materials and finished audiovisual products are so-called cultural goods, *i.e.* goods with cultural content ... with a potentially serious negative impact on public morals.'<sup>319</sup> China explained that 'as vectors of identity, values, and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics, and behaviours.'<sup>320</sup>

In this sense, China made express reference to the UNESCO Convention on Cultural Diversity (CCD)<sup>321</sup> and the related Universal Declaration on Cultural

<sup>318</sup> Id. para. 6.1(d)(III).

<sup>319</sup> *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Panel Report, 12 August 2009, WTO Doc WT/DS363/R, para. 7.751.

<sup>320</sup> Id.

<sup>321</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, entered into force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005, vol I, 83.

Diversity, which states that cultural goods ‘must not be treated as mere commodities or consumer goods.’<sup>322</sup> Thus, China argued that it was legitimate to adopt a content review mechanism to prevent the dissemination of cultural goods that might negatively affect public morals, or ‘Chinese culture and traditional values.’<sup>323</sup> However, the attempt to use the CCD as a shield was ultimately unsuccessful.

The panel held that restrictions on the distribution of publications violated Articles XVI and XVII of GATS and the national treatment requirement under GATT, and found several Chinese measures inconsistent with the Accession Protocol. The panel’s report was then upheld by the Appellate Body.<sup>324</sup> More interestingly, China did not invoke the Declaration as a defense to its breaches of WTO law; rather, it used it to support ‘the general proposition that the importation of products of the type at issue in this case could, depending on their content have a negative impact on public morals in China.’ Therefore, the panel ‘had no difficulty in accepting this general proposition.’<sup>325</sup> The panel also admitted the applicability of Article XX(a). However, because there was at least one other reasonably available alternative, China had not demonstrated that the relevant provisions were ‘necessary’ for protecting public morals.<sup>326</sup> The AB upheld these findings.

The third cultural heritage-related case involving public morals was *Brazil—Taxation*. In this case, Brazil exempted certain domestic companies producing television equipment from paying taxes, therefore violating its national treatment obligation. In its defense, Brazil argued that while television was the foremost medium of information reception in the country, large chunks of its population did not have (uninterrupted) access. In Brazil’s words, by exempting domestic TV producers from paying taxes, it was trying to ‘bridge the digital divide’ and to ‘promote social inclusion’. According to Brazil, the discriminatory aspects of the measure were necessary to ensure the ‘continuity of supply’ of digital television.

For the panel, social inclusion can be conceived as a legitimate objective by enabling mass communication and bridging the digital gap. However, although the measure was capable of protecting public morals, it was not necessary to

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322 Id. para.7.751.

323 Id. para.7.752–3.

324 *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, Appellate Body Report, 21 December 2009, WTO Doc WT/DS363/AB/R, para.25.

325 *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Panel Report, footnote 538.

326 Id. para. 7.913.

ensure continuity of supply: the complainants suggested alternatives (including tax exemptions for domestic *and* foreign companies) which the panel found to be WTO-consistent, trade-enhancing (rather than restricting), and capable of contributing to Brazil's stated objective of social inclusion to a higher degree than Brazil's original measure (by increasing supply and lowering the price of television equipment).<sup>327</sup> The panel's conclusion that the WTO-inconsistent measures were not justified under GATT Article XX(a) was not challenged.

### 6.3 *Morality and Trade Revisited*

Trade has contributed to the advancement of education, learning, and even the diffusion of cultural goods. Trade and cultural diversity can benefit from each other. At the same time, when trade and moral/ethical/religious values collide, WTO adjudicators need to adopt an intercivilizational approach to such cultural policy-related disputes, because such conflicts epitomize the rich cultural diversity of the world. Therefore, it would be auspicious to rethink the role of economic liberalization in relation to cultural values adopting a long-term perspective.

International trade law has traditionally prioritized trade while treating public morals as an exception. The review of the relevant jurisprudence of WTO courts reveals that despite the formal existence of general exceptions, rarely if ever do states succeed in invoking such exceptions. Moreover, while WTO courts have tended to ensure a high level of deference to state policies protecting human health and the environment, they have been less deferential on matters of public morals.<sup>328</sup> WTO courts have recognized public health and environmental protection as vital values, and have found ways to protect those values without resorting to exceptions.<sup>329</sup> Instead, it remains still unsettled how other vital values—like those which can fall under preemptory norms, public morals, and public order—can be similarly protected by the WTO courts.<sup>330</sup> Cultural concerns have not been taken into account in assessing the likeness of products.

For the time being, WTO courts have checked whether 'a certain belief is genuinely held within the regulator's society or whether it is shared more broadly

327 *Brazil—Certain Measures Concerning Taxation and Charges*, Panel Report, WT/DS472/R, 30 August 2017.

328 Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 *JIEL* 383–405, 383.

329 *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, 5 April 2001, para. 154.

330 Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence' 383.

by the international community.<sup>331</sup> They have also investigated the content of the cultural policy and whether it addresses a genuinely moral issue.<sup>332</sup> While panels and the Appellate Body have been deferential to Members on what constitutes public morals, they have held them to a strict standard in assessing whether such measures are nevertheless necessary and meet the requirements of the *chapeau* of Article xx, which requires non-discriminatory application of the measure.

It is high time to reconsider the interplay between culture and trade more holistically. On the one hand, ‘a new jurisprudence could focus on identifying space for flexibility within the primary rules themselves.’<sup>333</sup> Although this interpretive process revises settled doctrinal questions, ‘trade adjudicators should consider regulatory aims (not just effects) when deciding whether a measure discriminates against like products or services.’<sup>334</sup> Following this line of reasoning, a trade restriction clearly aimed at safeguarding legitimate cultural values ‘may perhaps not be considered discriminatory.’<sup>335</sup> Consumers’ cultural preferences could also be taken into account to ascertain whether two products are alike or not.

For instance, for certain believers, dietary laws, which define what food is permissible (*halal*) under Islamic law, are not obstacles to trade, but an integral part of their diet, culture, and belief.<sup>336</sup> To date, three disputes have related to *halal* measures.<sup>337</sup> While in *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, Indonesia did not rely on Article xx(a)

331 Ben Czapnik, ‘Moral Determinations in WTO Law: Lessons from the Seals Dispute’ (2022) 25 *JIEL* 390–408.

332 *Id.*

333 Julian Arato, Kathleen Claussen, and J. Benton Heath, ‘The Perils of Pandemic Exceptionalism’ (2020) 114 *AJIL* 627–636, 635.

334 *Id.*

335 Tomer Broude, ‘Mapping the Potential Interactions between UNESCO’s Intangible Cultural Heritage Regime and World Trade Law’, (2018) 25 *International Journal of Cultural Property* 419–448, 437.

336 Eva Johan and Anna Schebesta, ‘Religious Regulation Meets International Trade Law: Halal Measures, a Trade Obstacle? Evidence from the SPS and TBT Committees’ (2022) 25 *JIEL* 61–73.

337 Panel Report, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017; Appellate Body Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017; and *Indonesia—Measures Concerning the Importation of Bovine Meat*, WT/DS506, Request for Consultations, 29 April 2016.

of the GATT to justify its *halal* measures,<sup>338</sup> in *Indonesia—Importation of Horticultural Products, Animals, and Animal Products*, the country changed its approach, arguing that *halal* measures were a matter of public morals. Nonetheless, the panel found a breach of Article XI and held that Indonesia had not demonstrated that its measures were justified under Article XX. The AB upheld the decision. As *Indonesia—Measures Concerning the Importation of Bovine Meat* and other disputes are pending at the time of writing, it remains to be seen whether WTO courts will be willing to endorse the cultural and moral concerns of a significant part of the international community.

On the other hand, the term ‘necessary’ could be interpreted in a more lenient way: rather than indicating an unavoidable or indispensable measure—which is, in itself, an impossible target, because policymakers can always conceive alternative policies to protect public morals—it could indicate that such measures are needed to safeguard public morals. The existence of less trade-restrictive measures is always possible, but this does not necessarily mean that they can achieve the same level of public morals protection intended by the state.<sup>339</sup>

In conclusion, the predominant vision of international trade law still prioritizes commerce over other concerns. Nonetheless, ‘[i]n this context of crisis and uncertainty about the future, it is worth considering what a competing imagination would look like.’<sup>340</sup> In the words of a great philosopher from the 20th century, Simone Weil (1909–1943): ‘The spirit of justice and truth is nothing else but a certain kind of attention.’<sup>341</sup> As argued elsewhere, attention to human dignity, cultural diversity, and diverse civilizations should become part

338 Haniff Ahamat and Nasarudin Abdul Rahman, ‘Halal Food, Market Access, and Exception to WTO Law: New Aspects Learned From *Indonesia—Chicken Products*’ (2018) 13 *Asian Journal of WTO & International Health Law and Policy*, 355–373, 365.

339 Compare with *Australia—Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Panel Reports, WT/DS435/R, and WT/DS441/R, adopted 29 June 2020, as upheld by AB Reports, WT/DS435/AB/R and WT/DS441/AB/R (noting that the complainants failed to demonstrate that proposed alternative measures would be less-trade-restrictive or would make an equivalent contribution to Australia’s legitimate public health objectives.).

340 Nicolás M. Perrone, *Investment Treaties & the Legal Imagination—How Foreign Investors Play By their Own Rules* (Oxford: OUP 2021) 206.

341 Simone Weil, *La Personne et le Sacré [Écrits de Londres et Dernières Lettres* (Paris: Gallimard 1957)] (Paris: Editions Allia 2020) 57 (‘L’esprit de justice et de vérité n’est pas autre chose qu’une certaine espèce d’attention.’).

of the new imagination of international economic law.<sup>342</sup> More generally, we should ask ourselves: ‘[W]hat patterns of relationship among people and the material world [do] we want’?<sup>343</sup> While this question may seem peripheral to international economic law, it is at the heart of the field. In fact, this field of law governs economic relations among nations and among these and the world in which we all are born, live, and die.

## 7 The Security Exception

Nowadays, the emerging security concerns related to the illicit trade of antiquities can add new substantive dimensions to the trade and culture debate. In fact, the illicit trade of cultural property can pose a global security threat by financing organized crime and terrorist activities. These concerns fall within the scope of GATT Article XX(a) relating to public order, Article XX(f) concerning the protection of national treasures, and Article XXI relating to national and international security.

Security concerns have traditionally justified trade restrictions, as national security takes precedence over the benefits of trade.<sup>344</sup> Even Adam Smith recognized that national security could justify a departure from free trade among nations. According to Smith, ‘Defence is of much more importance than opulence.’<sup>345</sup> The need to protect the state overrides all trade concerns. Therefore, a state can decide to maintain or develop a given industry for the contingency of war or its survival, even though it may not be economically viable.<sup>346</sup> In addition, states need to avoid being too dependent on other countries in certain core industries as this allegedly ‘reduces real sovereignty and makes a nation vulnerable to economic and political forces beyond its control.’<sup>347</sup>

Until recently, GATT Article XXI had been invoked in only a few disputes and had played no significant role in the practice of the GATT 1947 or the WTO.<sup>348</sup>

342 Valentina Vadi, ‘Inter-Civilizational Approaches to Investor-State Dispute Settlement’ (2021) 42 *University of Pennsylvania Journal of International Law* 737–97.

343 Perrone, *Investment Treaties & the Legal Imagination*, 206.

344 Rostam Neuwirth and Alexandr Svetlicinii, ‘The Economic Sanctions over the Ukraine Conflict and the WTO: “Catch-XXI” and the Revival of the Debate on Security Exceptions’ (2015) 49 *JWT* 891–914.

345 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [*The Wealth of Nations*] (London: W. Strahan and T. Cadell 1776), Book 4, Chapter 2.

346 Jackson, *The World Trading System*, 22.

347 Id.

348 Van den Bossche, *The Law and Policy of the World Trade Organization*, 664.

Despite the constructive ambiguity of GATT Article XXI, most states showed restraint and maintained a sort of mutual ceasefire. They did not abuse the system to advance political agendas because doing so would encourage other states to do the same. Moreover, ‘preserving and extending the liberal economic order itself was seen as a security imperative.’<sup>349</sup> Finally, most GATT contracting parties belonged to the same political block and shared common goals.

However, in the past decade, there has been a surge of cases involving this exception.<sup>350</sup> Nowadays, in a world changed by multipolarity, the end of the Cold War, global pandemics, climate change, and geopolitical instability, the relationship between trade and security has ‘fundamentally changed.’<sup>351</sup> The linkage between trade and security is ‘far more contested’ even in countries that have traditionally supported trade liberalization.<sup>352</sup> Self-sufficiency is increasingly being considered ‘an overriding security priority,’ at least in some sectors.<sup>353</sup> While some cases presenting security claims have been settled or withdrawn,<sup>354</sup> the relevance of Article XXI of the GATT is on the rise due to current fluid geopolitics.<sup>355</sup> The fact that this provision has never been invoked with regard to the illicit traffic of cultural goods does not mean that such an exception might not be relevant in the future. Thus, this section briefly discusses its key features and then examines its possible role in the interplay between culture and trade.

GATT Article XXI enables measures to be taken to protect national security as well as international peace and security. Under Article XXI(b) Member states can take any action which they consider necessary for the protection of

349 Julian Arato, Kathleen Claussen, and J. Benton Heath, ‘The Perils of Pandemic Exceptionalism’ (2020) 114 *AJIL* 627–636, 634.

350 See e.g. *United States—Certain Measures on Steel and Aluminum Products*, WT/DS548/19, Recourse to Article 25 of the DSU, 21 January 2022 (the parties decided to resort to arbitration).

351 Ji Yeong Yoo and Dukgeun Ahn, ‘Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?’ (2016) 19 *JIEL* 417–44, 418; Harlan Grant-Cohen, ‘Nations and Markets’ (2020) 23 *JIEL* 793–815, 815.

352 Arato, Claussen, and Heath, ‘The Perils of Pandemic Exceptionalism’ 634.

353 *Id.*

354 *Qatar—Certain Measures Concerning Goods from the United Arab Emirates*, WT/DS576/3; *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, Communication from Qatar, WT/DS567/11, 25 April 2022 (notifying the DSU that it has agreed to terminate the dispute and that it will not seek the adoption of the Panel report dated 16 June 2020.)

355 See generally Tania Voon, ‘The Security Exception in WTO Law: Entering a New Era’ (2019) 113 *AJIL Unbound* 45–50.

their essential security interests relating, *inter alia*, to the traffic of goods and materials as is carried on to supply a military establishment taken in times of war or other emergencies in international relations. Essential security interests refer to ‘interests relating to the quintessential functions of the state, namely the protection of its territory and its population from external threats and the maintenance of law and public order internally.’<sup>356</sup>

Under Article XXI(c) Members can take any action in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security. Thus Members can deviate from their WTO obligations to implement economic sanctions adopted by the Security Council under Article 41 of the UN Charter. This provision mirrors and confirms Article 103 of the Charter which provides that ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’<sup>357</sup>

Unlike GATT Article XX, Article XXI does not have a *chapeau* to prevent abuse of the exception that it contains. In fact, ‘every country must be the judge in the last resort on questions relating to its own security.’<sup>358</sup> Because of the broad and permissive wording of Article XXI, the question has arisen as to whether this clause is self-judging or justiciable, that is, whether WTO courts can review its application. On the one hand, if interpretation were too deferential, abuses would be possible and states could engage in pretextual protectionism.<sup>359</sup> On the other hand, if interpretation were too strict, the entire trading system would collapse as ‘no country would agree to limit its use of trade measures when it faced what it considered a threat to its national security.’<sup>360</sup>

Therefore, a certain degree of judicial review has been maintained to avoid possible abuses. In *Russia—Measures concerning Traffic in Transit*, the Panel reaffirmed that it is left to every Member to define what it considers to be its essential security interests and whether measures are ‘necessary’ to pursue those objectives. Nevertheless, it also stated that such a determination is

356 *Russia—Measures concerning Traffic in Transit*, Panel Report, adopted on 29 April 2019, WT/DS512/7.

357 UN Charter Article 103.

358 *US—Restrictions on Exports to Czechoslovakia*, Contracting Parties Decision, 8 June 1949. GATT/CP.3/SR.22.

359 Roger Alford, ‘The Self-Judging WTO Security Exception’ (2011) *Utah LR* 697–759, 697.

360 William Kerr, ‘Loopholes, Legal Interpretations, and Game Playing: Whither the WTO Without the Spirit of the GATT?’ (2019) 20 *Journal of International Law and Trade Policy* 49–60, 55.

subject to the principle of good faith and that panels can review the circumstances of the national security exception.

With regard to the illicit trade of cultural artifacts, since the Iraqi war in 2003, the UN Security Council has adopted several binding resolutions supplementing international cultural heritage law under Chapter VII of the UN Charter.<sup>361</sup> Such resolutions have required all UN members to ‘take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property ... illegally removed from the Iraq National Museum ... and other locations in Iraq ... including by establishing a prohibition on trade in, or transfer of, such items’.<sup>362</sup> More recently, in 2015, the Security Council confirmed its ban on the trade of removed cultural objects with regard to Iraq and extended it to Syria,<sup>363</sup> condemning the destruction of cultural heritage in both countries and noting with concern that the looting and illicit trade of cultural properties was a means to finance terrorist activities.<sup>364</sup>

The Security Council emphasized that ‘the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflict, notably by terrorist groups ... can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic, and cultural development of affected states.’<sup>365</sup> It thus requested members of the United Nations to take appropriate steps to prevent and counter the illicit trade in cultural property and other items of archaeological, cultural, scientific, and religious importance originating from a context of armed conflict. Presumably, WTO Member States whose measures comply with obligations under the UN Charter, also comply with WTO law as their measures would fall under GATT Article XXI(c).

Once an arcane provision, GATT Article XXI is now characterized by some constructive ambiguity. While member states remain free to determine their essential security interests and comply with UN Security Council resolutions, WTO courts retain some scrutiny over the same measures.

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361 See generally Sabrina Urbinati, ‘Alcune Considerazioni sulle Ultime Attività del Consiglio di Sicurezza in Materia di Protezione del Patrimonio Culturale in Caso di Conflitto Armato’ in Elisa Baroncini (ed.) *Tutela e Valorizzazione del Patrimonio Culturale Mondiale nel Diritto Internazionale* (Bologna: Bononia University Press 2021) 195–210.

362 UN Security Council, Resolution 1483 (2003), para.7.

363 UN Security Council, Resolution 2199 (2015), para. 17 (deciding ‘that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items.’)

364 Id. para. 16.

365 UN Security Council, Resolution 2347 (2017) Maintenance of International Peace and Security, preamble.

## 8 Intellectual Property

Although not all intellectual property constitutes cultural heritage, and *vice versa*,<sup>366</sup> there is significant interaction between culture and global knowledge governance under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>367</sup> After briefly summarizing the key features of the TRIPS Agreement, this section discusses the dialectics between the protection of intellectual property and the safeguarding of various forms of cultural heritage in international trade law, focusing on copyright, geographical indications, and traditional knowledge.

The TRIPS Agreement is the most comprehensive international treaty setting global standards for knowledge governance.<sup>368</sup> Administered by the WTO, it sets minimum standards for intellectual property (IP) protection, below which the member states cannot fall.<sup>369</sup> Although WTO Members are free to offer greater protection than what is mandated by the TRIPS Agreement, this agreement already imposes relatively high standards of IP protection which basically correspond to those used in industrialized countries. WTO Members have the right to provide for more extensive protection that is not required by the TRIPS Agreement, as long as they follow the general principles of the most-favored nation clause and national treatment.<sup>370</sup> Therefore, any intellectual property agreement negotiated after TRIPS by WTO Members can only create similar or higher standards for IP protection (commonly known as TRIPS-plus). Members can enforce the provisions of the TRIPS Agreement through the WTO DSM, which has compulsory jurisdiction over TRIPS-related disputes.

The TRIPS Agreement has been controversial since its inception. IP rights grant the innovator a temporary monopoly on the use of the innovation. While such monopolies intend to reward the innovators and provide incentives for further inventions, they also prevent rapid imitation, raise the cost of new

366 Daniel Gervais, 'Spiritual but Not Intellectual—The Protection of Sacred Intangible Traditional Knowledge' (2003–2004) 11 *Cardozo Journal of International and Comparative Law* 633.

367 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

368 For a detailed commentary, see Carlos Correa, *Trade Related Aspects of Intellectual Property Rights—A Commentary on the TRIPS Agreement*, 11 edition (Oxford: OUP 2020); Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, V edition (London: Sweet & Maxwell 2021).

369 TRIPS Agreement Article 1.1.

370 *Id.*

cultural products, and restrict their availability. They may retard further innovation. Therefore, IP rights inherently endorse a conflict between the objective of promoting cultural production by providing incentives for the same and the objective of encouraging the diffusion of culture, new knowledge, and technology. Historically, governments have attempted to strike a balance between competing objectives by calibrating their municipal IP law on the basis of their social, cultural, and economic features. The TRIPS Agreement thus constituted a significant paradigm shift by linking IP to trade and limiting state cultural sovereignty in the field.

Developing countries opposed the adoption of the TRIPS Agreement fearing that the introduction of high standards of IP protection would jeopardize access to technology, and that the agreement would privilege the private economic interests of IP holders *vis-à-vis* important public policies furthering developmental objectives.<sup>371</sup> Some scholars claimed that the imposition of Western IP systems on other cultures amounted to economic imperialism. They highlighted that the Western model based on individual creation and incentive conflicts in fundamental ways with Indigenous, Eastern, and Southern cultures that are characterized by communal orientation.<sup>372</sup> In Oceania, Asia, and Africa, many civilizations have traditionally viewed ideas as part of a common heritage that benefits present and future generations.<sup>373</sup> Many such cultures view innovations as group products designed to meet common needs. Some scholars even doubted IP's link to trade, given its effect of restricting the market.<sup>374</sup> Not by chance, the 1947 General Agreement on Tariffs and Trade listed intellectual property among the general exceptions to the general commitment to free trade.<sup>375</sup>

371 Jerome H. Reichmann, 'The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries' (2000) 32 *Case Western Reserve JIL* 441–470, 441–43.

372 Rosemary Coombe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 59 *Indiana Journal of Global Legal Studies* 59–115.

373 Vincent Chiappetta, 'The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things' (2000) 21 *Michigan JIL* 333–392, 376–377.

374 Michael Spence, 'Which Intellectual Property Rights are Trade-Related?', in Francesco Francioni and Tullio Scovazzi (eds), *Environment, Human Rights, and International Trade* (Oxford: Hart Publishing 2001) 263–85.

375 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194, Article XX(d) ('Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (d) necessary to secure compliance with laws or regulations

Nevertheless, through intense negotiation and linkage bargaining – that is, linking negotiations on IP to negotiations in other sectors such as agriculture – the TRIPS Agreement was signed at the Marrakesh Ministerial conference in 1994, as part of a package deal with the other Uruguay Round Agreements, and came into force in January 1995.<sup>376</sup> As the outcome of intense cross-sectorial negotiations, the TRIPS Agreement does not necessarily entail an optimal balance between private and public interests. Rather, countries accepted its high standards of IP protection potentially reducing their regulatory autonomy in the cultural sector in light of the overall perceived benefits of the entire WTO package. While the TRIPS Agreement ‘moved from framing IP as a barrier to trade into conceptualizing it as a tradable commodity in the name of facilitating trade,’ it protected proprietary rights broadly while ‘construing user interests narrowly.’<sup>377</sup> In fact, while the TRIPS Agreement formally recognizes the non-economic concerns associated with intangible assets,<sup>378</sup> it is often under scrutiny in high-profile cases where it may be difficult to strike the right balance between public and private interests.<sup>379</sup>

The TRIPS Agreement provides some general provisions and basic principles which have to be taken into account by both policy makers and adjudicators in respectively adopting and interpreting IP norms. Article 7, entitled ‘Objectives’, requires that the protection and enforcement of IP rights should contribute to ‘the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’ Article 8, entitled ‘Principles’, states that ‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.’ In addition, paragraph 2 of the same provision adds that ‘[a]ppropriate measures, provided that they

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which are not inconsistent with the provisions of this Agreement, including those relating to ... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.’).

376 José E. Alvarez, ‘The WTO as Linkage Machine’ (2002) 96 *AJIL* 146–158, 147.

377 Rochelle Dreyfuss and Susy Frankel, ‘From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property’ (2015) 36 *Michigan JIL* 557–602, 560.

378 See for example, TRIPS Agreement, Articles 7 and 8.

379 Valentina Vadi, ‘Towards a New Dialectics—Pharmaceutical Patents, Public Health, and Foreign Direct Investments’ (2015) 5 *New York Journal of Intellectual Property and Entertainment Law* 113–195.

are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders.’

Yet, the vague wording of these general clauses may result in the hesitation of Members to make full use of such flexibilities for such cultural purposes as research, criticism, and education. This is all the more true as every clause is accompanied by a caveat in favor of protection. Evidence shows that in practice it may be difficult for member states to invoke the flexibilities provided by the TRIPS Agreement because of the fear of other countries’ complaints before the WTO Dispute Settlement mechanism.

Recent jurisprudential trends show that WTO courts have increasingly dealt with cultural heritage-related controversies involving copyright, geographical indications, and traditional knowledge.<sup>380</sup> These disputes demonstrate that without a sensible interpretation and/or remodelling, IP rights risk overprotecting individual economic interests.

### 8.1 *Copyright and Culture*

Copyright protects the rights of the creators of original works in the field of literature and the arts. Copyright holders have exclusive rights to copying and distribution of the work. At its core, copyright is a legal construct, because it extends the author’s right to ideas once they have been expressed in the form of books, artworks, songs, and other creative expressions.<sup>381</sup> Copyright has multiple functions. On the one hand, it rewards creativity: by rewarding authors for the use of their works, they can make a living from creative activities. On the other hand, the distribution of cultural goods contributes to the diffusion of culture and education. In fact, any work that is left inaccessible or unexpressed limits public access to culture. In any case, copyright does not cover mere ideas that thus remain in the public domain, as they represent intellectual commons or the common knowledge of humanity. As such, mere ideas are not copyrightable.

Copyright constitutes an important part of cultural policy, and strong copyright protection is usually associated with positive effects on creativity. More generally, there is a sort of mystical thinking about copyright as serving the interest of national cultures, values, and politics. Copyright is deemed the keystone of trade in cultural products, where individuals are encouraged to create and make their creations available to the public.

380 Michael Woods, ‘Food for Thought: The Biopiracy of Jasmine and Basmati Rice’ (2002–2003) 13 *Albany Law Journal of Science and Technology* 123–137, 123.

381 TRIPS Agreement Article 9.2 (‘Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.’).

The negative impact of copyright protection on culture seems counterintuitive or even paradoxical. Yet, it is a common criticism that in recent years law makers and judges have expanded the rights of copyright holders too far, at the expense of the common weal. In some cases, overprotection of copyright can chill further creativity rather than foster it. Although broad copyright protection can provide incentives for creativity, it can also ‘parcel up a stream of creative thought into a series of distinct claims each of which could constitute the basis of a separately owned monopoly.’<sup>382</sup> In other words, copyrights risk feudalizing culture and ‘rais[ing] the costs of creation for subsequent authors to the point where those authors cannot cover them.’<sup>383</sup> Thus, it becomes difficult for authors to have access to, and dialogue with, the work of pioneers. Copyright can restrict the free trade of cultural goods, thus potentially affecting developing countries.<sup>384</sup> At the international level, the expansion of copyright protection ultimately determines the emergence of antinomies between intellectual property law and other branches of public international law.

Historically, even industrialized countries offered weak IP protection regimes when they were developing; they have protected copyright and patents strenuously only since they became net IP producers.<sup>385</sup> The first known copyrights appeared in Renaissance Italy. As Venice took the lead in Italian printing, its government granted a series of privileges relating to books.<sup>386</sup> Other city-states soon followed suit, encouraging the revelation and application of secrets—whether of native genius or foreign provenance. In Florence, the architect Filippo Brunelleschi (1377–1446) successfully engineered the dome of the Cathedral of *Santa Maria del Fiore*, a world heritage site, with the aid of machines that he invented for the building. The project involved the transportation of marble slabs from Carrara, where the marble was quarried, to Florence for some 100 kilometers. Brunelleschi petitioned for, and obtained, a privilege for various machinery including a boat that would bring in the blocks on the river *Arno*.<sup>387</sup> In Renaissance Europe, governments granted patents to promote the transfer

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382 Paul Allan David, ‘Intellectual Property Institutions and the Panda’s Thumb’, in Mitchell Wallerstein, Mary Ellen Moguee, and Roberta Schoen (eds), *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington DC: National Academy Press 1993) 19–64, 28.

383 Id. 42; Calixto Salomão Filho, ‘Contemporary IP Paradoxes’ (2022) 53 IIC 321–323.

384 Chiappetta, ‘The Desirability of Agreeing to Disagree’, 336.

385 Id. 352.

386 David, ‘Intellectual Property Institutions and the Panda’s Thumb’, 51

387 Ross King, *La Cupola del Brunelleschi* (Milan: Rizzoli 2001) 187–202.

of foreign technologies. They hoped that foreign master artisans would introduce their local apprentices to the secrets of their respective arts.<sup>388</sup>

After highlighting some antinomies within copyright itself, this section critically assesses how the TRIPS Agreement currently governs copyright to verify whether, and if so how, systemic antinomies may be resolved within international trade law. The TRIPS Agreement has determined an evident propertization of intangible heritage and cultural expressions. Propertization can be defined as the process of emphasizing proprietary aspects of given intangible rights or the characterization of modern knowledge governance as moving toward a property-based regime.<sup>389</sup> This process is particularly evident with regard to copyrights.<sup>390</sup> The TRIPS Agreement governs copyrights because they are trade-related aspects of intellectual *property* rights.

Yet, the author's rights do not merely have economic dimensions; rather, they present a distinct cultural character.<sup>391</sup> Moreover, while propertization processes seem inevitable in contemporary society, what is less evident is the impact of this trend on access to culture and the very creative process. Indeed, protecting copyrights as proprietary rights risks overemphasizing the first essential function of copyright, which is the remunerative function, while jeopardizing the second function, which is broadening access to culture. There is a risk that copyright owners are given strong rights over their work without much regard for the social costs of such protection.

In governing trade-related aspects of copyright, the TRIPS Agreement incorporates and expands the Berne Convention which already adequately protected copyright.<sup>392</sup> Each Member state 'is free to determine the level of originality or artistic creativity' required for the work to be protected by copyright.<sup>393</sup> The

388 David, 'Intellectual Property Institutions and the Panda's Thumb', 45.

389 Valentina Vadi, 'Trademark Protection, Public Health, and International Investment Law: Strains and Paradoxes' (2009) 20 EJIL 773–803, 775.

390 Peter Drahos and John Braithwaite, *Information Feudalism: Who Own the Knowledge Economy?* (London: Earthscan 2002).

391 UN, Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, *Copyright Policy and the Right to Science and Culture*, 24 December 2014, A HRC/28/57, para. 29 ('The human right to protection of authorship is thus not simply a synonym for, or reference to, copyright protection, but a related concept against which copyright law should be judged. Protection of authorship as a human right requires in some ways more and in other ways less than what is currently found in the copyright laws of most countries.').

392 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

393 Van den Bossche, *The Law and Policy of the World Trade Organization*, 763.

TRIPS Agreement does not take a position on the issue of moral rights namely, the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honor or reputation. Thus, WTO Member states are free to govern such rights as they deem appropriate. The term of protection is the life of the authors and 50 years after their death. The paucity of provisions and their vagueness seems to leave a wide margin of discretion to WTO members on how to implement the agreement.

However, the fact that IP disputes can now be adjudicated before the WTO DSM has strengthened the global protection of copyright to an extent unknown before. About 10% of the total WTO disputes have related to IP protection. Most of these disputes have been brought by the United States mostly challenging general IP law or regulations for systemic reasons, rather than focusing on specific matters. As issues can be discussed during the review of national legislation by the TRIPS Council, WTO Members have often reached mutually agreed solutions as a result of consultations.<sup>394</sup> Some disputes have nonetheless reached the WTO DSM.

In *US—Section 110(5) Copyright Act*, the European Union complained about the so-called business exemption and home-style exemption of Section 110(5) of the *US Copyright Act*.<sup>395</sup> Such exemptions permitted the radio transmission of music in public spaces without paying a royalty fee. The dispute centered on the compatibility of the exemptions with Article 13 of the TRIPS Agreement, which allows certain exceptions to copyright, subject to the condition that such limitations are confined to certain special cases, do not conflict with a normal exploitation of the work in question, and do not unreasonably prejudice the legitimate interests of the right holder. The United States argued that both exemptions met the requirements of Article 13 of the TRIPS Agreement. However, the panel found that the business exemption, which enabled companies not to pay royalties provided that their facilities were limited to a certain square footage, did not meet the requirements of Article 13. In fact, as most restaurants and bars were covered by the business exemption, this would not constitute a special case as required by Article 13 of the TRIPS Agreement. Finally, the panel found that the home-style exemption was lawful as it met the

394 See e.g. *Japan—Measures Concerning Sound Recordings*, Notification of Mutually Agreed Solution, IP/D/1/Add1WT/DS28/4, 5 February 1997; *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, Notification of Mutually Agreed Solution, WT/DS15, 13 September 2002; *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes*, Notification of Mutually Agreed Solution, WT/DS125/1, 26 March 2003.

395 *United States—Section 110(5) of the US Copyright Act*, Panel Report, WT/DS160/R, adopted on 27 July 2000.

requirements of Article 13 of the TRIPS Agreement. In interpreting the exceptions, the panel found an appropriate balance between copyright protection and access to culture.

In *China—Intellectual Property Rights*, the United States complained about several features of Chinese IP law. First, China denied copyright protection and enforcement to creative works of authorship, sound recordings, and performances that had not been authorized for publication or distribution within China. The WTO courts found that authors did not to enjoy minimum standards of protection under Article 5(1) of the 1971 Berne Convention, as incorporated by Articles 9.1 and 41.1 of the TRIPS Agreement. Second, in the case of IP infringement, Chinese customs authorities could adopt the following policies: (i) pirated copies could be donated to social welfare bodies for public welfare undertakings; (ii) if the holder of IP wished to buy the goods, the goods might be sold; (iii) if the first two options were not possible, then the goods might be auctioned; or (iv) when auctioning was impossible, customs might destroy the goods. For the United States, pirated goods should have been destroyed, not commercialized or auctioned. For the panel, auctioning violated Article 59 of the TRIPS, but it held that Chinese authorities did not have any obligation to destroy pirated goods. Third, the United States lamented the extent of criminal procedures and penalties for unauthorized reproduction or distribution of copyrighted works. The panel upheld the claim holding that the lack of criminal procedures and penalties for commercial-scale piracy in China was inconsistent with China's obligations under Articles 41.1 and 61 of the TRIPS Agreement. Here again, the panel seemed to reach a fair balance between protecting copyright and culture, leaving Chinese authorities free to donate pirated copies to social welfare bodies, while condemning commercial-scale piracy.

From the cases examined in this section, it seems that WTO courts have balanced copyright and culture well. To further support the development of this balanced line of jurisprudence, Professor Gervais and Professor Geiger suggest the recognition of two equilibria within IP.<sup>396</sup> While the intrinsic equilibrium concerns the very structure or architecture of IP norms, the

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396 See Christophe Geiger, 'Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 *ICC International Review of Intellectual Property and Competition Law* 351; Daniel Gervais, 'The Changing Landscape of International Intellectual Property', in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and Free Trade Agreements* (Oxford: Hart Publishing 2007) chapter 3.

extrinsic equilibrium indicates the search for a balance between IP and other rights as established by different treaty regimes.

The intrinsic equilibrium appears in the conceptual matrix of certain norms of the copyright regime. For instance, TRIPS Article 13 requires Members to confine exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. The same Berne Convention, which is fully incorporated by the TRIPS Agreement, allows certain limitations and exceptions: in such cases, protected works may be used without the authorization of copyright holders or payment of compensation.<sup>397</sup> In other words, by presenting a certain degree of flexibility, the same copyright regime does not offer an absolutist paradigm, but an intrinsic balance between private interests and public concerns.

As Geiger notes, 'Already in the 13th century, the theologian and philosopher Thomas Aquinas held the opinion that positive rights (*ius positivum*) could be regarded only as fair and legitimate as long as they aimed for general well-being. Where this is no longer the case, property must be limited; otherwise it will lose legitimacy.'<sup>398</sup> According to Professor Gervais, 'one should not protect beyond what is necessary to achieve policy objective(s) because the risk of a substantial general welfare impact is too high.'<sup>399</sup>

This intrinsic equilibrium can be found in the international copyright regime itself, by taking into account the ultimate goal of IP as expressed in the preamble and Articles 7 and 8 of the TRIPS Agreement. If one adopts an instrumental view of intellectual property, the international IP system should function for the good of all.<sup>400</sup> In fact, 'property is not an end in itself. Obviously, it must be used in a way that contributes to the realisation of the higher objective of human society.'<sup>401</sup>

In parallel, the extrinsic equilibrium pertains to the search for a balance between copyright and other rights as established by different treaty regimes. As mentioned, copyright can enhance access to culture, but its overprotection can also affect cultural rights. In this regard, copyright exceptions can provide

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397 Berne Convention Article 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper for the purpose of reporting current events), and 10bis(3) (ephemeral recordings for broadcasting purposes).

398 Geiger, 'Constitutionalising Intellectual Property Law?' 374.

399 Id.

400 Gervais, 'The Changing Landscape of International Intellectual Property', para. 5.

401 Jakob Cornides, 'Human Rights and Intellectual Property, Conflict or Convergence?' (2004) 7 *Journal of World Intellectual Property* 135-167, 143.

states with the flexibility to accommodate other interests and values. Such provisions thus constitute ‘a vital part of the balance’ that governments must strike between the interests of copyright holders and the public interest in cultural participation.<sup>402</sup>

In assessing the legitimacy and reasonableness of state measures under the TRIPS Agreement, WTO courts could refer to other international instruments including UNESCO treaties, human rights instruments, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.<sup>403</sup>

WTO courts have already taken other international law instruments into account when adjudicating cases of public interest. For instance, in *Australia—Plain Packaging*,<sup>404</sup> a case concerning tobacco control measures adopted by Australia and allegedly infringing trademarks of tobacco companies, the panel referred to the Framework Convention on Tobacco Control and its Guidelines.<sup>405</sup> While the Convention does not mention ‘plain packaging’, its guidelines do. Such reference was crucial to establish the legitimacy of Australia’s plain packaging under the TRIPS Agreement. As WTO courts have taken into account other international law when adjudicating public health-related disputes, there is no reason why they could not take into account other international law when adjudicating cultural heritage-related cases.

## 8.2 *Geographical Indications*

Geographical indications (GIS) constitute a further area of connection between culture, trade, and intellectual property. Progressive modernization and globalization have raised questions about the role of tradition and place in the global village. In parallel, the international protection of intellectual property has dramatically increased worldwide since the inception of the TRIPS Agreement, thus raising the question of its interplay with local cultures. At the crossroads between these phenomena, geographical indications are ‘intellectual property rights that aim to protect both farmers

402 Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, *Copyright Policy and the Right to Science and Culture*, para. 61.

403 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on 27 June 2013, in force September 2016.

404 *Australia—Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467/23, Panel Report adopted on 27 August 2018.

405 WHO Framework Convention on Tobacco Control (FCTC), adopted on 21 May 2003, in force on 27 February 2005, 42 ILM (2003) 518.

and heritage' in international trade.<sup>406</sup> Because of the various cultural and economic as well as public and private interests they endorse, GIs have gradually moved from a matter of peripheral concern to the forefront of legal debate on globalization, that is, the simultaneous occurrence of both universalizing and particularizing trends and the convergence of both global and local considerations in law. After briefly describing how the TRIPS Agreement governs GIs, this section illuminates the ongoing controversies concerning these IP tools.

Geographical indications—such as tequila, champagne, and Chianti—are collective IP rights owned by all the producers of a given region whose products comply with the specification outlined in the relevant code of practice.<sup>407</sup> Each producer can then exercise that right independently. GIs protect producers' investments and consumers' expectations by certifying the unique qualities that characterize a product because of its geographical origin.

The TRIPS Agreement protects GIs as distinctive signs that identify a good as originating in a given territory; the quality, reputation, or other features of the good essentially depend on its geographical origin.<sup>408</sup> Most national systems allow the use of a given GI to producers who are based in the designated region, follow specific manufacturing practices, and use certain ingredients. In this manner, a given geographical indication conveys a certain quality that is based on both geographical/natural and historical/cultural features.<sup>409</sup>

While the TRIPS Agreement provides for the protection of GIs in order to avoid misleading the public and to prevent unfair competition,<sup>410</sup> it does not provide detailed regulation of the same. Under the TRIPS Agreement, GI holders can prevent any misleading indication that pretends that goods originate in a geographical area other than their true place of origin or any use that constitutes unfair competition. Enhanced protection is granted for GIs identifying wines and spirits: their holders can prevent the use of the GI even if the true origin of the product is indicated or their use is accompanied by expressions such as 'kind', 'style', and the like.<sup>411</sup> In other words, such GIs are protected even if consumers are not misled. WTO Members can decide the particular features of their GI protection system, subject to the general WTO rules

406 Kal Raustiala and Stephen Munzer, 'The Global Struggle over Geographical Indications' (2007) 18 *EJIL* 337–365, 365.

407 Riccardo Crescenzi, Fabrizio de Filippis, Mara Giua, and Cristina Vaquero-Piñero, 'Geographical Indications and Local Development: the Strength of Territorial Embeddedness' (2022) 56 *Regional Studies* 381–393, 382.

408 TRIPS Agreement Article 22.

409 Raustiala and Munzer, 'The Global Struggle over Geographical Indications', 342.

410 TRIPS Agreement Article 22.2.

411 TRIPS Agreement Article 23.

on national treatment and non-discrimination.<sup>412</sup> The TRIPS Agreement also includes an exception: Members are not obliged to protect a geographical indication after its transformation into a generic term, that is, when ‘the relevant indication is identical with ... the common name for such goods or services in the territory of that member.’<sup>413</sup> Finally, WTO Members have agreed to enter into negotiations to increase the protection of GIS.<sup>414</sup>

GIS have gained ‘political salience and economic value due to major changes in the global economy’.<sup>415</sup> On the one hand, the debate surrounding GIS relates to ‘the importance of economic competition’.<sup>416</sup> On the other hand, this debate also pertains to the salience of cultural policy, agriculture, and sustainable development. The United States has traditionally emphasized competition and free trade, arguing that GIS constitute a trade barrier. Conversely, for the EU, it is the inadequate protection of GIS that constitutes an impediment to trade.<sup>417</sup>

Several countries have supported the protection of GIS on the international plane for three different albeit related reasons: cultural policy, agriculture, and sustainable development. First, GIS endorse three cultural aspects: (1) the culture of producing a given type of food; (2) the culture of consuming a certain food; and (3) a group’s cultural identity.<sup>418</sup> By protecting regional food products, which have been produced using centuries-old manufacturing techniques, GIS protect the cultural values associated with the production of these goods. Proponents of GIS consider food as something more than a tradable commodity: as an artifact characterized by both visible features and intangible qualities related to the traditional manufacturing processes, consumption cultural practices, and cultural identity. In other words, ‘as a forged painting and the original one may not differ at all materially, while still being

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412 EC—*Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Panel Report, WT/DS290/R, 15 March 2005.

413 TRIPS Agreement Article 24.6.

414 TRIPS Agreement Article 24.1.

415 Raustiala and Munzer, ‘The Global Struggle over Geographical Indications’, 337.

416 Id. 339.

417 Dev Gangjee, ‘Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?’ in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar 2015).

418 Tomer Broude, ‘A Diet Too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices’ in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property Law—Identities, Interests, and Intersections* (Cambridge: CUP 2015) 472–493, 487.

quite different artworks, in the same way a GI cannot be equated to its material constitution: some aspects of its making are key to its identity.<sup>419</sup>

Consider, for instance, the GI *Piadina Romagnola*, an unleavened flat bread made in Romagna, a region in Northern Italy. Prepared with five simple ingredients (flour, water, salt, lard or oil, and sodium bicarbonate), *piadina* was once the alternative to bread for the poorer. Consolidated over centuries as family food prepared by women (*arzdore*), in the 1950s this tradition gave rise to commercial production of *piadina* at small outlets along the roads that led to the Adriatic Sea. Since then *piadina* became renowned throughout the country, being associated with Romagna and the holiday season. The widespread presence of these kiosks characterizes the territory and has shaped consumption patterns.<sup>420</sup>

Second, proponents of GIs link them to agricultural policy. In fact, 'GIs play a propulsive role for the local development of rural areas.'<sup>421</sup> Recent studies have demonstrated that GIs benefit rural areas at both micro and macro levels.<sup>422</sup> On the one hand, GIs confer an added value to producers who can sell their quality products at higher prices. Consumers are 'willing to pay a premium price for sparkling wine from Champagne, tea from Darjeeling, and pepper from Kampot'.<sup>423</sup> On the other hand, GIs also benefit the regions of origin because they increase employment levels and job quality and promote collateral economic activities such as ecotourism, thus contributing to rural development.<sup>424</sup>

In parallel, traditional cultivation techniques as protected by GIs may also provide cultural and social benefits to society, shaping landscapes, providing

419 Andrea Borghini, 'Geographical Indications, Food, and Culture', in Paul Thompson and David Kaplan (eds), *Encyclopedia of Food and Agricultural Ethics* (Heidelberg: Springer 2014) 1118.

420 Judgment of the General Court of 23 April 2018, *CRM Srl v. European Commission*, ECLI:EU:T:2018:208 (upholding the GI on the basis of the reputational link). For commentary, see Dev S. Gangjee, 'From Geography to History: Geographical Indications and the Reputational Link' in Irene Calboli and Wee Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific* (Cambridge: CUP 2017) 36–60.

421 Crescenzi, de Filippis, Giua, and Vaquero-Piñeiro, 'Geographical Indications and Local Development', 381.

422 Id. 383.

423 Irene Calboli, 'Geographical Indications between Trade, Development, Culture and Marketing: Framing a Fair(er) System of Protection in the Global Economy?' in Irene Calboli and wee Loon-Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture* (New York: CUP 2017) 3–35, 18.

424 Crescenzi, de Filippis, Giua, and Vaquero-Piñeiro, 'Geographical Indications and Local Development', 383.

aesthetic beauty, and strengthening identities. Some landscapes that originate GIS have been included in the World Heritage List as sites of outstanding and universal values for their natural and cultural features. For instance, the *Coffee Cultural Landscape of Colombia* has been included in the World Heritage List as ‘an exceptional example of sustainable and productive cultural landscape.’<sup>425</sup> Analogously, the *Champagne Hillsides, Houses, and Cellars* and the *Climats, Terroirs of Burgundy* of France have been inscribed on the World Heritage List as an agro-industrial landscape<sup>426</sup> and as a cultural landscape respectively.<sup>427</sup> Other cultural landscapes inscribed on the World Heritage List relate to GIS for wine.<sup>428</sup>

The EU has expressly linked GIS to its Common Agricultural Policy (CAP). Introduced in 1962 and amended several times, the CAP accounts for nearly half of European expenditure and is focused on rural development. As agricultural subsidies are gradually lowered, the Commission considers GIS as a key factor of global competitiveness. Therefore, it is refocusing its strategy on the quality rather than quantity of agricultural products. As most GIS relate to agricultural products, developing countries have started to favor GIS as well. While the EU has a relatively high proportion of its population employed in agriculture (4 percent compared to 1 percent in the United States), agriculture employed a quarter of the world’s workers in 2019.<sup>429</sup> About 400 million people work in agriculture in India and China. In parallel, 225 million people in Africa work in the sector.<sup>430</sup> Comprehensibly, these countries have increasingly supported GIS and obtained GIS for their renowned products such as India for Darjeeling tea and China for Sangzi White tea. In parallel, the African Union has established a continental strategy for GIS.<sup>431</sup> While European states have protected certain foodstuffs

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425 UNESCO, World Heritage Convention, *Coffee Cultural Landscape of Colombia*.

426 UNESCO, World Heritage Convention, *Champagne Hillsides, Houses, and Cellars*.

427 UNESCO, World Heritage Convention, *The Climats, Terroirs of Burgundy*.

428 UNESCO, World Heritage Convention, *Tokaj Wine Region Historical Cultural Landscape* (Hungary); *Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato* (Italy); *Le Colline del Prosecco di Conegliano e Valdobbiadene* (Italy); *Agave Landscape and Ancient Industrial Facilities of Tequila* (Mexico); *Alto Douro Wine Region* (Portugal); *Lavaux, Vineyard Terraces* (Switzerland).

429 Food and Agriculture Organization, *Statistical Yearbook—World Food and Agriculture* (Rome: FAO 2019).

430 Id.

431 African Union, Department of Rural Economy and Agriculture, *Continental Strategy for Geographical Indications in Africa 2018–2023*.

originating from specific geographical locations since the 15th century,<sup>432</sup> and the EU now has the largest share of GIs in the world, this will likely change in the near future.

Third, GIs have been linked to sustainable development, that is, development that meets the needs of current and future generations. By transmitting experimented practices to future generations, GIs enable the construction, safeguarding, and evolution of agricultural know-how. They express the link between human perseverance, culture, and natural resources. As noted by Calboli, ‘since the land is the essential wealth, the heart upon which the fortune of the GI producers is constructed’, GIs also incentivize farmers to adopt ‘long-term strategies’ for safeguarding the health of the land, thus ensuring the sustainability of food production. Because of the cultural, historical, and geographical features of GIs, they contribute to humanizing, spatializing, and diversifying globalization. They ‘may encourage people to live and work in their place of origin.’<sup>433</sup> By supporting local resilience and international competitiveness, GIs enable people to flourish in the land where they are rooted.

GIs can foster cultural resilience, that is, the capability to rise above challenges and adapt quickly to new circumstances using one’s own tradition and cultural background. For instance, when a 6.2 magnitude earthquake almost destroyed the Italian town of Amatrice in 2016, restaurants across the world made donations for every plate served of *Amatriciana* – the pasta dish named after the town. Even if most of the town no longer exists, not only does the tradition live on, but the recent conferral of a GI can contribute to the reconstruction efforts and cultural resilience.<sup>434</sup> In the aftermath of the 2012 earthquake shaking Northeast Italy, sales of *Parmigiano Reggiano*, a GI-protected cheese traditionally produced in Parma according to traditional cultural practices, helped the gradual recovery of the local communities.<sup>435</sup> Cultural resilience empowers individuals not only to survive and recover, but also to evolve and even thrive after stressful events.

At the same time, GIs also ‘embed local space in global spaces’ enabling local communities to interact with global markets, bypassing traditional

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432 Kaiko Shimura, ‘How to Cut the Cheese: Homonymous Names of Registered Geographic Indicators of Foodstuffs in Regulation 510/2006’ (2010) *Boston College International & Comparative LR* 129–151.

433 Crescenzi, de Filippis, Giua, and Vaquero-Piñeiro, ‘Geographical Indications and Local Development’, 387.

434 Valentina Vadi, ‘Intangible Cultural Heritage and Trade’, in Charlotte Waelde, Charlotte Cummings, Mathilde Parvis, and Helena Enright (eds), *Research Handbook on Contemporary Intangible Cultural Heritage* (Cheltenham: Edward Elgar 2018) 398–415, 398–9.

435 Id.

power hierarchies.<sup>436</sup> By ensuring high-quality food and encouraging local growth, GIs promote a re-organization of rural economies toward sustainable development.<sup>437</sup>

The clash of interests and values concerning GIs is epitomized by the ongoing battle concerning the wine *chateau*. As EC Regulation 607/2009 prevented the importation of United States wines bearing the label *chateau*, a term used mainly on wines from Burgundy in eastern France, the United States asked the European Commission to approve pending applications to commercialize such products.<sup>438</sup> However, French wine producers contended that American competitors should not be allowed to sell *chateau*-type wine in the EU, as their production standards differ from the French ones. In France, wine labelled *chateau* is entirely made from grapes grown on a *terroir* – a specific area of land – whose soil and micro-climate give it a unique character.<sup>439</sup> According to French rules, the *chateau* label can only be applied to wine made with grapes that were cultivated on the land and processed there.<sup>440</sup> According to French winemakers, '[t]his is a guarantee of quality..., a declaration to the buyer[s] that [they] [are] sharing in the heritage that gave rise to [their] wine.'<sup>441</sup> Instead, American wines are made with a mixture of grapes purchased from different growers, as the American labelling system 'traditionally highlights grape variety, rather than where the fruit was grown.'<sup>442</sup> Therefore, French producers claimed that American producers should not be allowed to have *chateau* on the label, while American vintners complained about the detrimental trade impact of the EC Regulation.

In an early case, *Japan—Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages*, the panel concluded that there was no evidence to suggest that Japanese manufacturers' use of marks like *chateau* affected geographical indications.<sup>443</sup> However, this case was adjudicated

436 Sarah Bowen, 'Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy' (2010) 75 *Rural Sociology* 209–243.

437 Food and Agriculture Organization, *Strengthening Sustainable Food Systems through Geographical Indications* (FAO: Rome 2018).

438 WTO Committee on Technical Barrier to Trade, Minutes of the Meeting of 27–28 November 2012, G/TBT/M/58, 6 February 2013, para. 2.53.

439 Devorah Lauter, 'French Winemakers concerned over "Chateau" Change', *The Telegraph*, 16 September 2012.

440 Edward Cody, 'An American *Chateau*? French Winemakers Say No', *Washington Post*, 23 September 2012.

441 Id.

442 Id.

443 *Japan—Customs Duties, Taxes, and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216, adopted 10 November 1987.

before the inception of the TRIPS Agreement which grants enhanced protection to wines and spirits. Nowadays, consumers may understand that bottles of *chateau* labelled ‘made in California’ do not come from France, yet they may be impressed by the word *chateau* and purchase the bottles because of the reputation built up by French vintners over centuries. In this scenario, ‘the GI is arguably misused even in the absence of consumer confusion’ because foreign producers would free-ride on the reputation of the GI.<sup>444</sup> In fact, consumers place a value on the cultural origins of GIs. Yet, in a recent 2022 Special 301 Report on Intellectual Property Protection and Enforcement, the US Trade Representative noted that EU agricultural producers benefit considerably from the protection of GIs whereas United States producers ‘are not afforded the same level of market access to the EU.’<sup>445</sup>

The transatlantic divide over the production of GIs has fostered intense conflicts at various levels. At the multilateral level, WTO Members are debating the adoption of a multilateral register not just for wines and spirits but for all GIs, and the possibility to extend the higher level of protection provided to wines to all GIs.<sup>446</sup> Some countries including the EU are pushing for an amendment to the TRIPS Agreement and the creation of a register with binding effects.<sup>447</sup> Other countries, led by the United States, are calling for a non-binding system under which the WTO would simply be notified of the Members’ respective geographical indications.<sup>448</sup> Although these negotiations were supposed to be completed in 2003, no agreement has been reached on such a system.

444 Tania Voon, ‘Geographical Indications, Culture, and the WTO’ in Benedetta Ubertazzi and Esther Muñoz Espada (eds), *Le Indicazioni di Qualità negli Alimenti—Diritto Internazionale ed Europeo* (Turin: Giuffrè 2009) 300–311, 307–8.

445 United States Trade Representative, 2022 *Special 301 Report*, 27.

446 Calboli, ‘Geographical Indications between Trade, Development, Culture and Marketing’, 13–14.

447 WTO, General Council Trade Negotiations Committee Council for Trade-Related Aspects of Intellectual Property Rights Special Session, Geographical Indications—Communication from the European Communities, T/GC/W/547, TN/C/W/26, TN/IP/W/11, 14 June 2005.

448 WTO, Council for Trade-Related Aspects of Intellectual Property Rights Special Session, Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa, and the United States, TN/IP/W/10/Rev.4, 31 March 2011.

In parallel, WTO members are discussing the question as to whether the higher level of protection currently afforded to wines and spirits<sup>449</sup> should be extended to other geographical indications (the so-called ‘GI extension’).<sup>450</sup> The EU has proposed negotiating the GI extension as part of the agriculture negotiations, but other countries remain opposed to this negotiation.<sup>451</sup>

At the bilateral level, this divergence between the EU and the United States also played a central role in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) – the free trade agreement that was negotiated between the two actors and has now been abandoned. The TTIP negotiations reflected fundamentally different appreciations of GIs. While the EU wanted to prevent United States’ producers from commercializing and labelling products bearing their protected names, the United States favored free trade.<sup>452</sup> The European negotiators argued that lack of protection enabled unacceptable exploitation of European intangible heritage and affected the economic interests of European producers. Conversely, the United States negotiators contended that such names had become generic, and therefore could not be monopolized by anyone. Moreover, EU-style legal protection would have constituted a barrier to trade, allowed monopolies, and ultimately increased final prices for consumers. Finally, the United States negotiators posited that the EU system would be unfair because European immigrants have long produced such goods in their host countries, thus sharing and developing the same ICH. Denying them the possibility to commercialize their products using traditional names for such items would deny their rightful association with a specific production process and long-standing cultural practice.

In conclusion, ‘attention to GIs is no longer a European thing.’<sup>453</sup> Rather, not only have many countries implemented GI protection as demanded by the TRIPS Agreement, but they have also pursued heightened protection of their GIs at the bilateral and regional levels. In fact, the stalling of WTO

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449 WTO, General Council Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other than Wines and Spirits and those related to the Relationship between the TRIPS Agreement and the Convention on Biological Diversity, Report by the Director-General, WT/GC/W/591, TN/C/W/50, 9 June 2008.

450 TRIPS Agreement Article 23.

451 WTO, General Council Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications, paras 2–3.

452 Enrico Bonadio, ‘Why Europe and the US are Locked in a Food Fight over TTIP’, *The Conversation*, 7 August 2015, <<http://theconversation.com/why-europe-and-the-us-are-locked-in-a-food-fight-over-ttip-45279>>.

453 Calboli, ‘Geographical Indications between Trade, Development, Culture and Marketing’, 34.

negotiations and the failure of the TTIP negotiations have not prevented the parties from pursuing their GI policies in other venues. The EU has signed agreements with several trading partners including Canada,<sup>454</sup> China,<sup>455</sup> Japan, and South Korea. Interest in GIs has spread beyond the West, with many bilateral and multilateral agreements signed by countries from all continents.<sup>456</sup>

### 8.3 *Traditional Knowledge*

Traditional knowledge is ‘a source of economic and cultural value’ for Indigenous peoples and local communities.<sup>457</sup> No single definition of traditional knowledge (TK) fully does justice to the diverse forms of knowledge that are held by Indigenous peoples and local communities. What makes knowledge ‘traditional’ is not its antiquity but its traditional link with a certain community.<sup>458</sup> Such knowledge is traditional because it has been transmitted from generation to generation and continuously evolves in response to a changing environment.<sup>459</sup> Indeed, TK is a vital, dynamic part of the lives of many contemporary communities. It includes ‘knowledge, innovations, and practices of Indigenous and local communities embodying traditional lifestyles’ and using local natural resources in a manner ‘relevant for the conservation and sustainable use of biological [and cultural] diversity.’<sup>460</sup> The term encompasses agricultural, scientific, technical, ecological, and medical knowledge, as well as traditional cultural expressions in the form of music, dance, handicrafts, designs, stories, artworks, and elements of language.<sup>461</sup>

International law broadly governs TK by requiring TK holders’ free, prior, and informed consent, as well as benefit sharing. The former requirement is

454 Comprehensive Trade and Economic Agreement, Canada–European Union, Consolidated CETA Text, Chapter 22, Article 7, 26 September 2014.

455 EU–China Agreement Protecting Geographical Indications, in force 1 March 2021, available at <https://ec.europa.eu>.

456 Calboli, ‘Geographical Indications between Trade, Development, Culture and Marketing’, 4

457 Sumathi Subbiah, ‘Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge’ (2004) 27 *Boston College International & Comparative LR* 529–559, 529.

458 Valentina Vadi, ‘Intangible Heritage, Traditional Medicine, and Knowledge Governance’ (2007) 2 *Journal of Intellectual Property Law and Practice* 682–692, 682.

459 Coenraad Visser, ‘Culture, Traditional Knowledge, and Trademarks: A View from the South’, in Graeme B. Dinwoodies and Mark D. Janis (eds), *Trademark Law and Theory—A Handbook of Contemporary Research* (Cheltenham: Edward Elgar 2008) 464–478,

460 Convention on Biological Diversity, signed on 5 June 1992, 1760 UNTS 69, Article 8(j).

461 Visser, ‘Culture, Traditional Knowledge, and Trademarks’, 464–5.

expressed in norms of customary law and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>462</sup> The latter requirement most prominently appears in the Nagoya Protocol to the Convention on Biological Diversity.<sup>463</sup> This protocol requires each party to take measures so that ‘the benefits arising from the utilization of TK associated with genetic resources are shared in a fair and equitable way with Indigenous and local communities holding such knowledge.’<sup>464</sup> Brought onto the international agenda by the Convention on Biological Diversity and its Nagoya Protocol, TK has captured the attention of other international institutions like UNESCO and the WTO due to its cultural and economic importance.

According to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage,<sup>465</sup> TK is a form of intangible cultural heritage as it is part of the ‘practices, knowledge, skills—as well as the instruments, objects ... associated therewith—that communities, groups ... and individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their ... interaction with nature ... and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.’<sup>466</sup>

To illustrate the linkage between TK and intangible cultural heritage, let us consider an example. The *Andean Cosmology of the Kallawaya* (Bolivia) is a masterpiece of humanity’s oral and intangible heritage, involving traditional medicine. The term Kallawaya means ‘herbalists from the sacred land of medicine’. The priest doctors have developed a traditional medicinal system by traveling through diverse ecosystems and learning about nearly 1,000 different medicinal plants. This traditional healing system is based not only on a deep understanding of the animal, mineral, and botanical pharmacopoeia but also on a set of ritual practices, such as religious ceremonies. In recent times, the traditional Kallawaya way of life has been adversely affected by

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462 UNDRIP Article 31. See Martin Papillon, Jean Leclair, and Dominique Leydet, ‘Free, Prior, and Informed Consent: Between Legal Ambiguity and Political Agency’ (2020) 27 *International Journal on Minority and Group Rights* 223–232.

463 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, open for signature on 2 February 2011, in force on 12 October 2014.

464 Id. Article 5(5).

465 Convention for the Safeguarding of Intangible Cultural Heritage (CSICH), Paris 17 November 2003, UNESCO Doc. MISC/2003/CLT/CH/14, in force in 2006.

466 CSICH Article 2(1).

poverty and the rural exodus of young people. Like other poor communities, the Kallawayas themselves are inclined to adopt a way of life that is detrimental to their customs.

Protecting traditional knowledge has also become more difficult due to the increasing misappropriation of intangible cultural heritage by multinational corporations.<sup>467</sup> Developing countries have been particularly affected by such biopiracy.<sup>468</sup> As their biodiversity has not been depleted by industrialization, it is a source of genetic resources that TK holders often use to address specific problems. Foreign corporations have often sought to market TK-based products to Western consumers. Designs have been copied and commercially exploited without authorization;<sup>469</sup> sacred knowledge has been disclosed and reproduced without authority.<sup>470</sup> Items of traditional knowledge have been included in registered trademarks;<sup>471</sup> TK has been patented by applicants without entitlement to do so. Such unauthorized use of TK has distressed its holders, causing them cultural and economic harm. Although TK constitutes a part of the identity of the cultural communities concerned, this form of intangible cultural heritage is vulnerable in a globalizing world where little room is left for the preservation of religious beliefs and alternative knowledge.

Three renowned cases well illustrate the clash between traditional knowledge and IP. In 1995, the US Patent and Trademark Office granted a patent on the wound-healing properties of turmeric. The claimed invention was considered novel at the time of application on the basis of the information then available to the examining authority. The patent was subsequently challenged and found invalid after additional evidence (including ancient Sanskrit scripts) revealed that turmeric was widely known to have 'varied uses in cooking and medicine.'<sup>472</sup> The patent was finally revoked.<sup>473</sup>

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467 See generally Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (Boston: South End Press 1997).

468 Subbiah, 'Reaping What They Sow', 537.

469 *Milpurrurru v Indofurn (Pty) Ltd* (1993) 30 IPR 209; *Yumbulul v Reserve Bank of Australia* (1991) 21IPR 481; and *Bulun Bulun & Anor v. R&T Textiles Pty Ltd* (1998) 3(4) AILR 547.

470 Susan Lobo, 'The Fabric of Life: Repatriating the Sacred Coroma Textiles' (1991) 40 *Cultural Survival Quarterly*.

471 Earl Gray, 'Maori Culture and Trade Mark Law in New Zealand', in Christopher Heath and Anselm Kamperman Sanders (eds), *New Frontiers of Intellectual Property Law* (Oxford: Hart Publishing 2005) 71–95, 79–82.

472 Subbiah, 'Reaping What They Sow', 539.

473 Vadi, 'Intangible Heritage, Traditional Medicine, and Knowledge Governance', 685.

In 2005, the European Patent Office (EPO) revoked a patent on an anti-fungal product derived from neem. The Indian government obtained the revocation of the patent, successfully arguing that the medicinal neem tree is part of Indian traditional knowledge. Neem has been used for centuries in India in medicinal and ceremonial ways.<sup>474</sup> Neem derivatives are commonly used in the production of insect repellents, soaps, cosmetics, and tooth cleaners. In particular, the application was held to lack inventive step since formulations such as those defined in the claim were commonly used for controlling fungi on plants.<sup>475</sup>

Another interesting case concerned an EPO patent application for an appetite-suppressant medicine. Aimed at preventing, treating, and combating obesity, the formula contained an extract from a plant of the genus *Hoodia*. This plant has been known for a long time as a traditional foodstuff of the original inhabitants of the Kalahari Desert, because eating the plant efficiently removes the pangs of hunger for days. In 2005, the Board of Appeal, reversing the Examining Division's decision, held that 'a skilled person, knowing that consumption of *Hoodia* removed the pangs of hunger, could not obviously derive from this disclosure that an extract from the plant could be used for the manufacture of an appetite suppressant, antiobesity medicament.'<sup>476</sup>

The TRIPS Agreement does not govern traditional knowledge as such. It 'treats inventiveness as an isolated, individualized achievement of an identifiable inventor' and emphasizes intellectual property rights as individual rights.<sup>477</sup> Instead, TK 'develops incrementally in response to a communal necessity' and is collectively held and shared by communities.<sup>478</sup> The TRIPS Agreement is premised on a Western conceptualization of knowledge, Cartesian rationality, and analytical methods. Such epistemology separates 'subject from object, [the] observer from [the] observed' and it accords 'priority, control, and power to the first half of the duality.'<sup>479</sup> It also 'isolates its objects of study from their vital contexts.'<sup>480</sup> Instead, TK is 'spiritual, intuitive, and holistic' and the individual

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474 Subbiah, 'Reaping What They Sow', 539.

475 Vadi, 'Intangible Heritage, Traditional Medicine, and Knowledge Governance', 685.

476 EPO Boards of Appeals T 0543/04 Appetite Suppressant/ICSIR [2005], at 6.

477 Subbiah, 'Reaping What They Sow', 543.

478 Id.

479 Stephen Gudeman, 'Sketches, Qualms, and Other Thoughts on Intellectual Property Rights' in Stephen Brush and Doreen Stabinsky (eds), *Indigenous Peoples and Intellectual Property Rights* (Washington DC: Island Press 1996) 102–121, 102–3.

480 Fulvio Mazzocchi, 'Western Science and Traditional Knowledge' (2006) *EMBO Reports* 463–466, 464.

is seen as part and parcel of the surrounding world.<sup>481</sup> Western science is materialist in contrast to TK, which Indigenous peoples and local communities generally view as having a spiritual foundation. The core of TK precisely consists of metaphysical and cosmological principles, while its gloss consists of empirical applications.<sup>482</sup> Finally, while Western thinking distinguishes between arts and culture on the one hand and science on the other, TK is a complex whole including knowledge, belief, arts, and culture.

Can the international IP system be reformed to safeguard traditional knowledge and the cultural values associated with it? WTO 'Members have consistently voiced support for the principles and objectives of the [Convention on Biological Diversity], including the principle of prior informed consent and the principle of equitable sharing of benefits.'<sup>483</sup> Several proposals have been put forward, focusing on the reform or amendment of certain provisions and/or use of other rules of the TRIPS Agreement. Two proposals relate to the amendment of the patent system; three proposals relate to certification, trademarks, and geographical indications.

The first proposal suggests amending patentability requirements. As is known, patentability requires novelty, inventiveness, and practical applicability. The invention must be novel or involve an inventive step to be patented. As a general rule, patent applicants must disclose to the patent authority all information known to be material to the patentability.<sup>484</sup> The proposed amendment would create a five-paragraph Article 29 bis in TRIPS, requiring the disclosure of the origin of biological resources and TK.<sup>485</sup> According to this proposal, patent applications based on the use of TK should include a description of the TK utilized in the invention and evidence of compliance with national laws (that is, on access to and use of genetic resources and TK) and international principles regarding free, prior, and informed consent of Indigenous

481 Visser, 'Culture, Traditional Knowledge, and Trademarks', 467.

482 Vadi, 'Intangible Heritage, Traditional Medicine and Knowledge Governance', 682.

483 WTO General Council, Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits and those Related to the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity: Report by the Director General, Pascal Lamy, WT/GC/W/633, TN/C/W/61, 21 April 2011, para. 27.

484 Article 29.1 of TRIPS provides that the applicant 'shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor'.

485 WTO, Trade Negotiations Committee, Draft Modalities for TRIPS Related Issues, TN/C/W/52, 19 July 2008.

communities and benefit sharing under the CBD.<sup>486</sup> However, Members remain divided over this idea.

A second proposal calls for the creation of TK-specific patent protection. For example, Cottier and Panizzon have proposed the creation of Traditional Intellectual Property Rights.<sup>487</sup> However, the protection of TK through *sui generis* rights has been criticized as lacking a moral basis. It is unclear why 'such a community should be entitled to a special right not available to others whose inventive predecessors gave the world comparable benefits.'<sup>488</sup>

Third, some proposals support the creation of an international certification system. Competent authorities would give written assurance that a product or process conforms with relevant international law requiring benefit sharing and free, prior, and informed consent. Such a certificate of origin would be required for patent applications. While national and regional certification schemes already exist, no consensus has been reached at the international level. The main objectives of an internationally recognized system would be to ensure the traceability of genetic resources, increase fairness and transparency, and combat biopiracy.

However, the development of an overly restrictive regime could have a negative impact on key areas of research. A particular source of concern is the need for rapid access to resources in the fight against infectious diseases such as SARS, Ebola, and COVID-19. Exemptions or waivers should be available in the event of an emergency to allow for easy access to genetic material.

Fourth, trademarks have been considered particularly suited to protect TK. As Frankel points out, 'the potential indefinite duration of trademarks avoids the difficulties that finite terms of patent... pose for Indigenous peoples and local communities of traditional knowledge falling into the public domain. The recognition of an association between a sign and a particular source, rather than novelty and originality, accords more with the goal of protecting

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486 Art 16(5) CBD states: 'The Contracting Parties, recognizing that patent and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objective.'

487 Thomas Cottier and Marion Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection' (2004) 7 *JIEL* 371–399, 387.

488 Rosemary Coombe, 'Intellectual Property, Human Rights, and Sovereignty: New Dilemmas in International Law Posed the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998) 6 *Indiana Journal of Global Legal Studies* 59–115, 86–87.

traditional knowledge and cultural ... interests.<sup>489</sup> However, there is a significant disadvantage in protecting TK through trademarks. In fact, such protection is trade-related: the indefinite protection of registered trademarks depends on maintaining their use in trade. Therefore, such protection is 'a tool that Indigenous peoples [and local communities] can harness to achieve some goals, but not all.'<sup>490</sup>

Finally, geographical indications can give a particular community the right to prevent the use of the name of a place associated with a given product. The distinct advantage of protecting TK through GIS is that they share several features: the concepts of heritage and authenticity are central to both TK and GIS.<sup>491</sup> Both TK and GIS recognize collective rights and underlying values.<sup>492</sup> Neither has any temporal limitation. The main obstacle to TK protection through GIS is that 'cultural identity is not always a question of geography.'<sup>493</sup>

In conclusion, TK is an important part of cultural heritage, the result of countless traditions and civilizations, and the 'remnant of history that has casually escaped the shipwreck of time.'<sup>494</sup> In fact, encounters between different civilizations have not always been peaceful or respectful of cultural diversity: 'European colonization eroded and destroyed much of this traditional knowledge by replacing it with Western educational and cultural systems.' Nowadays, economic globalization might even worsen this situation and hasten the process of cultural homogenization.<sup>495</sup>

Safeguarding TK is crucial not only because 'all of society grows and benefits from [the] diversity of knowledge and ideas' but also because such knowledge has 'fed, clothed, and healed the world for centuries.'<sup>496</sup> It offers a viable, holistic, and sustainable way of seeing and interacting with the world for the benefit of present and future generations.<sup>497</sup> More interestingly, modern science 'often confirms the ancient practices' such as crop rotation

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489 Susy Frankel, 'Trademarks, Traditional Knowledge, and Cultural Intellectual Property' in Graeme Dinwoodie and Mark Janis (eds), *Trademark Law and Theory—A Handbook of Contemporary Research* (Cheltenham: Edward Elgar 2008) 445–463, 445.

490 Id. 437.

491 Raustiala and Munzer, 'The Global Struggle over Geographical Indications', 345–6.

492 Frankel, 'Trademarks, Traditional Knowledge, and Cultural Intellectual Property', 452

493 Id.

494 Francis Bacon, *Advancement of Learning* [London 1605] Book II, Chapter ii, 1.

495 Mazzocchi, 'Western Science and Traditional Knowledge', 465.

496 Gurdial Singh Nijar, 'Traditional Knowledge Systems, International Law, and National Challenges: Marginalization or Emancipation?' (2013) 24 *EJIL* 1205–1221, 1205.

497 Frankel, 'Trademarks, Traditional Knowledge, and Cultural Intellectual Property', 463.

(*rotation des cultures*).<sup>498</sup> Just as different maps can chart the same territory, so too can different forms of knowledge map the inner and outer worlds of human beings, the immaterial and material environment in which we live and die.<sup>499</sup> Therefore, a ‘renewed approach to dialogue among cultures is required’<sup>500</sup> and the plurality of knowledge systems should be restored.<sup>501</sup>

TK systems ‘do not interpret reality on the basis of a linear conception of cause and effect, but rather ... [on the basis] of multidimensional cycles ... [and] complex webs of interactions.’<sup>502</sup> Such epistemology offers a culturally sensitive and complexity-aware model of development based on the ethic of stewardship (*kaitiakitanga* in Māori).<sup>503</sup> The idea of being guardians (*kaitiaki* in Māori) of natural and cultural resources, of showing respect to all things on Earth, and taking care of their life force (*mauri* in Māori) and spirit (*wairua* in Māori), in exchange for the right to use resources responsibly constitutes a paradigm shift *vis-à-vis* the Western approach to the management of natural resources.<sup>504</sup>

TK often ‘falls outside the protection provided under the conventional system of intellectual property rights’ as endorsed and enhanced by the TRIPS Agreement.<sup>505</sup> Such agreement adopts a proprietary, individualistic, and rationality-based model of knowledge governance that is fundamentally incompatible with the shared, communitarian, and holistic epistemology characterizing TK.<sup>506</sup>

## 9 Agriculture

Agriculture is another sector where trade and culture frequently collide.<sup>507</sup> Economic globalization has deeply changed agriculture. While trade in agricultural products has undeniably facilitated access to food in many countries by increasing the availability of food and lowering food prices, globalization

498 Nijar, ‘Traditional Knowledge Systems, International Law, and National Challenges’, 1027.

499 Mazzocchi, ‘Western Science and Traditional Knowledge’, 464.

500 Id. 465.

501 Nijar, ‘Traditional Knowledge Systems, International Law, and National Challenges’, 1205.

502 Mazzocchi, ‘Western Science and Traditional Knowledge’, 464.

503 Gray, ‘Maori Culture and Trade Mark Law in New Zealand’, 74.

504 Id.

505 Id. 86.

506 Johanna Gibson, ‘Knowledge and Other Values—Traditional Knowledge and the Limitations for Traditional Knowledge’, in Guido Westkam (ed.), *Emerging Issues in Intellectual Property—Trade, Technology, and Market Freedom: Essays in Honour of Herchel Smith* (Cheltenham: Edward Elgar 2007) 309–318, 315.

507 Tomer Broude, ‘Taking Trade and Culture Seriously: Geographical Indications and Cultural Protections in WTO Law’ (2005) 26 *University of Pennsylvania JIEL* 629.

has also greatly changed agriculture in three principal ways relating to cultures of production, consumption, and even identity.

First, agricultural production has intensified and become overspecialized. The imbalanced and unsustainable use of natural resources has disrupted traditional lifestyles, reduced biodiversity, and affected soil fertility, thus reducing communities' resilience in times of crisis.<sup>508</sup> Unsustainable farming practices have led to soil erosion, inefficient use of water, and pollution impacting both environmental health and human life.

Yet, when agriculture is practiced in a sustainable way, it can preserve cultural landscapes and biological and cultural diversity, protect watersheds, improve environmental health, and preserve associated cultural values. The use of sustainable practices such as agroforestry, intercropping, and crop rotation characterize resilient agricultural models developed over centuries. Accordingly, agricultural heritage, meant as inherited landscapes and their associated management systems, can provide sustainable, resilient, and viable models of agricultural production.<sup>509</sup>

Second, the consumption of agricultural products has changed as food is traded long distances.<sup>510</sup> Of course, 'agricultural trade is both broader and narrower than trade in food. On the one hand, it encompasses non-food products such as cotton[;] on the other hand, important food products, most notably fish, are excluded from the ambit of agricultural trade.'<sup>511</sup> In long food chains, raw ingredients are usually transformed into processed products with considerable sugar, salt, and fat content.<sup>512</sup> This has changed dietary habits worldwide as people increasingly consume food rich in sugar, salt, and fat. Not only has the new global diet increased the risk of non-communicable diseases (NCDs) thus constituting a global health threat in both industrialized and developing countries, but it can also lead to the gradual abandonment of traditional food cultures with the resulting loss of cultural diversity. Nowadays, economic globalization has led to the convergence if not homogenization of food, eating habits, and foodways.

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508 Olivier De Schutter, 'International Trade in Agriculture and the Right to Food' in Olivier De Schutter and Kaitlin Cordes (eds), *Accounting for Hunger* (Oxford: Hart 2011) 137–191, 141.

509 Viviana Ferrario, 'Learning from Agricultural Heritage?' (2021) 13 *Sustainability* 8879–92.

510 Anna Lartey, Günter Hemrich, and Leslie Amoroso, 'Influencing Food Environments for Healthy Diets', in FAO, *Influencing Food Environments for Healthy Diets* (Rome: FAO 2016) 1–14, 5.

511 Broude, 'Taking Trade and Culture Seriously', 629.

512 Corinna Hawkes, 'The Role of Foreign Direct Investment in the Nutrition Transition (2005) 8 *Public Health Nutrition* 357–365.

Yet, food is important not only for its nutritional significance but also for its economic and cultural value.<sup>513</sup> As noted by Broude, ‘food is a tradable commodity, a foundation of personal and corporate income, [and] a visible component of the economy.’ At the same time, it is also ‘an important expression of cultural practices, perception, and identities.’<sup>514</sup> Food thus contributes to community cohesion. Human rights bodies have explicitly linked the right to food to cultural or consumer acceptability, that is, the need to consider cultural values attached to food and food consumption.<sup>515</sup>

Third, changes in agricultural production and consumption have also affected the development of civilizations: ‘Each civilization has been characterized not only by its arts, literature, and politics, but also ... by its ... food habits.’<sup>516</sup> As the historian Fernand Braudel wrote, ‘The vine and wine are products of civilization, just as the tea of the Chinese and Japanese is the sign of their special culture.’<sup>517</sup> Because of economic globalization and agricultural market liberalization, local farmers have had to compete with imports.<sup>518</sup> Competition has driven prices down and forced certain farmers out of business. This phenomenon has also touched products that have been central to a country’s culture.<sup>519</sup> For example, the influx of highly subsidized corn from the United States has undermined the ability of Mexican farmers to grow corn, a crop that Mexicans have cultivated for centuries.<sup>520</sup> Corn is an essential component of traditional Mexican cuisine, which is also listed on the Representative List of the Intangible Cultural Heritage of Humanity.<sup>521</sup> Concerns for fading rural cultures have accompanied industrialization processes for more than a century.<sup>522</sup> Rural culture certainly ‘relates to the culture of production,

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513 Broude, ‘Taking Trade and Culture Seriously’, 642.

514 Id.

515 General Comment No. 12, *The Right to Adequate Food (Article 11)*, UN doc. E/C.12/1999/5, 12 May 1999, para. 8; General Comment No. 21, *Right of Everyone to Take Part in Cultural Life (Article 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights)*, UN doc. E/C.12/GC/21, 21 December 2009, para. 16(e).

516 Broude, ‘Taking Trade and Culture Seriously’, 643.

517 Giovanni Rebola, *Culture of the Fork*, Albert Sonnenfeld (trans.) (New York: Columbia University Press 2001) (quoting Fernand Braudel).

518 Wenonah Hauter, ‘The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations’ (2007) 40 *Vanderbilt Journal of Transnational Law* 1071–1098, 1071.

519 See generally Fiona Smith, *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade Regulation* (Cheltenham: Edward Elgar 2009).

520 Id. 161.

521 UNESCO, Decision of the Intergovernmental Committee: 5.COM 6.30, <<https://ich.unesco.org/en/decisions/5.COM/6.30>>.

522 Broude, ‘Taking Trade and Culture Seriously’, 655.

but borders also on the cultures of identity', being perceived as 'an expression of family and community culture.'<sup>523</sup>

Against this background, the WTO's Agreement on Agriculture<sup>524</sup> requires the use of tariffs instead of quotas, imposes minimum market access requirements, and provides rules on domestic support and export subsidies in the agricultural sector. It is based on the market liberalization model and economic efficiency criteria.<sup>525</sup> It requires WTO Members to convert non-tariff barriers to tariffs, lower tariff barriers to trade, and reduce export subsidies. By gradually reducing the protections available for domestic agricultural sectors, the agreement does 'not allow farmers to maintain their current methods of production solely on cultural or environmental grounds, if those methods prevent the farmers from efficiently adjusting their production in line with market forces.'<sup>526</sup> Rather, the WTO regards agriculture 'as an economic sector like any other industrial sector.'<sup>527</sup>

Developing countries have traditionally sought agricultural trade liberalization, demanding the dismantling of trade-distorting and protectionist agricultural policies of the EU, the United States, and other industrialized countries. Trade in agricultural products has been on the agenda for negotiations of the Doha Development Round. In 2015, an agreement was reached on the elimination of agricultural export subsidies by 2018.<sup>528</sup>

While negotiations on agriculture remain open, some 40% of WTO disputes have involved edible products.<sup>529</sup> Countries have adopted protective tariffs and taxation measures to protect domestic agricultural production and/or food consumption patterns. For instance, in an early case, Spain altered its tariff classifications for unroasted coffee. No custom duties were imposed on mild types of coffee while 7% was imposed on the other types. Most of Brazil's exports of coffee to Spain were subject to higher tariff rates. Most duty-free coffee varieties came from Spain's former colonies. Although the target of protection was not local production, Brazil argued that the measure amounted to a violation of the MFN provision, because local consumption patterns ended up

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523 Id.

524 Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410.

525 Fiona Smith, 'Indigenous Farmers' Rights, International Agricultural Trade, and the WTO' (2011) 2 *Journal of Human Rights and the Environment* 157–177, 159.

526 Id. 168.

527 Id. 159.

528 WTO Ministerial Conference, Nairobi Ministerial Decision on Export Competition, WT/MIN(15)/45, 19 December 2015.

529 Broude, 'Taking Trade and Culture Seriously', 629.

discriminating against Brazilian coffee in favor of other countries. The panel found that all categories of coffee at issue were 'like'. The differences – geographical factors, cultivation methods, processing, and genetic factors – were insufficient to allow a different tariff treatment. Coffee in its end use was universally regarded as a single product. Moreover, no other country set up the tariff schedule in this way.<sup>530</sup>

Korea and Japan adopted measures overtly favoring the local rice-based *Soju* (in Korea) and *Shochu* (in Japan) over foreign drinks.<sup>531</sup> Chilean measures set a low tax rate for low alcoholic beverages such as Pisco and imposed a high tax rate for the higher alcoholic imported brandies.<sup>532</sup> In such cases, WTO courts have found a breach of the non-discrimination provisions under Articles I and III of the GATT.

More interestingly, in these leading cases, cultural arguments or exceptions were not emphasized or raised respectively.<sup>533</sup> On the one hand, the linkage between culture and trade has traditionally focused on audiovisual products. Yet, cultural products are a broader category that includes foodways meant as cultural practices relating to food production and consumption. Therefore, consumers' cultural preferences could be relevant in assessing the likeness of competing products. On the other hand, there is no general cultural exception at the WTO generally exempting cultural products from the application of WTO law. More fundamentally, these cases well illustrate the point that it may be difficult to draw the line between covert trade protectionism and genuine cultural policies.

One of the most important culture clashes regarding agricultural products has been governing food safety regulation. As noted by Voon, 'although WTO disputes in this field are not typically framed in terms of "culture", consumers' perception and tolerance of risk in connection with food safety often have cultural foundations.'<sup>534</sup> In general terms, while European citizens 'have tended to favor traditional foods and minimal processing, being sceptical of new technologies, ... Americans have been more willing to accept new technologies ... but

530 Panel Report, *Spain—Tariff Treatment of Unroasted Coffee*, L/5135, 11 June 1981, GATT BISD (1981).

531 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS58/AB/R; Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R.

532 Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, 13 December 1997.

533 Broude, 'Taking Trade and Culture Seriously', 646.

534 Tania Voon, 'Culture, Human Rights, and the WTO' in Ana Filipa Vrdoljak (ed.), *The Cultural Dimension of Human Rights Law* (Oxford: OUP 2013) 1–15, 5.

sceptical of some traditional production processes.<sup>535</sup> While the precautionary approach to risk management is a general principle of EU law – requiring that given products are prohibited until they are proven safe – on the other side of the Atlantic, it goes the other way round, and products must be proven unsafe to be banned. These different approaches to risk and food safety – based on different cultural understandings of food – have resulted in several disputes at the WTO concerning hormones, genetically modified organisms (GMOs), and other issues. Furthermore, trade experts tend to consider safety regulations and cultural concerns as forms of protectionism and technical trade barriers, rather than legitimate concerns.

The WTO Sanitary and Phytosanitary Agreement<sup>536</sup> encourages WTO members to base sanitary and phytosanitary measures on internationally accepted scientific standards in order to meet the public interest in food safety.<sup>537</sup> However, conflicts have arisen with regard to the interpretation of scientific evidence. For instance, in *EC—Hormones*, the WTO Appellate Body held that the EU had violated several provisions of the SPS Agreement in restricting the trade of meat treated with hormones.<sup>538</sup> Given the firm opposition to such use in the EU, the EU failed to comply and arbitration followed on the extent to which the United States could retaliate against the EU for its non-compliance.<sup>539</sup> Finally, the parties settled the dispute more than ten years after the AB had ruled on the dispute, ‘demonstrating the extreme difficulty involved in resolving conflicts arising from deeply held cultural beliefs.’<sup>540</sup>

Similarly, as science has advanced to new levels, the EU has prevented trade in GMOs on health, environmental, and biosafety grounds. The United States has nonetheless challenged such measures considering them a form of

535 Marsha Echols, ‘Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws’ (1998) 4 *Columbia Journal of European Law* 525–544, 526.

536 Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493.

537 John Beghin, ‘The Protectionism of Food Safety Standards in International Agricultural Trade’ (2014) 1 *Agricultural Policy Review* 7–9, 7.

538 WTO Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

539 WTO Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*—Original complaint by the United States: Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/ARB, 12 July 1999.

540 Voon, ‘Culture, Human Rights, and the WTO’, 7.

agricultural protectionism. A WTO panel found several violations by the EU of the SPS Agreement in connection with restrictions on biotech products.<sup>541</sup>

## 10 Conclusions

The WTO is a legally binding and highly effective regime that demands that states promote and facilitate free trade. The WTO system governs international trade based on a free-market paradigm and its rules are about trade.<sup>542</sup> It is not interested in culture, cultural heritage, and cultural diversity as such. These issues are considered non-economic concerns and therefore remain at the margins of the regime.<sup>543</sup> The GATT Contracting Parties and the WTO Members have never agreed on the introduction of a general cultural exception.

Although the covered agreements do not aim to govern cultural heritage, and instead assume they indirectly touch upon it, international trade and cultural diversity have increasingly intersected.<sup>544</sup> In theory, several mechanisms are available within the WTO to promote mutual supportiveness between different fields of international law. In practice, however, much remains to be done to improve the coherence across the different fields of law.

For the time being, free trade essentially sees cultural goods as tradable commodities as any other. Under the non-discrimination provision, Members cannot justify the differentiation of given products on cultural grounds, but this can change through the consideration of consumers' preferences and reconsideration of the aims-and-effects test. Nonetheless, cultural aspects have been factored into trade law. Article IV of the GATT provides a specific exception for screen quotas, even though the precise content of this provision and its interplay with the GATS remain unclear. The general exceptions provisions in GATT 1994 and GATS also provide Members some flexibility for adopting cultural policies. Article XX of the GATT contains limited exceptions for the protection of public morals and national treasures.<sup>545</sup> In any case, the absence of an explicit reference to culture in GATT Article XX or GATS Article XIV does not mean that measures adopted to protect

541 WTO Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, circulated 29 September 2006, adopted 21 November 2006.

542 Smith, 'Indigenous Farmers' Rights, International Agricultural Trade, and the WTO', 176.

543 *Id.* 176.

544 Voon, 'Culture, Human Rights, and the WTO', 2.

545 Article XX(a) and (f) of the GATT.

culture are necessarily WTO-inconsistent.<sup>546</sup> Several legitimate policy objectives are not inscribed in the list of the general exceptions which is generally deemed to be non-exhaustive. Moreover, GATT Article XXI enables WTO Members to adopt cultural heritage-related measures to safeguard national and international security. Intellectual property rights and agriculture are emerging focal points for discussion concerning the trade-culture nexus.

Cultural heritage-related trade disputes are generally characterized by the need to strike a balance between the preservation of cultural heritage and the promotion of free trade. Many such controversies arise during trade negotiations or are brought before the WTO Dispute Settlement Mechanism. The WTO courts do not have a specific mandate to assess the cultural implications of the disputes they are adjudicating. It is therefore no surprise that such courts have paid little attention to the cultural aspects of trade disputes. In applying the exceptions, WTO courts have been 'open-minded in identifying legitimate policy objectives of Members', but 'strict' in applying the necessity and *chapeau* requirements.<sup>547</sup>

Like other specialized international courts and tribunals, WTO courts may have a built-in bias (*Missionsbewusstsein*).<sup>548</sup> It is evident that 'an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade.'<sup>549</sup> WTO panels and the AB are tribunals of limited jurisdiction and cannot adjudicate on eventual infringements of cultural entitlements. As such, WTO panels and the AB do not decide whether cultural heritage is safeguarded by a given state measure; rather, their prime task is 'to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.<sup>550</sup>

The existence of a highly sophisticated dispute settlement mechanism in international trade law risks eclipsing the salience of other regimes, such as international cultural heritage law, which lacks such a mechanism. Economic globalization can affect cultural diversity, and the WTO courts may not be the most appropriate courts for settling cultural heritage disputes. Nonetheless, cultural heritage matters, and the existence of such disputes requires a sustained reflection on whether international law is indeed a fragmented system by nature, or whether there are tools to promote better coordination among

546 Voon, 'Geographical Indications, Culture, and the WTO', 302.

547 Voon, 'Culture, Human Rights, and the WTO', 4.

548 Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *EJIL* 73–91, 81.

549 See Joel P. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333–374, 333.

550 DSU Article 3(2).

its various subfields. The relationship between international trade law and other branches of international law, including international cultural heritage law, should be addressed in terms of coordination between interrelated systems of public international law. WTO law is a field of public international law, endowed with relative autonomy, but still open to the influence of international law.

# Converging Divergences in the Jurisprudence of Cultural Heritage-Related International Economic Disputes

In nature we never see anything isolated,  
but everything in connection with something else.

JOHANN WOLFGANG VON GOETHE<sup>1</sup>



## 1 Introduction

International investment law and international trade law are often viewed as similar due to perceived substantive and procedural commonalities.<sup>2</sup> From a substantive perspective, the case for drawing such an analogy is evident. Both regimes govern global economic integration, promote transnational business, and aim to foster development. Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, the TRIMS Agreement, the TRIPS Agreement, and the GATS bring FDI into the trade fold.<sup>3</sup>

From a procedural perspective, arbitral tribunals and the WTO dispute settlement organs essentially share the same functions by settling international disputes in accordance with international economic law. WTO panels,

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1 Johann Peter Eckerman, *Conversations of Goethe with Eckermann and Soret*, John Oxenford (trans.) (London: Smith, Elder & Co. 1850) 266–67

2 Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016).

3 Agreement on Trade-Related Investment Measures (TRIMS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; General Agreement on Trade in Services (GATS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

the Appellate Body, and arbitral tribunals are often asked to strike a balance between economic and non-economic concerns.

However, there are significant institutional differences between the two systems. While the WTO is an international organization administering a 'cohesive multilateral system', international investment agreements (IIAs) have a bilateral or regional scope and almost never set up an organization.<sup>4</sup> The very concept of 'international investment law is an academic systematization' based on 'a comparative analysis.'<sup>5</sup>

The respective dispute settlement mechanisms also differ. While only states can file claims before the WTO courts, foreign investors can pursue investor–state arbitration without any intervention from the home state. In theory, after bringing trade disputes before *ad hoc* panels, states can file appeals on matters of law before a permanent Appellate Body. For 25 years, the WTO Appellate Body has reviewed legal errors and ensured consistency in interpretation. In practice, in the past two years, the United States has blocked the appointment of new judges to the WTO's Appellate Body due to complaints over judicial activism. Efforts to reform the dispute settlement mechanism have been unsuccessful so far. Conversely, appeals mechanisms have been included in IIAs only in the past decade. Yet, the EU is pursuing the establishment of a standing mechanism, an international investment court for the settlement of investment disputes.<sup>6</sup> Annulment proceedings are limited to ascertaining grave breaches of due process.<sup>7</sup> In case of breach, while the WTO DSM usually provides for re-establishing the previously existing state of affairs, arbitral tribunals generally award the payment of compensation.<sup>8</sup> Furthermore, while remedies at the WTO only have prospective character, arbitral tribunals can award the full range of compensatory damages.

Finally, while economic analysis has always played an important role in international trade law and the settlement of international trade disputes, legal analysis has predominated in investment disputes. In international trade law, 'economists and trade policy experts wrote and administered the General Agreement on Tariffs and Trade (GATT). The lawyers came along later'.<sup>9</sup> Instead, international investment law 'has always been the concern of

4 Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33 *Berkeley JIL* 1–59, 6–7.

5 *Id.* 7.

6 Guillaume Croissant, 'Multilateral Investment Court', *Jus Mundi*, 17 June 2022.

7 Puig, 'The Merging of International Trade and Investment Law', 9.

8 *Id.* 8–9.

9 Donald McRae, 'The World Trade Organization and International Investment Law: Converging Systems—Can the Case for Convergence be Made?' (2014) 9 *Jerusalem Review of Legal Studies* 13–23, 16.

lawyers.<sup>10</sup> Lawyers draft investment contracts and IIAs. They perform case assessment, determining whether arbitration is worthwhile from a legal, as well as financial, standpoint. They assist their clients in the various steps of the arbitration process, from filing a request for arbitration and crafting written submissions to pleading at oral hearings and assisting with the recognition, enforcement, and execution of an award, if the host country does not comply voluntarily. While arbitrators can be non-lawyers experts in areas relevant to the dispute, in practice most arbitrators have been lawyers.<sup>11</sup>

Comparing the jurisprudential patterns of international courts and tribunals differs from, yet complements, the existing literature in the field in several ways. Given the fact that culture-related disputes are adjudicated before international economic courts, it is important to examine this emerging jurisprudence through a cultural heritage law lens, as such cases tend to be scrutinized by experts from an economic law perspective only. These cases constitute a paradigmatic example of the interface between global governance and state regulatory autonomy and put international economic courts to the test. By dealing with cultural interests and values, international economic courts can deepen their understanding of their field, discern complexity, and acknowledge both their promises and pitfalls.<sup>12</sup>

There are several reasons for focusing on the jurisprudence of international economic courts. While most authors have focused on the interplay between cultural diversity and international trade law,<sup>13</sup> or investment law,<sup>14</sup>

<sup>10</sup> McRae, 'The World Trade Organization and International Investment Law', 16.

<sup>11</sup> Id.

<sup>12</sup> Compare with Edith Stein, *L'Empatia [Zum Problem der Einfühlung]* (Halle: Buchdruckerei des Waisenhauses 1917)] Michele Nicoletti (ed.) (Milan: Franco Angeli 1986) 101.

<sup>13</sup> See e.g. Ben Garner, *The Politics of Cultural Development—Trade, Cultural Policy, and the UNESCO Convention on Cultural Diversity* (Abingdon: Routledge 2016); Hélène Ruiz Fabri, 'Cultural Diversity and International Trade Law: the UNESCO Convention on Cultural Diversity' in Adriana Di Stefano and Rosario Sapienza (eds), *La Tutela dei Diritti Umani e il Diritto Internazionale* (Naples: Editoriale Scientifica 2012) 437–451; Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: CUP 2011); Lilian Richieri Hanaña, *Diversité Culturelle et Droit International du Commerce* (Paris: CERIC 2009); Rostam J. Neuwirth, *The Cultural Industries in International Trade Law: Insights from the NAFTA, the WTO, and the EU* (Hamburg: Dr. Kovač 2006).

<sup>14</sup> Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014); Federico Lenzerini, 'Property Protection and Protection of Cultural Heritage', in Stephan Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: OUP 2010).

a comprehensive comparative jurisprudential analysis of the two fields is missing.<sup>15</sup> Yet, the comparison of these bodies of jurisprudence is useful to ascertain whether, and if so how, economic interests have been balanced with cultural interests, and whether common approaches have emerged demanding the protection of cultural heritage *vis-à-vis* economic interests in international economic law.

Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the common good (*bien commun*). In drawing comparisons, key questions will be addressed. Have international economic courts considered cultural concerns? What type of reasoning have they adopted? In addressing these questions the book illuminates convergences and/or divergences between international economic courts. It also helps ascertain the eventual emergence of general principles of international law requiring the protection of cultural heritage in times of peace and the appropriate balancing of public and private interests in such protection. While some research has been done with regard to the existence of general principles of law requiring the protection and preservation of cultural heritage in the event of armed conflict,<sup>16</sup> the parallel question as to whether such principles exist in times of peace has received more limited scholarly attention.

Ascertaining the existence of general principles and/or customary international law requiring the protection of cultural heritage even in times of peace would be a significant outcome, because general principles and customary international law are binding on states irrespective of their adherence to specific international law treaties.

This chapter proceeds as follows. First, it briefly considers the institutional convergences and divergences between international economic courts. Such courts form part of legal regimes designed to achieve various non-identical institutional goals. Second, the study investigates the convergences or divergences in the cultural heritage-related jurisprudence of international economic courts. This jurisprudence reveals that arbitrators are taking cultural elements

15 But see Valentina Vadi and Bruno de Witte (eds), *Culture in International Economic Law* (London: Routledge 2015).

16 UNESCO, Records of the General Conference at its Twenty-seventh Session, UNESCO Doc. 27/C100 (1993), para. 3(b) (stating that ‘the fundamental principles to protect and preserve cultural property in the event of armed conflict could be considered as part of international customary law’); Marina Lostal, *International Cultural Heritage Law in Armed Conflict—Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Oxford: OUP 2017); Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: CUP 2011); Nout van Woudenberg and Liesbeth Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict* (Leiden/Boston: Nijhoff 2010).

into account when adjudicating disputes.<sup>17</sup> Instead, the WTO DSM has adopted a more restrained approach in its consideration of other international law. Third, the chapter focuses on a crucial point of divergence between arbitral tribunals and WTO courts, namely discerning cultural protection from cultural protectionism. While arbitral tribunals have taken cultural concerns into account in assessing the likeness of investments, WTO courts have been dominated by economic thinking and have consistently equated cultural goods to other products. While arbitral tribunals have considered other international law instruments to ascertain the outstanding and universal value of given artifacts and landscapes, WTO courts have refrained from such an endeavor. Fourth, the chapter discusses the question as to whether, and if so how, cultural heritage could be mainstreamed in international economic law. Fifth, the chapter briefly discusses whether the cultural heritage-related jurisprudence of international economic courts can contribute to good cultural governance. Finally, the chapter highlights the gradual emergence of general principles of international law requiring the protection of cultural heritage in times of war and peace.

## 2 Converging Divergences between the Two Fields

Although foreign investments and international trade often converge in a globalized economy and are frequently depicted as ‘two sides of the same coin,’<sup>18</sup> they remain governed by separate regimes.<sup>19</sup> While international trade is now governed at the multilateral level by the WTO-covered agreements, foreign direct investment is regulated by more than 3,000 bilateral investment treaties. Therefore, a comprehensive examination of their convergences and divergences remains critical for assessing the nexus between trade, investment, and cultural heritage.

International trade law and international investment law converge on a number of grounds.<sup>20</sup> From a substantive perspective, international investment law and international trade law share many commonalities. Both legal fields

17 See also José Alvarez, ‘Epilogue: Convergence is a Many-Splendored Thing’, in Szilárd Gáspár-Szilágyi, Daniel Behn, and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge: CUP 2020) 311 (noting that arbitrators are ‘far more likely to consider other international legal rules ... in the course of adjudicating investment disputes.’).

18 Sergio Puig, ‘The Merging of International Trade and Investment Law’ (2015) 33 *Berkeley Journal of International Law* 1–59, 1.

19 Steve Charnovitz, ‘What is International Economic Law?’ (2011) 14 *JIEL* 1, 3–9.

20 Roger P Alford, ‘The Convergence of International Trade and Investment Arbitration’ (2014) 12 *Santa Clara Journal of International Law* 35.

share the general objectives of providing security and predictability to economic actors, increasing world prosperity by reducing barriers to the international flow of goods and investments, and promoting transnational business and sustainable development.<sup>21</sup> Both seek to overcome protectionism and prevent discrimination.<sup>22</sup> Both are ‘branches of international economic law’.<sup>23</sup>

Moreover, the regimes for trade and investment often intersect, as some aspects of foreign direct investment are governed by relevant WTO agreements. For example, the TRIMS Agreement prohibits trade-related investment measures, such as local content requirements, that are inconsistent with GATT Article III.<sup>24</sup> The TRIPS Agreement also governs trade-related aspects of IP; thus, its coverage overlaps with investment treaties that include IP as a type of investment.<sup>25</sup> In addition, GATS Modes 3 and Mode 4 address the establishment of service providers abroad. Furthermore, certain trade elements also surface in relevant investment arbitrations. For example, in *Continental Casualty v. Argentina*, a case arising in the wake of the 2001–2002 economic crisis, the arbitrators interpreted the US–Argentina BIT’s non-precluded measures clause by drawing from WTO jurisprudence.<sup>26</sup> International investment law and international trade law certainly converge to a certain extent.<sup>27</sup>

From a sociological perspective, the background and expertise of the relevant epistemic communities constitute an informal communal element, which contributes to mutual convergence between international trade law and international investment law. International investment law and arbitration have long been dominated by lawyers.<sup>28</sup> Meanwhile, although the GATT system

21 Vadi, *Analogies in International Investment Law and Arbitration*, 209.

22 Nicholas DiMascio and Joost Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 AJIL 48–89, 88.

23 Donald McRae, ‘The World Trade Organization and International Investment Law: Converging Systems—Can the Case for Convergence be Made?’ (2014) 9 *Jerusalem Review of Legal Studies* 13–23, 14.

24 Agreement on Trade Related Measures Agreement Establishing the World Trade Organization, Annex 1A, adopted 15 April 1994, in force 1 January 1995, 1868 UNTS 186 (TRIMS Agreement) Article 2(1).

25 Valentina Vadi, ‘Towards a New Dialectics—Pharmaceutical Patents, Public Health, and Foreign Direct Investments’ (2015) 5 *New York Journal of Intellectual Property and Entertainment Law* 1–83.

26 *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008.

27 See generally Jürgen Kurtz, *The World Trade Organization and International Investment Law: Converging Systems* (Cambridge: CUP 2016).

28 On the judicialization of investment arbitration see e.g. Alex Stone Sweet and Florian Grisel, ‘The Evolution of International Arbitration: Delegation, Judicialization, Governance’ in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: OUP 2014) 22, 23.

used to be run by diplomats and economists, an increasing juridification has taken place.<sup>29</sup> Since the inception of the WTO, more and more WTO panellists and members of the Appellate Body (AB) have some legal background.<sup>30</sup> Moreover, several AB members and—to a lesser extent—panellists have served as arbitrators for the International Center for the Settlement of Investment Disputes (ICSID).<sup>31</sup> This informal commonality could contribute to possible convergence between international trade law and international investment law.

From a procedural perspective, investment treaty arbitration and the WTO courts certainly share the same function: settling international disputes in accordance with a specific set of international economic law and ensuring the proper administration of justice in this area. Both foreign investment and international trade are domains in which conflict is latent between market freedom and the free flow of capital on the one hand and the state's regulatory autonomy to address public policy concerns on the other. International economic courts may be asked to strike a balance between economic and non-economic concerns.

Disputes that cross the boundary between the trade and investment regimes are increasing.<sup>32</sup> In fact, some measures simultaneously affect international trade and the economic interests of investors and their investments.<sup>33</sup> Therefore, government measures that are challenged before the WTO are increasingly also challenged before arbitral tribunals.<sup>34</sup> While some contend that measures that are capable of review in both regimes tend to be either compliant or non-compliant with both regimes,<sup>35</sup> inconsistent outcomes remain possible due to textual differences between the applicable laws.

International investment law and international trade law also present several notable differences. Although the current investment treaty network is multilateral in nature, due to the similarities among different treaties and dispute settlement mechanisms, it is still structurally based on a myriad of

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29 Joseph H H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2000) *Harvard Jean Monnet Working Paper* 9/00, 2.

30 José Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields' (2011) *Oñati Socio-Legal Series Working Paper* 1/4, 16.

31 Id. 20.

32 Vadi, *Analogies in International Investment Law and Arbitration*, 209.

33 Arwel Davies, 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?' (2012) 15 *JIEL* 793–822.

34 Id. 794.

35 Nicholas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *ICLQ* 831, 844–45.

international investment treaties.<sup>36</sup> There is no world investment organization charged with governing foreign investments, nor is there a ‘World Investment Court’ at least for the time being despite advanced negotiations on this.<sup>37</sup> By contrast, since its inception in 1995, the World Trade Organization has emerged as the world forum for multilateral trade negotiations, and the Appellate Body has been frequently analogized to a World Trade Court.<sup>38</sup>

At the procedural level, for now, both arbitral tribunals and WTO panels settle disputes without an appellate review. However, this has not always been the case, and the situation can change soon. For 25 years, WTO panel reports could be appealed before the Appellate Body which reviewed the relevant legal issues and thereby ensured consistency and predictability. As is known, the US has blocked the functioning of the Appellate Body, and the fate of this organ remains unpredictable.<sup>39</sup> Moreover, several countries have included appeals mechanisms in their IIAs in the past decade, and the EU is pursuing the establishment of an international investment court for the settlement of investment disputes.<sup>40</sup>

Foreign investors can pursue investor–state arbitration directly without any intervention from the home state and can nominate one of the arbitrators. By contrast, access to the WTO courts is limited to members of the WTO. As noted by Alvarez, ‘Investor–state dispute settlement was designed to avoid politicized espousal and the gunboat diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage.’<sup>41</sup> While the trade regime focuses on the macro-issues of liberalizing trade flows,

36 See generally Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009).

37 European Commission, Directorate General for Trade, *Multilateral Investment Court Project*, available at [https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en) (accessed on 6 July 2022) (explaining that ‘For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreements. Both the EU–Canada Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it. The EU now includes similar provisions in all of its negotiations involving investment.’)

38 Claus-Dieter Ehlermann, ‘Six Years on the Bench of the World Trade Court – Some Personal Experiences as Member of the Appellate Body of the WTO’ (2002) 36 *JWT* 605.

39 Peter Van Den Bossche, ‘Is There a Future for the WTO Appellate Body and WTO Dispute Settlement?’ *World Trade Institute Working Paper* No. 01/2022 (2022) 1–28.

40 Guillaume Croisant, ‘Multilateral Investment Court’, *Jus Mundi*, 17 June 2022.

41 José E Alvarez, ‘Beware: Boundary Crossings’ (2016) 17 *JWIT* 171, 217.

the investment regime deals with the 'micro issues of attracting and protecting investments made by individual investors'.<sup>42</sup>

This is not to say that non-state actors do not play any substantive role at the WTO. On the one hand, specific industrial sectors have influenced the negotiation of covered agreements. For example, the pharmaceutical industry significantly influenced the negotiations of the TRIPS Agreement.<sup>43</sup> On the other hand, many cases have been brought by states to protect the interests of given industrial sectors. However, at a procedural level, companies cannot enforce their rights against a foreign state at the WTO; rather, they 'depend on their home state of nationality to take up a WTO case on their behalf'.<sup>44</sup> The various factors which influence the choice of a WTO Member to bring a case against another member state include the magnitude of the impact of the measure in question, political considerations, and the lobbying efforts of the relevant industry sectors.<sup>45</sup>

The trade and investment regimes also offer different remedies to the aggrieved actors. In order to encourage trade liberalization and prevent protectionism, the WTO dispute settlement mechanism enables the authorization of trade retaliation by the injured state.<sup>46</sup> However, this is possible only after a state fails to withdraw or modify an offending measure within a reasonable period.<sup>47</sup> The investment regime, on the other hand, provides a monetary remedy to foreign investors whose investments have been harmed by government action. Therefore, while WTO remedies are only prospective and state-centric, arbitral tribunals can award damages to foreign investors.

In conclusion, despite their structural separation and differences, the borders between international trade law and international investment law are porous. There are several reasons for juxtaposing the two systems. First, international investment law and international trade law belong to the same branch of international law, namely international economic law. Second, the nature of the problems that both systems encounter is similar – that is,

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42 Di Mascio and Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties', 53–56.

43 See generally Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: CUP 2003).

44 Daniel Sarooshi, 'Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?' (2014) 49 *Texas International Law Journal* 445, 462.

45 Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and Its Discontents' (2009) 20 *EJIL* 749, 757.

46 DSU Article 22.

47 Id. Articles 19–21.

arbitral tribunals and WTO adjudicative bodies are often required to review domestic regulation pursuing cultural values against a set of obligations of a purely economic character (unlike, for example, other international courts and tribunals). Third, there are several substantive overlappings as several WTO agreements touch upon various aspects of international investment law. As such, portions of WTO law can be regarded as a component of the international investment regime. Finally, the arbitral jurisprudence on cultural heritage-related disputes is well-developed when compared to that of the WTO courts, providing rich practical, albeit not necessarily transposable, material for comparison.

### 3 Converging Divergences in the Jurisprudence of Cultural Heritage-Related International Economic Disputes

One may wonder whether the fact that cultural disputes are adjudicated before international economic courts determines a sort of institutional bias. Treaty provisions can be vague and a potentially wide variety of state regulations may interfere with economic interests. Therefore, potential tension exists when a state adopts cultural policies interfering with foreign investments or free trade, as such measures may be considered as violating substantive standards of treatment under investment treaties or WTO-covered agreements. Thus, the affected foreign investor may seek redress before arbitral tribunals or spur the home state to bring a case before the WTO.

More specifically, with regard to the WTO DSB, 'it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade.'<sup>48</sup> According to some empirical studies, there is a consistently high rate of complainant success in WTO dispute resolution,<sup>49</sup> and 'the WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of respondents' negotiated and reserved regulatory competencies.'<sup>50</sup> In particular, given the fact that WTO courts have settled

48 Joel Trachtman 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333–374.

49 John Maton and Carolyn Maton, 'Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement' (2007) 10 *JIEL* 317–334.

50 Juscelino Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383–439 at 388.

about 80% of the cases in favor of the claimant, 'the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade.'<sup>51</sup>

This study investigates whether the same institutional bias exists in investor–state arbitration. Some scholars believe that this mechanism prioritizes economic interests over other vital concerns.<sup>52</sup> Certainly, given the architecture of the arbitral process, significant concerns arise in the context of cultural heritage disputes. While arbitration structurally constitutes a private model of adjudication, investment disputes present international public law aspects.<sup>53</sup> Arbitral awards ultimately shape the relationship between the state on the one hand and private individuals on the other.<sup>54</sup> Arbitrators determine matters such as the legality of governmental activity, the protection of investors' rights, and the appropriate role of the state.<sup>55</sup> Nonetheless, empirical studies based on statistical analysis have shown 'no tendency [of] any group of arbitrators ... to rule in favor of investors.'<sup>56</sup> Professional reputation can be a key incentive for them to be impartial.<sup>57</sup>

While international economic courts have a similar function, namely settling international economic disputes, they have adopted diverging approaches to cultural heritage disputes. While arbitral tribunals, WTO panels, and the Appellate Body have all formally acknowledged that international economic law is an integral part of international law, in practice, their respective bodies of jurisprudence diverge to a significant extent. While cultural concerns have influenced, if not shaped, some significant awards, cultural concerns remain marginal topics at the WTO.

The real problem of the WTO lies in its vision of the world as merely a global economic system. In fact, cultural heritage-related disputes rest on more than

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51 Colares, 'A Theory of WTO Adjudication', 387.

52 Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes—A Case Study of a Global Mining Corporation Suing El Salvador' (2015) 36 *University of Pennsylvania JIL* 854–874.

53 Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *ICLQ* 371–393, 372.

54 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2007) 70.

55 M. Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10 *Canadian Foreign Policy* 1–20.

56 Daphna Kapeliuk, 'The Repeat Appointment Factor—Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 *Cornell LR* 47–90, at 90.

57 *Id.* at 90.

the trade of audiovisual goods and cultural treasures. All human activities may have a cultural dimension and often reflect fundamentally different and competing views of the world.<sup>58</sup> Yet, in addressing cutting-edge disputes at the crossroads between culture and trade, the economic theory remains the predominant judicial philosophy in the adjudication of such disputes.

However, ‘market-driven economic wealth maximization is only one consideration among many.’<sup>59</sup> The protection of cultural heritage is not an end in itself: not only is culture a key driver of wealth and sustainable development, but respect for and promotion of cultural entitlements can contribute to constructive dialogue among civilizations and the maintenance of peace. According to the United Nations, ‘without this dialogue taking place every day among all nations—within and between civilizations, cultures, and groups—no peace can be lasting and no prosperity can be secure.’<sup>60</sup> Given the diversity of cultural, economic, and political positions among Member States, the most appropriate approach is to respect those differences.

#### 4 Distinguishing Cultural Protection from Cultural Protectionism

The jurisprudence of international economic courts highlights ‘the difficulty of distinguishing legitimate cultural policy concerns from mercantilist impulses to protect local industry.’<sup>61</sup> States have traditionally used a range of cultural policies affecting trade. Such measures have included ‘prohibitive tariffs, import bans, quantitative restrictions, discriminatory taxation, subsidies, domestic content requirements, regulatory prohibitions, licensing restrictions, and foreign investment constraints.’<sup>62</sup> If states could shield any type of discriminatory policies in the name of culture, this would entail the end of trade liberalization and foreign investment protection. However, if states could never successfully defend legitimate cultural policies before international economic courts, in extreme cases, this could also cause the collapse of the international economic system, as some cultural values are of prime importance and may even relate to transnational public order and peremptory norms of international law.

58 Broude, ‘Taking Trade and Culture Seriously’, 637.

59 Vincent Chiappetta, ‘The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things’ (2000) 21 *Michigan JIL* 333–392, 383.

60 United Nations General Assembly, *Dialogue Among Civilizations*—Report of the Secretary General, 2 November 2001, A/56/523, p. 3.

61 Voon, ‘Geographical Indications, Culture, and the WTO’, 301.

62 Broude, ‘Taking Trade and Culture Seriously’, 637.

At the WTO, conflicts between international economic law and domestic cultural policies are often portrayed in economic terms. WTO courts scrutinize municipal policies to check whether they are protectionist, that is, whether they favor domestic industries over foreign ones. In economic theory, protectionism reduces trade, affects consumers, and can jeopardize economic growth by raising the cost of imported goods.

Yet, adopting a cultural perspective, countries may be required to pursue legitimate cultural policies under international cultural heritage law, human rights law, and even peremptory norms of international law. For instance, forced cultural assimilation is prohibited under international law; and international law has evolved to include the protection of various aspects of cultural heritage, including not only tangible cultural heritage in the various forms of world heritage sites, underwater cultural heritage, artworks, and antiquities, but also immaterial heritage in the forms of cultural diversity, intangible, and Indigenous cultural heritage.<sup>63</sup>

The challenge of distinguishing the lawful protection of cultural heritage from unlawful protectionism is heightened by the fact that cultural goods and activities often have both economic and cultural value. On the one hand, if one adopts an overly broad understanding of culture, everything becomes worth of protection and thus trade liberalization and its benefits would come to an end. For instance, a country's measures to protect its steel industry could be seen as necessary to safeguard a traditional way of life.<sup>64</sup> The World Heritage List includes select industrial landscapes as sites of outstanding and universal value.<sup>65</sup> However, listing such landscapes does not mean that a given economic activity should be continued despite changing times. Moreover, the reasons for listing a site on the World Heritage List are varied. In fact, the List also includes 'difficult' or 'dissonant' heritage, that is, sites that convey history that hurts and involves a contrast between past and present value systems.<sup>66</sup> Difficult heritage sites are 'place[s] of memory for the whole of humankind;' they remind 'dark chapter[s] in the history of

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63 See Chapter 1 above.

64 Voon, 'Geographical Indications, Culture, and the WTO', 304 (reporting this argument).

65 See, *ex multis*, World Heritage Convention, *Nord-Pas de Calais Mining Basin* (France); *Erzgebirge/Krušnohoří Mining Region* (Germany/Czechia); *Iwami Ginzan Silver Mine and its Cultural Landscape* (Japan); *Røros Mining Town and the Circumference* (Norway); *Rosia Montana Mining Landscape* (Romania); *Blaenevon Industrial Landscape and Cornwall and West Devon Mining Landscape* (United Kingdom); *Fray Bentos Industrial Landscape* (Uruguay).

66 Sharon Macdonald, *Difficult Heritage: Negotiating the Nazi Past in Nuremberg and Beyond* (Abingdon: Routledge 2009).

humanity' and constitute 'a sign of warning of the many threats and tragic consequences of extreme ideologies and denial of human dignity.'<sup>67</sup>

On the other hand, if one adopts an overly narrow view of cultural heritage, then economic globalization risks eclipsing cultural diversity, mutual respect, and dialogue among civilizations. For instance, agricultural products are traded like any other products.<sup>68</sup> Countries with a comparative advantage in producing a certain type of food can trade for other foods that are too expensive to produce domestically. Yet, the current food crisis suggests that applying the theory of comparative advantage to agriculture may be too simplistic. This theory will certainly require some adjustments to be viable in this sector in order to ensure access to food in times of geopolitical crisis and climate change.<sup>69</sup>

In this regard, several WTO members call for recognizing the multifunctionality of agriculture,<sup>70</sup> highlighting the existence of non-trade values linked to this human activity.<sup>71</sup> Multifunctionality refers to 'the idea that agriculture has many functions in addition to producing food.'<sup>72</sup> In fact, agricultural policies can foster the production and trade of agricultural products and contribute to environmental protection, cultural landscape preservation, rural employment, and food security. In particular, agriculture also protects cultural values and select agricultural products can deserve special treatment on that basis.<sup>73</sup>

For instance, in Asia, 'rice is more than just a food... it is a cereal that has become the cornerstone of [the local] food system', and informs cultures, rituals, and ceremonies.<sup>74</sup> Rituals associated with the plantation of rice have

67 World Heritage Convention, *Auschwitz Birkenau German Nazi Concentration and Extermination Camp (1940–1945)* (Poland).

68 See Chapter 5, Section 9 above.

69 On the current food crisis, see e.g. Carlo Cambi, 'La Battaglia del Grano', *Panorama*, 20 April 2022.

70 WTO, Trade Policy Review Body, Trade Policy Review of Switzerland and Liechtenstein: Minutes of Meeting held on 15 and 17 December 2004, WT/TPR/M/141, 16 February 2005, para. 40; WTO, Trade Policy Review Body, Trade Policy Review of the Republic of Korea: Minutes of Meeting held on 15 and 17 September 2004, WT/TPR/M/137, 19 November 2004, para. 88.

71 Clive Potter and Jonathan Burney, 'Agricultural Multifunctionality in the WTO—Legitimate Non-Trade Concern or Disguised Protectionism?' (2002) 18 *Journal of Rural Studies* 35–47.

72 WTO, 'Multifunctionality', Glossary term, <[https://www.wto.org/english/thewto\\_e/glossary\\_e/multifunctionality\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/multifunctionality_e.htm)>.

73 Voon, 'Geographical Indications, Culture, and the WTO', 304 (reporting this argument).

74 Subbiah, 'Reaping What They Sow', 534–5.

been inscribed on the Representative List of the Intangible Cultural Heritage of Humanity.<sup>75</sup> Several cultural landscapes of outstanding and universal value attest to such cultural importance.<sup>76</sup> Other products can similarly express humanity's long interaction with the land and, in some cases, people's daily struggle for survival.<sup>77</sup>

In order to detect whether a given product is cultural, a quantitative assessment may not suffice. As Voon explains, 'the more commercial a given product or service, the more tempting it may be to conclude that cultural elements are secondary.'<sup>78</sup> Such market-based assessment relies on economic analysis. Nonetheless, cultural products often have both cultural and economic values. Therefore, in order to discern lawful cultural policies from unlawful protectionist measures, a qualitative assessment is also needed. Such a qualitative assessment is based on legal analysis and centers on the emergence of general principles of law requiring the protection of cultural heritage in times of war and peace.

As Judge Tanaka once stated, '[t]he historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law.'<sup>79</sup> Nowadays, general principles of law have emerged requiring the protection of cultural heritage. Such principles appear in almost universally ratified UNESCO Conventions and human rights instruments.

Like other international courts and tribunals, international economic courts are organs of justice and can be viewed as guardians of legality.<sup>80</sup> They have duties not only to the parties to given disputes, but also to the international

75 UNESCO, *Mibu no Hana Taue, ritual of transplanting rice in Mibu, Hiroshima* (describing such ceremony as 'a Japanese agricultural ritual carried out ... in Kitahiroshima Town, Hiroshima Prefecture, to assure an abundant rice harvest by celebrating the rice deity. On the first Sunday of June, after the actual rice transplanting has ended, the ritual enacts the stages of [rice] planting and transplanting.')

76 See e.g. *Cultural Landscape of Honghe Hani Rice Terraces* (China); *Cultural Landscape of Bali Province: the Subak System as a Manifestation of the Tri Hita Karana Philosophy* (Indonesia); *Rice Terraces of the Philippine Cordilleras* (Philippines).

77 See e.g. *Coffee Cultural Landscape of Colombia* (Colombia); *Archaeological Landscape of the First Coffee Plantations in the South-East of Cuba* (Cuba).

78 Voon, 'Geographical Indications, Culture, and the WTO', 304.

79 ICJ, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase) Judgment, 18 July 1966, (1966) 6 *ICJ Reports* 252 (Judge Tanaka, Dissenting Opinion).

80 Compare with Stephan Wilske and Martin Raible, 'The Arbitrator as Guardian of International Public Policy?' in Catherine Rogers and Roger Alford (eds), *The Future of Investment Arbitration* (Oxford: OUP 2009) 249–272, 262.

community as a whole. In fact, customary norms of treaty interpretation require international economic courts to settle international disputes ‘in conformity with principles of justice and international law.’<sup>81</sup> Moreover, the principle of systemic integration and defragmentation, as expressed by Article 31(3)(c) of the VCLT, requires adjudicators to consider the system of international law.

Arbitral tribunals have distinguished cultural sites of outstanding and universal value from other sites on the basis of the World Heritage Convention. More generally, they have considered other international law instruments in adjudicating investment disputes on the basis of Article 31(3)(c) of the VCLT.<sup>82</sup> In comparison, WTO courts have been more likely to reject or not deal with Article 31(3)(c).<sup>83</sup> There is no reason why WTO courts could not rely on such a provision to distinguish lawful cultural protection from unlawful protectionism. Instead, despite formally acknowledging that WTO should not be read in splendid isolation from general international law,<sup>84</sup> usually WTO courts fail to consider other international law in practice. In fact, they use economic theory to ascertain indirect discrimination and adopt a quantitative type of analysis to assess other violations of WTO. They postpone their more legalistic analysis to a later phase, when they consider whether a general exception could justify a given measure. This approach enables them to mention the appropriateness of balancing opposing interests.<sup>85</sup> In practice, however, the invocation of general exceptions tends to inevitably fail because cultural arguments fall between the Scylla of the necessity test (in fact, less trade-restrictive measures can always be envisaged) and the Charybdis of the *chapeau* (further narrowing down the applicability of general exceptions).

Economic analysis cannot and should not provide the overarching interpretative framework for international economic law. Rather, a holistic approach

81 VCLT preamble.

82 *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, paras 86–92; *Urbaser SA v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, paras 1200–1210.

83 See Nicola Strain, *Jurisdiction and Applicable Law in Investor-State and WTO Dispute Settlement*, Doctoral Thesis, University of Oslo, Faculty of Law (Oslo: University of Oslo 2022) 164.

84 *Peru—Additional Duty on Imports of Certain Agricultural Products*, Report of the Panel, 27 November 2014, WT/DS457/R, para. 6.67; *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R 17.

85 Tania Voon, ‘UNESCO and the WTO: A Clash of Cultures?’ (2006) 55 ICLQ 635–651, 648 (reporting the ‘AB’s own description of the WTO agreements as containing carefully negotiated language, reflecting, variously, a carefully drawn balance of rights and obligations of Members’).

should be adopted to ensure mutual supportiveness among different treaty regimes.<sup>86</sup> Customary norms of treaty interpretation require systemic interpretation of treaties.<sup>87</sup> From an economic perspective, ‘the economic costs of preserving diversity may be a small price to pay to avoid the arbitrary homogenization of values.’<sup>88</sup> From a cultural perspective, some inefficiency costs related to the protection of cultural heritage can be better viewed as ‘investments in diversity for everyone’s benefit.’<sup>89</sup> Finally, from a legal perspective, ‘international law ... may not contain, and generally does not contain, rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find ... the solution of the problem.’<sup>90</sup>

## 5 Mainstreaming Cultural Heritage in International Economic Law

Is it possible to safeguard cultural heritage from within the citadel of international economic law?<sup>91</sup> International economic law emphasizes economic freedom from governmental intervention.<sup>92</sup> For some scholars, though, international economic courts can balance different interests and values.<sup>93</sup> The lack of a cultural exception within international economic law does not mean that foreign direct investments and trade do not interact with cultural governance.

Other scholars, however, warn against a merger and acquisition of non-economic values by international economic law arguing that the WTO, the World Bank, and cultural heritage bodies have different functions and that each international organization should remain within its sphere, rely on its

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86 See Chapter 7 below.

87 VCLT Article 31(3)(c).

88 Chiappetta, ‘The Desirability of Agreeing to Disagree’, 391.

89 Id. 391.

90 *Eastern Extension, Australasia, and China Telegraph Co Ltd Case (Great Britain v. United States)* British–United States Claims Arbitral Tribunal, Award, 9 November 1923, (1926) 6 *Review of International Arbitral Awards* 112–118.

91 Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *EJIL* 815–844.

92 Ernst-Ulrich Petersmann, ‘Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy’ in Armin von Bogdandy, Petros Mavroidis, and Yves Meny (eds), *European Integration and International Coordination: Festschrift für CD Ehlermann* (Kluwer Publishers 2002) 383, 387.

93 Ernst-Ulrich Petersmann, ‘From “Negative” to “Positive” Integration in the WTO: Time for “Mainstreaming Human Rights” into WTO Law?’ (2000) 37 *Common Market LR* 1363–1382.

given competences, and fulfill its mandate.<sup>94</sup> They stress that there is a risk that international economic courts misunderstand cultural entitlements, eventually leading to incoherence and inconsistency between different fields of international law. Far from being of a purely theoretical nature, this battle of ideas can have very practical implications in the adjudication of cultural heritage-related disputes before international economic courts.

In theory, trade and culture can be mutually supportive. International trade and foreign investment are based upon human interaction and can foster dialogue, mutual respect, and understanding between civilizations.<sup>95</sup> As such, international economic law 'is more than a mere technical regime' dealing with trade and investment issues;<sup>96</sup> rather, it has significant political, legal, and cultural implications. For example, the Bretton Woods conference aimed to reinforce economic cooperation as a means of preventing war. In addition, the legalization of the field has attempted to overcome power-based economic relations. The objectives of the WTO covered agreements and IIAs generally include sustainable development.<sup>97</sup> The achievement of these objectives does not exclude the safeguarding of cultural heritage.

International economic law and international cultural heritage law are characterized by different aims, objectives, and procedural features. While international economic law aims to promote trade liberalization, investment protection, and sustainable development, international cultural heritage law aims at safeguarding cultural heritage. The pursuit of different objectives – economic/utilitarian interests on the one hand, cultural interests on the other – discourages the formation of broad analogies between international economic law and international cultural heritage law.

While international economic law obligations are not owed to all (*erga omnes*), the question remains of whether they are owed to all the members states (*erga omnes partes*). In theory, 'breach of WTO treaty can be limited to one single party'.<sup>98</sup> However, in practice, all WTO Members have an interest

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94 Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law'.

95 Pascal Lamy, 'Trade and Human Rights Go Hand in Hand', Speech at UNITAR, 26 September 2010, available at <[www.wto.org/english/news\\_e/sppl\\_e/sppl172\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl172_e.htm)>.

96 Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO' (2005) 16 EJIL 857, 875.

97 Marrakesh Agreement preamble.

98 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 13 EJIL 907, 934.

in any breach of the covered agreements.<sup>99</sup> In addition, in case of violation complaints within the WTO, there is no need for the complainant to show nullification or impairment of a benefit.<sup>100</sup>

In contrast, international cultural heritage law includes *jus cogens*, that is, peremptory norms of a non-derogable nature, as well as *erga omnes* and *erga omnes partes* obligations. The violation of a customary norm requiring the protection of cultural heritage by a state inherently affects the legal interest of the international community as a whole (*erga omnes* obligation). Moreover, the violation of a treaty norm of international cultural heritage law by a state party to a UNESCO convention affects the legal interest of any other state party to that treaty (*erga omnes partes* obligation). Given the almost universal ratifications of some UNESCO conventions, the safeguarding of cultural heritage can be considered a common concern of humankind, 'an important shared problem and shared responsibility, and for an issue which reaches beyond the bounds of a single community and state as a subject of international law.'<sup>101</sup>

The disparity between international economic law and international cultural heritage law is particularly evident in the manner in which disputes are settled and the enforcement imbalance. International economic law is characterized by well-developed and sophisticated dispute settlement mechanisms. The creation of the WTO Dispute Settlement Body and investor–state arbitration constituted a major shift away from the political-consensus-based dispute settlement system of the 1947 GATT and power-based gunboat diplomacy and toward a rule-based architecture designed to strengthen peaceful and prosperous relations among nations.<sup>102</sup>

Meanwhile, international cultural heritage law is characterized by various compliance and dispute settlement mechanisms, as well as under-enforcement of its obligations. Only a few UNESCO Conventions mention dispute settlement procedures. Rather, the vast majority of UNESCO Conventions rely solely on some sort of reporting and/or monitoring system to compel compliance.

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99 Mitsuo Matsushita, Thomas Schoenbaum, and Petros Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford: OUP 2004) 26.

100 See Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 EJIL 723.

101 Thomas Cottier, 'The Principle of Common Concern of Humankind' in Thomas Cottier (ed.) *The Prospects of Common Concern of Humankind in International Law* (Cambridge: CUP 2021).

102 SP Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 AJIL 193.

Tension has arisen between economic globalization and the protection of cultural heritage. While the legal regimes governing these fields are institutionally distinct, their subject matters are interconnected. For example, some provisions of the TRIPS Agreement and the Agreement on Agriculture<sup>103</sup> can prevent WTO members from safeguarding Indigenous cultural heritage.<sup>104</sup> The question of international economic law can foster, or hinder, cultural diversity is still fiercely debated.

As a matter of policy, structural arguments of institutional separation have given way to a growing awareness of the interconnectedness of legal regimes. The so-called ‘linkage issue’, that is, the interplay between trade and cultural values, can promote institutional development and progress. It can offer both international economic law and international cultural heritage law an opportunity for self-reflection on whether they need to evolve and adapt to new needs and circumstances.

As a matter of law, the mainstreaming of select cultural norms into international economic law may be not only possible, but also required under international law. There are several textual anchors enabling international economic courts to interpret international economic law in conformity with international law, thus enabling select cultural concerns to enter the system through several ports of entry.<sup>105</sup>

First, customary norms of treaty interpretation require international economic courts to consider other international law instruments.<sup>106</sup> Second, UNESCO Conventions might reflect global citizens’ preferences in relation to certain goods and services, thus differentiating them from other goods and services. Third, UNESCO Conventions might influence the interpretation of the ordinary meaning of ‘public morals’ and ‘natural treasures’ under Article XX(a) and (f) respectively. Inevitably, the interpretation of such terms is likely to evolve over time. Fourth, GATT Article XX(d) provides one possible textual anchor for raising obligations under international cultural heritage law as a defense against a claim of WTO violation. This exception covers measures that are ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement.’<sup>107</sup> In *Mexico—Soft Drinks*,

103 Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 1A, adopted 15 April 1994, entered into force 1 January 1995, 1867 UNTS 410.

104 Simone Vezzani, ‘Protection of Traditional Knowledge of Agricultural Interest in International Law’, in Antonietta Di Blase and Valentina Vadi (eds), *The Inherent Rights of Indigenous Peoples in International Law* (Rome: University of Rome III Press 2020) 279–327.

105 Michael Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’ (2002) 5 JIEL 17.

106 VCLT Article 31(3)(c).

107 GATT Article XX(d).

the Appellate Body clarified that such laws include ‘rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct legal effect according to that WTO Member’s legal system.’<sup>108</sup> Finally, UN Security Council resolutions condemning the illicit traffic of artifacts may affect the interpretation of the concept of transnational public order in international economic law.

In conclusion, while arbitral tribunals are more open to international cultural heritage law than WTO courts, there is scope for increasing the dialogue between international economic law and other international law. Like arbitral tribunals, WTO courts do have a range of textual hooks at their disposal for taking international cultural heritage law into account. International economic courts do not belong to a self-contained regime; accordingly, they could integrate cultural perspectives into their working methods using the mentioned defragmenting techniques to respect the cultural diversity of the family of nations.

## 6 Toward Good Cultural Governance?

The review by international economic courts of domestic regulations could improve good cultural governance and the transparent pursuit of legitimate cultural policies.<sup>109</sup> *Cultural governance* refers to the need to regulate human activities and their implications for cultural heritage and to protect the cultural interests of present and future generations. It entails several legislative, executive, and administrative functions.<sup>110</sup> *Good cultural governance* refers to the exercise of state authority according to due process and the rule of law, which includes respect for human rights and fundamental freedoms.<sup>111</sup>

The growing importance of international economic law and international economic courts may compel governments to consider the impact of cultural policies on foreign investors and traders before enacting such measures, to avoid potential claims and subsequent liability.<sup>112</sup> If foreign investment is expropriated, whether directly or indirectly, compensation must be

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108 *Mexico—Taxes on Soft Drinks*, Appellate Body Report, para. 79.

109 Anél A. Du Plessis and Christa Rautenbach, ‘Legal Perspectives on the Role of Culture in Sustainable Development’ (2010) 13 *Potchefstroom Elec. LJ* 27, 55.

110 *Id.* 46.

111 *Id.* at 48 and 62.

112 Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *AJIL* 295, 297.

paid.<sup>113</sup> While states are free to adopt zoning measures, they must treat foreign companies fairly and equitably.<sup>114</sup> Analogously, under WTO law, general exceptions are subject to the requirements of the *chapeau*.

While each state retains the right to regulate within its territory, international economic law poses vertical constraints on this right, ‘introducing global interests into the decision-making processes of domestic authorities.’<sup>115</sup> Adherence to these international regimes ‘add[s] a circuit of external accountability, forcing domestic authorities to consider the interests of the wider global constituency affected by their decisions.’<sup>116</sup> At the same time, the internal accountability of state authorities to their domestic constituencies does not cease to exist.<sup>117</sup>

Like other international adjudicative bodies, international economic courts are not to undertake a *de novo* review of the evidence once brought before the national authorities, merely repeating the fact-finding conducted by the latter.<sup>118</sup> It is not appropriate for international economic courts to ‘second-guess the correctness of the ... decision-making of highly specialized national regulatory agencies.’<sup>119</sup> For instance, in the *Glamis Gold* case, the Arbitral Tribunal accorded deference to the municipal measures aimed at protecting Indigenous cultural heritage.<sup>120</sup> It recognized that ‘[i]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency’ and that ‘governments must compromise between the interests of competing parties.’<sup>121</sup>

On the other hand, international economic courts examine given national measures to ascertain their compliance with that state’s international

113 *Marion and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 332.2 (with regard to indirect expropriation); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (with regard to direct expropriation).

114 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 166.

115 Stefano Battini, ‘The Procedural Side of Legal Globalization: The Case of the World Heritage Convention’ (2011) 9 *International Journal of Constitutional Law* 340, 343.

116 *Id.* at 364.

117 *Id.*

118 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 11, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 ILM 1125 (1994).

119 *Chemtura Corp. (formerly Crompton Corp.) v. Canada*, Ad Hoc NAFTA Arbitration, Award, 2 August 2010, para. 134.

120 *Glamis Gold, Ltd. v. United States*, Award, 8 June 2009, 48 ILM 1035.

121 *Id.* paras 779 and 803.

economic law obligations. Thus, they are not to give total deference to domestic cultural policies and simply accept the determinations of municipal authorities as final. Rather, they assess whether or not the relevant authorities met their international economic law obligations in making their decisions. For instance, in the *Pyramids* case, which involved the denial of a construction project in front of this world heritage site for understandable cultural reasons, loss of profits was not awarded due to the illegality of the proposed economic activity under international cultural heritage law.<sup>122</sup> The Tribunal upheld the claimants' argument that the particular public purpose of the expropriation could not change the obligation to pay fair compensation.<sup>123</sup> However, it reduced the amount of the award, stating that only actual damage (*damnum emergens*) and not profit loss (*lucrum cessans*) could be compensated.<sup>124</sup> Indeed, it stated: '[S]ales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under ... international law and ... the allowance of *lucrum cessans* may only involve those profits which are legitimate.'<sup>125</sup>

Therefore, it will be important for the states to show that their regulations aim to achieve legitimate public goals and that they follow due process of law. As one Arbitral Tribunal held, the term 'public interest' 'requires some genuine interest of the public. If mere reference to "public interest" can magically [create] such interest ... and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.'<sup>126</sup>

That being said, the review of cultural heritage-related disputes by international economic courts can also jeopardize the protection of cultural heritage.<sup>127</sup> In the end, the protection of cultural heritage is not listed among the objectives of investment treaties or WTO-covered agreements. At best, the protection of cultural heritage may be listed among the exceptions in the relevant economic treaties and, at worst, it may not be mentioned at all. Arbitrators, panels, and the Appellate Body have a limited mandate and may lack

122 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, (1993) 32 ILM 933, 974.

123 *Id.* at 972.

124 *Id.* at 973.

125 *Id.*

126 *ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 432.

127 Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights LR* 797–889, 883.

adequate expertise to deal with cultural heritage. Moreover, good governance can be a patronizing concept. There is a risk that this framing of international adjudication as the embodiment of good governance represents solely ‘the perspective of political and private elites.’<sup>128</sup> ‘Without the incorporation of substantive principles from other areas of international law’ such framing also risks causing a regulatory chill.<sup>129</sup>

Certainly, by taking elements of cultural heritage law into account, this jurisprudence and emerging state practice can contribute to the emergence of general principles of law requiring the protection of cultural heritage. This outcome would be notable because states are bound by general principles of law, irrespective of their consent. This would facilitate the consideration of cultural concerns in future adjudication of analogous disputes.

## 7 The Emergence of General Principles of Law Requiring the Protection of Cultural Heritage

Cultural heritage governance can affect, and has affected, the economic interests of several stakeholders, including traders and foreign investors. Therefore, trading states and foreign investors have brought a number of heritage-related claims before the WTO dispute settlement mechanism and arbitral tribunals respectively. This section addresses the question as to whether international economic courts contribute to the coalescence of general principles of law requiring the protection of cultural heritage.

Defined as ‘a core of legal ideas which are common to all legal systems’,<sup>130</sup> general principles of law are a primary source of international law.<sup>131</sup> The Statute of the ICJ empowers the court, if the occasion should arise, to apply the ‘general principles of law recognized by civilized nations.’<sup>132</sup> Although the Statute

<sup>128</sup> Kate Miles, *The Origins of International Investment Law: Empire, Environment, and Safeguarding Capital* (Cambridge: CUP 2013) 335.

<sup>129</sup> See Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’, in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP 2011) 606.

<sup>130</sup> Rudolph B. Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’ (1957) 51 AJIL 734–753, at 739.

<sup>131</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: CUP 1953).

<sup>132</sup> Article 38 Statute of the ICJ. The Statute of the International Court of Justice is annexed to the Charter of the United Nations. Charter of the United Nations, 26 June 1945, in force 24 October 1946, 1 UNTS XVI.

applies to the ICJ, the relevant provisions have been deemed to reflect customary international law:<sup>133</sup> therefore other international courts and tribunals have considered general principles of law as a source of international law.

Often considered as a dormant source of international law, general principles of law revive and govern a certain issue, if such issue is not regulated by treaty law and customary law. Therefore, general principles of law constitute a crucial element of international law, helping adjudicators to settle a given dispute, filling in the gaps in the treaty and customary law, and allowing international law to evolve and respond to new challenges.<sup>134</sup> General principles of law have a flexible, subsidiary, and dynamic nature filling gaps in legal norms and contributing to the development of international law. In addition, general principles can be a source of higher law, that is, *jus cogens*.<sup>135</sup>

Not only do general principles of law fill any gaps left open by treaties and customs, but they can also contribute to the construction of international law as a unitary legal system. As Cassese put it, general principles 'constitute ... the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the international community'.<sup>136</sup> Some authors contend that 'it is largely due to general principles that international law can be defined as a system'.<sup>137</sup> Some principles such as *pacta sunt servanda* provide the foundations of the international legal system,<sup>138</sup> expressing a belief in a universal 'common heritage' of international law,<sup>139</sup> and 'form[ing] the irreducible essence of all legal systems'.<sup>140</sup> Waldron suggests that principles expressing 'a sort of consensus among judges, jurists, and lawmakers around the world' constitute a common law of mankind.<sup>141</sup> International courts and tribunals use general principles of law to reinforce their legal arguments.

133 James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, H. Waldock (ed.) 6th ed. (New York: OUP 1963) 56.

134 Christina Voigt, 'The Role of General Principles in International Law and Their Relationship to Treaty Law' (2008) 31 *Retfærd Årgang* 3, at 5.

135 M. Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 *Michigan JIL* 768, at 780.

136 Antonio Cassese, *International Law*, 2nd ed. (Oxford: OUP 2005) 188.

137 Voigt, 'The Role of General Principles in International Law', 5.

138 Id. 12.

139 Giorgio Del Vecchio, *Sui Principi Generali del Diritto* (Milano: Giuffrè 1958) 11.

140 Frances Freeman Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations' (1963) 10 *University of California Los Angeles LR* 1041, 1044.

141 Jeremy Waldron, 'Foreign Law and the Modern Jus Gentium' (2005) 119 *Harvard LR* 129–147, 132.

As international courts and tribunals can refer to general principles of law even in the absence of general practice (which is an element of customary law),<sup>142</sup> or express consent of the parties in the form of treaty law, arguments have been made that general principles of law amount to an external constraint on state behavior and in fact 'go beyond legal positivism, according to which states are bound by their will only'.<sup>143</sup> Yet, if one conceives general principles as expressing a common legal heritage of humankind, then rather than representing a delimitation of state autonomy, general principles of law constitute its highest expression.<sup>144</sup> Certainly, the identification and application of general principles of law give significant discretion to international adjudicators. One could argue that in certain cases, the determination of legal principles of law has amounted to judicial law-making,<sup>145</sup> giving rise to a sort of praetorian law.<sup>146</sup> General principles are recognized by states but they do not require general practice by the same. Rather, consistent decisions can prove the existence of general principles.

Given the fact that there are no apposite cultural heritage courts, the jurisprudence of international economic courts can and does have an impact on cultural governance, and can bridge the gap between different legal regimes. For instance, in some cases, arbitral awards have settled disputes concerning investments near world heritage sites by referring to the World Heritage Convention.<sup>147</sup> In other cases, arbitrators have resolved disputes relating to investments in areas valued as sacred by Indigenous peoples,<sup>148</sup> or in sectors related to Indigenous cultural heritage.<sup>149</sup> This jurisprudence contains some elements

142 Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 24.

143 Dissenting Opinion, Judge Tanaka, *South West African Cases (Second Phase)*, ICJ Reports 1966, 298.

144 Del Vecchio, *Sui Principi Generali del Diritto*, 69.

145 But see Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949, 949 (arguing that recourse to general principles does not amount to judicial law-making).

146 ICTY, *Prosecutor v. Zoran Kupreskic*, Case No.: IT-95-16-T, Judgment, 14 January 2000, para. 669 (noting that 'In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of ius praetorium. However, its powers in finding the law are of course far more limited than those belonging to the Roman praetor: under the International Tribunal's Statute, the Trial Chamber must apply *lex lata i.e.* existing law, although it has broad powers in determining such law.')

147 See Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration', (2013) 28 *ICSID Review-Foreign Investment Law Journal* 1, 1.

148 *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009.

149 *Grand River Enterprises Six Nations Ltd et al. v. United States of America*, ICSID UNCITRAL NAFTA Chapter 11, Award, 12 January 2011.

that can be used to detect customary law and/or general principles of international law.

Detecting the emergence of a general principle of international law requiring the protection of cultural heritage in times of peace, and the equilibrium balancing of private and public interests in such protection is a theoretical endeavor with significant practical outcomes. While some research has been done on the question of whether the principle requiring the protection of cultural heritage exists in times of war,<sup>150</sup> the parallel question of whether such principle exists in times of peace has not received much scholarly attention. Ascertaining the existence of general principles and/or customary international law is a major achievement since general principles and customary international law are binding on states, irrespective of their adherence to specific international law treaties, and this facilitates the consideration of cultural heritage in the adjudication of transnational disputes.

The examination of a discrete number of cultural heritage-related disputes reveals the coalescence of general principles of law relating to the safeguarding of cultural heritage. Such principles have both procedural and substantive dimensions. At a procedural level, general principles of international law relating to the protection of cultural heritage include procedural principles such as the duty for states to comply with the rule of law, due process, and good governance values including transparency, participation, and accountability.<sup>151</sup> For instance, the principle of due process requires that foreign investors should not be exposed to prolonged uncertainty with regard to the legal status of the property claimed by the state, especially if such property is of historical and cultural significance.<sup>152</sup> With regard to Indigenous cultural heritage, such procedural principles include the duty to obtain the free, prior, and informed consent of Indigenous Peoples and to guarantee them benefit-sharing for projects potentially affecting their heritage.<sup>153</sup> States must

150 See e.g. Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: CUP 2011).

151 Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 187–214, 187.

152 Compare *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, Case No. ARB/08/1, ICSID Case No. ARB No. 09/20, Award, 16 May 2012 with ECtHR, *Catholic Archdiocese of Alba Iulia v. Romania*, ECtHR, Appl. No. 33003/03, 25 September 2012; *Beyeler v. Italy*, Application no. 33202/96, Judgment, 5 January 2000; *Debelianovi v. Bulgaria*, Application no. 61951/00, 29 March 2007.

153 See *Grand River Enterprise Six Nations Ltd. et al. v. United States of America*, Award, 12 January 2011; see also *Case of the Saramaka People v. Suriname*, IACtHR Series C No. 172, 28 November 2007, para. 137; *Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No. 245, 27 June 2012, para. 164 (holding that states' obligation to carry out

respect the land rights of Indigenous peoples as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.<sup>154</sup> General principles of law also enable states to conduct cultural/environmental impact assessments before eventually granting permits to exploit given natural resources.<sup>155</sup> Companies have the responsibility to respect human rights and conduct themselves with due diligence to obtain local consent and a social license to operate. In fact, companies need to work closely with all of the relevant communities.<sup>156</sup>

At the substantive level, states must protect cultural heritage whether in time of war or peace, as restated in several treaties dealing with the conservation of cultural heritage.<sup>157</sup> The protection of cultural heritage is indispensable to allow individuals to enjoy their cultural rights.<sup>158</sup> According to the UN Special Rapporteur in the field of cultural rights, the prohibition of acts of deliberate destruction of cultural heritage with major value for humanity, whether in times of war or peace, has now become part of customary international law.<sup>159</sup>

Thus, the protection of cultural heritage is a legitimate aim that states may pursue when interfering with private rights.<sup>160</sup> In particular, the protection of a country's cultural heritage can justify the expropriation by the state of a building or area listed as cultural property. The legitimacy of cultural policies can

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prior consultation with Indigenous peoples on the exploitation of natural resources in their land is a general principle of international law); *Angela Poma Poma v. Peru*, CPCR/C/95/D/1457/2006, 27 March 2009, para. 7.6.

154 *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo, 12 October 2018, para. 327 (*‘Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.’*)

155 Valentina Vadi, ‘Environmental Impact Assessment in Investment Disputes—Method, Governance, and Jurisprudence’ (2010) 30 *Polish Yearbook of International Law* 169–205.

156 *Bear Creek Mining Corporation v. Republic of Perú*, Award, para. 218.

157 CESCR, General Comment No. 21, para. 50(a).

158 *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo, 12 October 2018. See also Report of the Independent Expert in the field of cultural rights, A/HRC/17/38, 21 March 2011.

159 Report of the Special Rapporteur in the Field of Cultural Rights, A/71/317, 9 August 2016, para. 24.

160 *Glamis Gold, Ltd v. United States of America*, Award of 8 June 2009, (2009) 48 ILM 1039. See also ECtHR, *Sylogos Ton Athinaion v. the United Kingdom*, App no 48259/15, 31 May 2016.

be presumed when such policies honor international obligations to UNESCO.<sup>161</sup> The fact that a property belonging to the cultural and natural heritage has not been included in the World Heritage List shall in no way be construed to mean that it does not have an outstanding universal value. In fact, the state obligation to protect world heritage rather flows from the ratification of the World Heritage Convention.<sup>162</sup> The safeguarding of cultural heritage requires that a fair balance be struck between public and private interests. If there is expropriation, compensation must be paid.<sup>163</sup> Failure to award any compensation upsets the fair balance that has to be struck between the public interest and individual rights.<sup>164</sup> However, private actors have no blanket protection against legitimate cultural policies. In fact, they should foresee the denial of project permission if their investment lies within or close to a cultural site.<sup>165</sup>

## 8 Conclusions

Both cultural heritage protection and the promotion of economic activities are important public interests that can contribute to economic growth and the commonweal. The protection of cultural heritage can be thought of as a public interest of the state, but also as the common interest of humankind, transcending borders and stressing the common bonds uniting the

161 *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992; *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, (2000) 39 ILM 1317; *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8, 11 September 2007; *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd v. Republic of Mauritius* ICSID Case No. ARB/16/32, Award, 18 February 2020. See also ECtHR, *Kristiana Ltd. v. Lithuania*, Appl. No. 36184/13, Judgment, 6 February 2018.

162 *WHC* Article 12; *Glamis Gold, Ltd. v. United States of America*, Award, 8 June 2009.

163 *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000.

164 *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, Case No. ARB/08/1, ICSID Case No. ARB No. 09/20, Award, 16 May 2012. See also *Catholic Archdiocese of Alba Iulia v. Romania*, ECtHR, Appl. No. 33003/03, 25 September 2012.

165 *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8, 11 September 2007; *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 October 2018; *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992. See also ECtHR, *Kristiana Ltd. v. Lithuania*, Case No. 36184/13, Judgment, 6 February 2018.

international community as a whole.<sup>166</sup> At the same time, economic freedoms can also promote the free flow of ideas, cultural diversity, equality of opportunities, as well as social and economic welfare.

The clash between the protection of cultural heritage and the promotion of economic activities epitomizes the tension between state regulatory autonomy on the one hand, and international economic law on the other hand. International disputes relating to the interplay between cultural heritage protection and economic integration are characterized by the need to balance the legitimate interests of a state to adopt cultural policies on the one hand, and the legitimate interests of investors, traders, and property owners to protect their economic interests on the other. Given the importance of cultural policies that are at the heart of state sovereignty, cultural heritage-related cases tend to be high-profile and reach a broader audience than is usually the case for other disputes presenting economic character.

International economic law has developed limited institutional machinery for the protection of cultural heritage. At the institutional level, there seems to be ‘a strict separation of powers between the competent international organizations’.<sup>167</sup> There is no in-built requirement for expert advice or consultation with other international bodies such as UNESCO. The relationship between international economic law and other branches of international law, including international cultural heritage law, should be addressed in terms of coordination between interrelated systems of public international law. Both WTO law and international investment law are public international law sub-systems, endowed with relative autonomy, but still open to the influence of international law, including international cultural heritage law. Public order or—albeit less frequently—cultural exceptions are introduced in the texts of international economic agreements to preserve state regulatory autonomy in crucial areas. Nonetheless, given the open-ended wording of key provisions, often it is up to the adjudicators to decide the extent of these exceptions and/or consider relevant cultural policies without detailed guidance from the text of the treaties.

Like ‘castles of crossed destinies’,<sup>168</sup> international economic courts have attracted a number of ‘culture and trade’ and ‘culture and investment’ related disputes. In these disputes brought before the WTO and arbitral tribunals

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166 Rome Statute of the International Criminal Court, preamble (recalling that ‘all peoples are united by common bonds, their cultures pieced together in a shared heritage, and ... this delicate mosaic may be shattered at any time.’)

167 Rostam Neuwirth, ‘The Future of the “Culture and Trade Debate”: a Legal Outlook’ (2013) 47 *JWT* 391–419, at 407.

168 Italo Calvino, *Il Castello dei Destini Incrociati* (Torino: Einaudi 1973).

respectively, the arguments in support of free trade and foreign direct investment are intertwined with cultural heritage claims. International economic courts scrutinize cultural policies to determine whether the latter were enacted in the public interest or to disguise protectionism and whether the state has struck a proper balance between the means employed and the aim sought to be realized. On the one hand, the review by international economic courts of domestic measures can improve good cultural governance and the transparent pursuit of legitimate cultural policies. On the other hand, the interpretative pathways adopted by international economic courts may converge or diverge, due to the different institutional mandates of each forum. There is a risk that some of these courts dilute or neglect significant cultural aspects, eventually prioritizing economic interests.

International economic courts are of limited jurisdiction and cannot adjudicate on the eventual violation of international cultural heritage law. This does not mean, however, that they cannot consider cultural concerns in the adjudication of economic disputes, or that cases adjudicated by these courts cannot have broad and significant implications for the protection of cultural heritage. International economic law is not a self-contained regime. Therefore, it is of crucial importance to ascertain whether, and if so how, cultural heritage has been taken into account by these courts and tribunals; to verify whether their approaches have converged or diverged to any extent.

There are some convergences and a few divergences in the way international economic courts have adjudicated analogous cases. On the one hand, international economic courts have interpreted their jurisdiction as not accepting claims brought under other international law. Arbitral tribunals, WTO panels, and the AB do not decide whether cultural heritage is protected or not. Rather, they ascertain different matters. In particular, arbitral tribunals assess whether there is a breach of the relevant investment treaty provisions. If there is expropriation, compensation must be paid, irrespective of the public policy objective pursued by the state.<sup>169</sup> Analogously, the prime task of the WTO panels and the Appellate Body is 'to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.<sup>170</sup> Therefore, arbitral tribunals, WTO panels, and the AB cannot address the

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169 *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000; *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, Case No. ARB/08/1, ICSID Case No. ARB No. 09/20, Award, 16 May 2012.

170 DSU, Article 3(2).

question as to whether cultural entitlements are fully respected, protected, and fulfilled by states, as these tribunals have no mandate to adjudicate such claims.<sup>171</sup>

On the other hand, international economic courts have also admitted that customary canons of treaty interpretation require systematic interpretation.<sup>172</sup> Neither the WTO nor international investment governance are monocultures;<sup>173</sup> rather, they deal with a variety of issues and sectors. Yet, while arbitral tribunals have tended to interpret and apply international investment law in line with general international law, WTO courts have privileged the use of economic theory in their judicial philosophy. The panel and the Appellate Body reports confirm previous jurisprudence on the interpretation of the WTO covered agreements. Very rarely have exceptions been successfully invoked by defendants in the adjudication of international trade disputes.<sup>174</sup> While arbitral tribunals have shown more deference to the cultural policies of the host state, WTO courts have not recognized trade and other societal values as equals, adopting a liberal trade bias to interpret the WTO agreements. Nonetheless, 'excessive compartmentalization impedes coherence; it emphasizes the particular over the universal; it may defeat important policy objectives of the international community by leading to competition and clashes between regimes.'<sup>175</sup>

Finally, the examination of a discrete number of cultural heritage-related disputes reveals the coalescence of general principles of law relating to the safeguarding of cultural heritage. Such principles have both procedural and substantive dimensions. On a procedural level, general principles of international law relating to the protection of cultural heritage include procedural principles such as the duty for states to comply with the rule of law, due process, and good governance values including transparency, participation, and accountability. For instance, the principle of due process requires that foreign investors should not be exposed to prolonged uncertainty with regard to the legal status of the property claimed by the state, especially if such property is of historical and cultural significance. With regard to Indigenous cultural

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171 DSU, Article 3(2) (clarifying that 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements').

172 VCLT, Article 31(3)(c).

173 Marco Bronckers, 'More Power to the WTO?', (2001) 4 *JIEL* 41–65, at 45.

174 Juscelino F. Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383 ff.

175 Michael Waibel, 'International Investment Law and Treaty Interpretation', in Rainer Hoffmann and Christian Tams (eds), *International Investment Law and General International Law* (Baden-Baden: Nomos 2011) 30.

heritage, such procedural principles include the duty to obtain the free, prior, and informed consent of Indigenous Peoples and to guarantee them benefit-sharing for projects potentially affecting their heritage.

On a substantive level, states must safeguard cultural heritage in times of war and peace. The preservation of cultural heritage is indispensable to allow individuals to enjoy their cultural rights. Thus, the protection of cultural heritage is a legitimate aim that can justify the state's seizure of private property. The legitimacy of cultural objectives can be presumed when such policies honor international obligations to UNESCO. The safeguarding of cultural heritage requires that a fair balance be struck between public and private interests. If there is expropriation, compensation must be paid. However, private actors have no blanket protection against any cultural policy. In fact, they should expect project rejection if their investment is within or near cultural heritage sites.<sup>176</sup>

In conclusion, cultural heritage-related economic disputes determine a sort of 'entropy', a move from order to disorder in the international legal order.<sup>177</sup> In physics and chemistry, the concept of 'entropy' indicates a dynamic transition between different states, the tension between the regular and irregular, and a shift from order to disorder, from isolated items to a mix of different elements. The cultural heritage-related disputes brought before international economic courts determine a sort of perfect storm that can spur self-reflection, evolution, and even reform of the system. In these disputes, the content of international cultural heritage law and international economic law intermingle; these disputes constitute an unexpected change in the types of disputes that international economic courts generally deal with resulting in an unstable situation from which the courts can explore a wide variety of options.

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<sup>176</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8, 11 September 2007; *Cortec Mining Kenya Limited, Cortec (PTY) Limited, and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 October 2018; *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992. See also ECtHR, *Kristiana Ltd. v. Lithuania*, Case No. 36184/13, Judgment, 6 February 2018.

<sup>177</sup> See e.g. Paul Diehl and Charlotte Ku, *The Dynamics of International Law* (Cambridge: CUP 2010) 69 (noting that 'some entropy exists within the international legal system'); David Collins, 'The Chaos Machine: The WTO in a Social Entropy Model of the World Trading System' (2014) 34 *Oxford Journal of Legal Studies* 353–374 (observing 'shifts in world trading system towards disorder'); Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged, and How It Can Be Reformed' (2014) 29 *ICSID Review* 372–418, 372.

**PART 3**

*Challenges and Prospects*



The third part of the book proposes legal methods to reconcile the possible tensions between cultural governance and economic interests in international law, both *de lege lata* (that is, interpreting the existing legal instruments) and *de lege ferenda* (that is, amending the existing law or proposing the adoption of substantive and procedural provisions). While arguably perfect solutions do not exist to completely reconcile the inevitable tension between cultural heritage and economic development, the next chapter provides specific suggestions for enhancing the current legal tools for resolving this tension.

# Challenges and Prospects

The present is not a potential past;  
it is the moment of choice and action.<sup>1</sup>

SIMONE DE BEAUVOIR



## 1 Introduction

Far from being self-contained regimes,<sup>2</sup> international cultural heritage law and international economic law have increasingly intersected. While these areas of international law reflect the increasing specialization of this field of law, they are not separate from international law; rather, they maintain continuity with their matrix. In fact, there seems to be conceptual fluidity between international law and its subsystems. On the one hand, the contained systems contribute to the development of the container system. Both international cultural heritage law and international economic law play an active role in the development of the substantive and procedural content of international law. They contribute to the maintenance of peace and security by fostering friendly and prosperous relations among nations, by promoting mutual understanding,

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1 Simone de Beauvoir, *The Ethics of Ambiguity*, Bernard Frechtman (transl.) (Citadel Press 1948).

2 The term 'self-contained regime' was first used by the PCIJ in the *Wimbledon* case to determine the relationship between conflicting treaty provisions. *Case of the ss Wimbledon (United Kingdom, France, Italy, and Japan v. Germany)* PCIJ Reports Series A No. 1 at 23–24. The ICJ used the expression in a different context. *Diplomatic and Consular Staff in Teheran Case (United States v. Iran)* 1980 ICJ Reports 40, at para. 86. See also WTO AB Report, *United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, at 17 (affirming that WTO treaties are 'not to be read in clinical isolation from public international law'); *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 21 (highlighting that international investment law 'is not a self-contained closed legal system ..., but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'.)

free trade, and foreign direct investments among states, and providing generally effective dispute settlement mechanisms to name a few.

More interestingly, international economic law and international cultural heritage law also continuously contribute to the development of international law through their constant interactions. Arbitral tribunals build an ongoing dialogue between international investment law and international cultural heritage law, contributing to the current debate on the unity or fragmentation of international law, and supporting the argument that international law, albeit decentralized, is not an anarchic amalgam of different norms but rather has a structure similar to a system.<sup>3</sup> In parallel, the WTO panels and AB have consistently reaffirmed that international trade law is not a self-contained regime, but an important part of international law. In turn, the container system contributes to the development of the contained systems, and international economic courts refer to international law cases and principles in their decisions.

To say that there is continuity between international law on the one hand, and international economic law and international cultural heritage law on the other, does not imply a sort of pre-established harmony (*harmonie préétablie* or *harmonia praestabilita*) between the system and its subsystems.<sup>4</sup> For the German philosopher Gottfried Wilhelm Leibniz (1646–1716), just as two clocks can tick in time with each other without interaction purely because each is properly constructed, so an invisible hand can from the beginning ensure the harmony of each legal system's development with that of the others. Rather, the argument of this book is that it is up to the interpreters to act as cartographers of international law and to find the appropriate equilibrium within the system.

What strategies are available to avoid collisions between the promotion of foreign investments and free trade on the one hand, and the safeguarding of cultural heritage on the other? After having critically assessed the interplay between international cultural heritage law and international economic law in theory and practice, this chapter now explores a set of different, yet complementary, legal avenues for integrating cultural threads into the fabric of international economic law.

From a procedural perspective, commentators have proposed a range of alternatives moving toward some judicialization of investor–state arbitration and the

3 On the concept of legal system or legal order, see Santi Romano, *L'Ordinamento Giuridico*, 2nd edn (Firenze: Sansoni 1946).

4 Gottfried Wilhelm Leibniz, *Principes de la Nature et de la Grâce*, in C.J. Gerhardt (ed.), *Die philosophischen Schriften von G. W. Leibniz* (Leipzig 1875–90) volume VI, p. 598, para. 3.

parallel simplification of the WTO dispute settlement mechanism.<sup>5</sup> While a discussion of the various reform proposals is outside the scope of this chapter, it will suffice to mention the fact that some reforms could actually foster the consideration of important policy objectives, including the protection of cultural heritage within international economic law. The establishment of a Multilateral Investment Court, a proposal backed by Canada and the European Union, can contribute to the development of a relatively consistent jurisprudence (even in the absence of binding precedent in international law). Tenured judges may be perceived to be more independent and impartial than *ad hoc* arbitrators. Their background might be in international law and public law rather than commercial law, and this could favor a more balanced assessment of potential clashes between the safeguarding of cultural heritage and the promotion of foreign investments. The establishment of appeals mechanisms, an initiative adopted by countries such as the United States in some of its BITs, can also provide an additional layer of scrutiny.

In parallel, while a number of WTO members have launched an alternative appeals mechanism, the Multi-Party Interim Appeal Arbitration Arrangement, others have emphasized that ‘as the WTO needs to be reformed to be responsive, so too does its dispute settlement function need to evolve as part of the institution.’<sup>6</sup> While the Appellate Body can contribute to the ‘stability and predictability of the multilateral trading system’, it must also ‘reflec[t] the real interests’ of the WTO members.<sup>7</sup> The question of substantive overreach, namely, the fact that the Appellate Body has ‘legislated too much’ in favor of liberalizing trade has inevitably affected the policy space of Member States. Accordingly, scholars call for rethinking the role of the Appellate Body to adjudicate disputes ‘one case at a time,’ and not consider its precedents as binding, thus enabling the development of its jurisprudence.<sup>8</sup>

Although the establishment of a permanent world investment court and the eventual reform of the Appellate Body could improve the delicate balance between cultural and economic interests in international economic law, they do not necessarily offer a magic formula for balancing the various interests at stake; further reflection is needed.

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5 Anthea Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor–State Arbitration’ (2018) 112 *AJIL* 410–432; Simon Lester, ‘Ending the WTO Dispute Settlement Crisis: Where to From Here?’, *IISD Newsletter*, 2 March 2022.

6 Lester, ‘Ending the WTO Dispute Settlement Crisis’, (quoting US Trade Representative, Katherine Tai).

7 WTO, ‘Members Commit to Engagement on Dispute Settlement Reform’, *News Item*, 27 April 2022.

8 Robert Howse, ‘Appointment with Destiny: Selecting WTO Judges in the Future’ (2021) 12 *Global Policy* 71–82.

Substantively, this chapter explores several policy options that may help policymakers and adjudicators to reconcile the different interests at stake. The chapter is divided into two parts. The first part discusses the mechanisms that are currently in force (*de lege lata*) that can help relevant stakeholders to settle disputes with cultural elements. Part I thus focuses on negotiation, applicable law, conflict of law, cultural public order, and treaty interpretation. The second part of the chapter examines the mechanisms that promote a change to the current law (*de lege ferenda*). Part II focuses on cultural exceptions, counterclaims, *amici curiae*, amendments, and waivers, as well as institutional cooperation. Since international treaties are renegotiated periodically, there is scope for inserting *ad hoc* clauses within these treaties and/or amending their provisions or waiving specific obligations for certain periods of time to safeguard cultural heritage. The conclusions then sum up the key findings of the chapter. Not only can these approaches promote the effectiveness of international cultural heritage law but they can also humanize international economic law and foster unity, coherence, and mutual supportiveness between different competing subsets of international law.

## 2 De Lege Lata

### 2.1 *Negotiating Cultural Disputes*

Disputes involving cultural heritage often raise complex political, economic, and cultural issues.<sup>9</sup> While ‘adjudication is not designed to address extralegal issues’, which are deemed non-justiciable, alternative dispute resolution (ADR) methods (that is, alternative to arbitration and litigation) can be suited to resolve complex disputes involving political, economic, and cultural interests.<sup>10</sup> ADR methods are part and parcel of international economic law.

BITs typically include a three to six-month ‘cooling-off period’ for consultation and negotiation before a claim may be brought.<sup>11</sup> The period runs from the date when the dispute arose or when the host state was formally notified by the investor. The practical purpose of the ‘cooling off period’ is twofold. On the one hand, the host state is granted the right to be informed

9 James A. R. Nafziger, Robert K. Paterson, and Alison Dundes Renteln, *Cultural Law: International, Comparative, and Indigenous* (Cambridge: CUP 2010) 605.

10 Anna Spain, ‘Integration Matters: Rethinking the Architecture of International Dispute Resolution’ (2010–2011) 32 *University of Pennsylvania JIL* 1–55, 16

11 See, for instance, US–Ecuador BIT, Article VI. Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993, in force 11 May 1997.

about the dispute and ‘an opportunity to redress the problem’.<sup>12</sup> On the other hand, the cooling-off period can facilitate settlement before positions become entrenched.<sup>13</sup> While the obligation to negotiate is an obligation of means, not of results, failure to observe a treaty’s cooling-off period results in a tribunal declining jurisdiction.<sup>14</sup> Negotiations can take place even after the cooling-off period. Although complete statistics are not available due to confidentiality, almost one-third of ICSID cases and two-thirds of International Chamber of Commerce (ICC) cases are settled by negotiation.<sup>15</sup>

At the WTO, several provisions of the Dispute Settlement Understanding are ‘clearly designed to facilitate settlement’.<sup>16</sup> First, before requesting the establishment of a panel to hear a dispute, a complainant requests consultations.<sup>17</sup> In the course of such consultations, which should be conducted in good faith, ‘members should attempt to obtain satisfactory adjustment of the matter.’<sup>18</sup> About 40% of the disputes brought before the WTO since its establishment in 1995 have been settled at this stage. For instance, in 1996 the United States initiated consultations regarding Turkey’s taxation of revenues generated from showing foreign movies.<sup>19</sup> While Turkey imposed a 25% tax on box office revenues generated from showing foreign movies, it did not impose any tax on receipts from the showing of local films. Following consultations on this matter, Turkey acknowledged that the practice was incompatible with Article III GATT and agreed to equalize any tax imposed on box office revenues.<sup>20</sup>

Second, Article 3.7 of the DSU provides that ‘[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.’ It stresses that ‘[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute’ and concludes that ‘[a]

12 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 31.

13 *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, at paras 151 and 154.

14 *Id.* para. 135.

15 Jeswald Salacuse, ‘The Emerging Global Regime for Investment’ (2010) *Harvard ILJ* 427.

16 Lester, ‘Ending the WTO Dispute Settlement Crisis’.

17 DSU Article 4.

18 DSU Articles 4.3 and 4.5.

19 *Turkey—Taxation of Foreign Film Revenues*, Notification of Mutually Agreed Solution, WT/DS43/3.

20 Michael Hahn, ‘A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law’ (2006) 9 *JIEL* 515–552, 528.

solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.’

Third, if the parties agree to do so, they can resort to good offices, conciliation, and mediation to settle a dispute.<sup>21</sup> A party can request good offices, conciliation, and mediation at any time. Under this mechanism, the Director-General, acting in an *ex officio* capacity, may help members settle a dispute. As Lester explains, ‘[t]aking all of these provisions into account, it is clear that the DSU as it is currently written is designed to facilitate the settlement of disputes between members, and provides many opportunities to do so.’<sup>22</sup>

Negotiation is based on cooperative and interest-based approaches. In abstract terms, it creates a situation where the parties cooperate to reach a satisfactory result. The parties can often reach an agreement if they consider their underlying interests. Negotiation may also produce more successful outcomes than the adversarial ‘winner takes all’ approach.<sup>23</sup> Negotiation has proven to be a strategic tool to enhance cultural heritage protection while allowing economic activities. For instance, when the Yellowstone National Park, which is a World Heritage Site, was added to the Danger List in 1995 due to the proposed development of a gold and copper mine three miles outside the Park boundary, negotiation allowed the US government to eliminate the threat to the Park, by creatively proposing a land swap to the investor.<sup>24</sup>

Similarly, in Germany, after strenuous litigation before national courts, a local community was able to negotiate the relocation of a fortified ancient church as part of an investment deal.<sup>25</sup> By the end of 2008, the town of Heuersdorf in Saxony had to make way for a lignite mine, to fuel a nearby power plant.<sup>26</sup> Although the local inhabitants could not save their village, they saved the 750-year-old Emmaus Church (*Emmauskirche*) by relocating it to the nearby town of Borna. The US mining company had the chance to exploit its investment, albeit ultimately agreeing to pay the transplantation costs.<sup>27</sup>

21 DSU Article 5.

22 Lester, ‘Ending the WTO Dispute Settlement Crisis’.

23 Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books 1983).

24 Daniel L. Gebert, ‘Sovereignty Under the World Heritage Convention: A Questionable Basis for Limiting Federal Land Designation Pursuant to International Agreements’ (1998–1999) 7 *Southern California Interdisciplinary Law Journal* 427–444, 428.

25 ‘A Holy Journey: Church Moved to Make Way to Coal Mine’, *Spiegel Online*, 24 October 2007.

26 Constitutional Court of Saxony, Judgment of 25 November 2005, Vf. 119-VIII-09, available at: [www.justiz.sachsen.de/esaver/internet/2004\\_119\\_VIII/2004\\_119\\_VIII.pdf](http://www.justiz.sachsen.de/esaver/internet/2004_119_VIII/2004_119_VIII.pdf)

27 ‘A Holy Journey’.

The images of the church's journey crossed boundaries, capturing the imagination of thousands of people and making headlines worldwide.

Conciliation and mediation may also play a useful role in cultural heritage-related disputes. Where the degree of animosity between the parties is so great that direct negotiations are unlikely to lead to a dispute settlement, the intervention of a third party to reconcile the parties may be very practical.<sup>28</sup> In this sense, several institutions provide the setting for conciliation, including UNCITRAL, the ICC, and the ICSID, although conciliation has been used sparingly. At the WTO, conciliation may be requested by any party at any time.<sup>29</sup>

Mediation of cultural heritage-related disputes is also possible.<sup>30</sup> Mediation involves the good offices of a neutral third party which facilitates communication between the discussants.<sup>31</sup> Like negotiation, mediation is guided by the goal of finding a win-win situation for all parties through a process that focuses on the interests of the parties rather than on their positions and searches for creative alternatives to solve the dispute. The Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group, has mediated disputes between investors on the one hand and host states on the other hand, to help resolve investment claims resulting from state measures. The satisfaction of both parties is maximized, as the settlement constitutes a more-than-zero sum game. As mediators do not have the authority to make a binding decision and do not follow a fixed procedure, they may promote flexible and dynamic dialogue. Furthermore, mediation might involve the participation of other stakeholders.<sup>32</sup>

ADR methods present a number of intrinsic advantages. First, they usually achieve results in a short time frame. Second, they are not required to deal with the past: they ask the parties to look at their future and reshape their rights and responsibilities toward each other. Third, the parties participate in the decision-making process that will ultimately affect them. In these proceedings, all the different interests concerned are disclosed and discussed. Experience shows that agreements entered into through a voluntary process stand out

28 John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford: OUP 2000) 27.

29 DSU Article 5.3.

30 Stephen Schwebel, 'Is Mediation of Foreign Disputes Plausible?', in Stephen Schwebel, *Justice in International Law* (Cambridge: CUP 2011) 318–22.

31 Jeswald Salacuse, 'Is There a Better Way? Alternative Methods of Treaty Based, Investor-State Dispute Resolution' (2007) 31 *Fordham ILJ* 138–185, 161.

32 Chester A. Crocker, Fen Osler Hampson, Pamela R. Aall, *Herding Cats: Multiparty Mediation in a Complex World* (Washington D.C.: United States Institute of Peace 1999).

for their durability. The underlying reason is that the parties strongly identify with the achieved result which is perceived as fair. Finally, the confidentiality characterizing ADR mechanisms allows the parties to focus on the underlying interests of a given dispute.

However, ADR methods also present some limits. First, the confidential nature of these methods makes documenting their use and lessons learned difficult.<sup>33</sup> Second, the parties to a given dispute may be 'disinclined to subject disputes between them' to ADR mechanisms 'primarily because bureaucracies, governmental and corporate, may be reluctant to assume responsibility for accepting the provisions of a mediated settlement which afford them less than their publicly voiced demands'.<sup>34</sup> Third, while ADR methods can be useful in those situations where both contracting parties have equal or similar bargaining power, such methods do not seem to be advisable when there are power asymmetries. This is particularly the case when the cultural heritage in question is associated with Indigenous peoples and minorities, for such groups have often been disregarded by the relevant state authorities in the race to attract foreign investment.<sup>35</sup> Without adequate safeguards, ADR may fail to address power imbalances. Furthermore, in prioritizing the interests of the parties present, there is a concern that ADR methods cannot adequately ensure that the disputes are settled 'in conformity with the principles of justice and international law' including 'universal respect for, and observance of, human rights and fundamental freedoms for all'.<sup>36</sup>

Next, from a political science perspective, the specter of a potential dispute with a powerful investor can exert a chilling effect on a government's decisions to regulate in the public interest. For instance, in 2002, a group of mainly foreign-owned mining companies threatened to commence international arbitration against the government of Indonesia in response to its ban on open-pit mining in protected forests.<sup>37</sup> Six months later, the Ministry of Forestry agreed to change the forest designation from protected to production forests.<sup>38</sup> In this problematic context, a legal approach is very much needed.

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33 Spain, 'Integration Matters', 23.

34 Schwebel, 'Is Mediation of Foreign Disputes Plausible?'

35 See César Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 *Indiana J. Global Legal Studies* 263–306, 299.

36 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, in force 27 January 1980, 1155 UNTS 331, preamble.

37 See Stuart Grass, 'Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 *Michigan JIL* 893–960, 894.

38 Id.

In conclusion, ADR can be cheaper and less time-consuming than arbitration and adjudication, preserving the relations between the investors and traders on the one hand and states on the other.<sup>39</sup> For instance, Professor Salacuse reports that in the *Pyramids* case, the state authorities ended up paying higher damages after they refused a tentative settlement.<sup>40</sup> ADR methods can provide more flexibility than arbitration and litigation, enabling the consideration of political, economic, and cultural questions raised by cultural heritage-related disputes. Creative solutions can include land swaps or the rerouting of investment projects.

However, ADR mechanisms should not be seen as a tool for diluting states' obligations under international law or as a delaying tactic. In some cases, it may be better to have recourse to arbitration or litigation because the resulting outcome can contribute to the development of international (economic) law and can inhibit further spurious claims on the part of the claimant, or illegal misconduct on the part of the respondent.<sup>41</sup> Finally, ADR mechanisms are not suitable when there is uneven bargaining power between the parties.

## 2.2 *Conflict and Reconciliation of Norms*

International law offers a fertile ground for overlapping norms and conflicting obligations. The multitude of lawmakers and the constellation of courts and tribunals contribute to making international law a vibrant legal system accommodating new fields and actors. The increased proliferation of treaties and the specialization of different branches of international law make some overlapping between the latter unavoidable. At the same time, the chaotic and incremental nature of international law facilitates the potential for conflicts of norms. Although conflicts have been traditionally perceived negatively – as a source of separation or a struggle for definite dominance – the potential for conflicts of norms is inherent in every legal system.<sup>42</sup> Provided that conflicts are successfully managed, they can foster positive change and strengthen the legal order.<sup>43</sup> Reconciling seemingly opposing interests, as expressed in norms, can increase the legitimacy and strength of the legal system.

The act of reconciling conflicts, or of perceiving them as compatible, entails a complex interpretative process. Some scholars question whether norms belonging to different international law subsystems are truly comparable.

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39 Salacuse, 'Is There a Better Way?', 176.

40 Id.

41 Id. 179.

42 Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: CUP 2003), 12.

43 Anne Marie Slaughter, *A New World Order* (Princeton N.J.: Princeton University Press 2004) 209.

According to some scholars, the difference in nature between different branches of law means that they operate on different levels and are thus not amenable to balancing. Accordingly, only human rights courts should be empowered to adjudicate on highly sensitive issues involving cultural rights because they have jurisdiction over the matter and are composed of competent judges.<sup>44</sup>

However, one may wonder whether a holistic approach might be preferred. Not only would such an approach bring coherence to international law, but it would also favor the 'humanization' of the same.<sup>45</sup> Considering international public law as a 'universe of interconnected islands' may have a positive impact on economic globalization, promoting economic, social, and cultural development.<sup>46</sup> While it is not possible to contest the importance of protecting aliens and traders in international law, it is important to keep in mind that economic interests do not receive absolute protection but may be limited for legitimate reasons in most legal systems.

Even if we accept the assumption that property rights are human rights, the very idea of granting these rights makes it necessary to limit their exercise in situations where such exercise would collide with the rights and protected interests of others. For instance, according to the European Convention on Human Rights, property rights can be limited to the extent necessary 'to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.<sup>47</sup> Owners have not only rights but also obligations. This is particularly true with regard to the protection of cultural heritage. In case of conflict between state obligations concerning cultural heritage and investors and traders' rights, adjudicators will be called on to balance these interests through a procedure similar to that established and consolidated by human rights bodies and national constitutional courts.

There may be both apparent conflicts and conflicts in the applicable law. Apparent conflicts indicate those conflicts that are avoidable according to the time-tested criterion of presumption of conformity in the cumulative

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44 Ioana Tudor-Knoll, 'The Fair and Equitable Treatment Standard and Human Rights Norms', in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2008) 310–343, 338.

45 Todor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff 2006).

46 Joost Pauwelyn, 'Bridging Fragmentation and Unity, International Law as a Universe of Inter-connected Islands' (2004) 25 *Michigan JIL* 903–916.

47 See e.g. Article 1(2) Protocol No. 1 to the European Convention on Human Rights.

application of different legal regimes. In many cases, ‘what may seem like a conflict’ may prove to be a mere ‘divergence which can be streamlined by means of ... treaty interpretation.’<sup>48</sup> Pursuant to the process of treaty interpretation and other legal techniques, many apparent conflicts can be resolved or even prevented. The attempt to prove the compatibility of two norms – when there is at least one way of complying with all their requirements – has been defined as the ‘reconciliation’ of norms.<sup>49</sup>

However, other conflicts may have a genuine nature. Genuine or material conflicts of norms include two species of conflicts: inherent normative conflict and conflict in the application of the relevant norm. When a norm constitutes, in and of itself, a breach of another norm, there is an inherent normative conflict. A conflict in the application of norms arises when a party to two treaties cannot simultaneously comply with its obligations under both treaties; compliance with one norm entails noncompliance with the other.<sup>50</sup> With regard to the relationship between the protection of cultural heritage and the promotion of trade and FDI, inherent normative conflicts, albeit theoretically conceivable, will rarely if ever appear in practice. Instead, both apparent conflicts and conflicts in the applicable law have often arisen in the context of cultural heritage-related trade and investment disputes. Often, conflicts in the application of norms arise because conflict prevention and management of apparent conflicts have not been attempted or have failed. Thus, both kinds of conflict deserve scrutiny, and theoretical effort is needed to reconcile the relevant interests.

The Vienna Convention on the Law of Treaties establishes a framework that governs the interplay between different international law rules. In particular, it addresses three different relationships: (1) the relationship between two or more treaties relating to the same subject matter; (2) that between a treaty and *jus cogens*; and (3) that between a treaty and other relevant rules of international law.

Whenever two or more norms deal with the same subject matter, generally accepted techniques of interpretation and conflict resolution in international

48 Pauwelyn, *Conflict of Norms in Public International Law*, 6.

49 Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden: Brill 2003) 33.

50 Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 BYIL 401–453, 426.

law require that 'priority should be given to the norm that is more specific' (*lex specialis derogat legi generali*)<sup>51</sup> or more recent (*lex posterior derogat priori*).<sup>52</sup>

However, such general rules may not be wholly adequate to govern the interplay between treaty regimes, because international economic law and international cultural heritage law do not exactly overlap nor does the one contain the other. Rather, they have different scopes, aims, and objectives.<sup>53</sup> In particular, international economic law aims to govern economic relations between states as well as between these and alien economic actors. It aims at fostering peaceful and prosperous relations among nations. International cultural heritage law is a more recent branch of international law that has been codified since the end of WWII. It aims at governing the international dimension of cultural phenomena, safeguarding heritage, and promoting the restitution of stolen cultural goods. International cultural heritage law can promote cultural cooperation and mutual understanding among nations, thus contributing to international peace and security.

There is no hierarchical relationship between international economic law and international cultural heritage law. The relevant UNESCO instruments do not set out a hierarchical relationship between international cultural heritage law and other components of public international law.<sup>54</sup> Unless a cultural norm constitutes *jus cogens*, it is difficult to foresee and govern the interaction between different legal regimes.<sup>55</sup>

The Vienna Convention on the Law of Treaties defines *jus cogens* as 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.<sup>56</sup> While this provision sets a legal framework on how peremptory norms work, it does not specify which norms belong to *jus cogens*.<sup>57</sup> In fact,

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51 See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, A/61/10, para. 251.

52 Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 30.

53 Donald McRae, 'International Economic Law and Public International Law: The Past and the Future' (2014) 17 JIEL 627–638, at 635.

54 See e.g. CCD Article 20.

55 Pierre Lalive, 'Réflexions sur un Ordre Public Culturel', in Eric Wyler and Alain Papaux (eds), *L'Extranéité ou le Dépassement de l'Ordre Juridique Étatique* (Paris: Pédone 1999).

56 VCLT Article 53.

57 Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491–508, 491 (internal citation omitted).

some authors contend that *jus cogens* is not a scientific reality.<sup>58</sup> In this vein, Koskenniemi contends that *jus cogens* ‘ha[s] no clear reference in this world ... Instead of meaning, [it] invokes a nostalgia for having such a meaning.’<sup>59</sup> However, the concept of *jus cogens* is positive law.<sup>60</sup> Generally accepted examples include the prohibition of apartheid, the use of force, slavery, torture, piracy, and genocide.<sup>61</sup> Given the legal uncertainty surrounding this concept, it is up to international courts to decipher the complex tapestry of international law in determining its meaning.

Concerning the relationship between a treaty and *jus cogens* norms, Article 53 of the VCLT states that a treaty shall be void ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’. In parallel, Article 64 of the VCLT provides that ‘if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ Accordingly, if an international economic law treaty conflicted with a peremptory norm, it would be null.<sup>62</sup> Alternatively, some argue that any violation of peremptory norms would automatically annul any contrary treaty provisions.<sup>63</sup> However, this conclusion is not supported by the VCLT which provides that ‘[i]n cases falling under Articl[e] ... 53, no separation of the provisions of the treaty is permitted.’<sup>64</sup>

However, the hypothesis that investment treaties, WTO-covered agreements, or some of their norms are incompatible as such with *jus cogens* seems an overstatement. International investment treaties and the WTO-covered agreements generally include vague and open-ended provisions, giving states parties flexibility in the implementation of their international economic law obligations. Because of the character of international economic law and the subject matter it covers, it is difficult to envisage a direct conflict between

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58 See Mark Janis, *Jus Cogens: An Artful Not a Scientific Reality* (1987–1988) 3 *Connecticut JIL* 370.

59 Martti Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *EJIL* 113–124.

60 Pierre-Marie Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’ (2005) 16 *EJIL* 131–137, at 136.

61 Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale JIL* 331–387.

62 VCLT Article 53.

63 Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 *EJIL* 753–814, at 778.

64 VCLT Article 44(5).

international economic law and peremptory norms. Rather, some interpretations of international economic law may be incompatible with peremptory norms. Therefore, any such interpretation should be avoided. In most cases, the good faith interpretation of international economic law will resolve all or most apparent and direct conflicts with peremptory norms. In other words, international economic courts should read international economic law provisions so as to avoid conflicts with peremptory norms.

With regard to the relationship between a treaty obligation and other international agreements, international law comes into play under Article 31(3)(c) of the VCLT, which provides that the treaty interpreter shall take into account ‘any relevant rules of international law applicable in the relations between the parties.’<sup>65</sup> Pursuant to Article 31(3)(c) of the VCLT, ‘[e]very treaty provision must be read not only in its own context, but in the broader context of general international law, whether conventional or customary.’<sup>66</sup> International law should guide the interpretation of international economic law. Accordingly, Article 31(3)(c) of the VCLT reflects a principle of integration, emphasizing the unity of international law and requiring that rules should not be considered in isolation from general international law.

### 2.3 *The Applicable Law*

Deciding cases according to equity has a long history in international adjudication<sup>67</sup> and might be fruitful in cases dealing with cross-cutting themes.<sup>68</sup> Nonetheless, the parties often prefer adjudicating their disputes on the basis of law rather than equity because equity is perceived as leading to uncertain and unpredictable outcomes, operating outside of the law (*extra legem*) or overcoming the law (*contra legem*).<sup>69</sup> While arbitral tribunals may be asked to adjudicate cases on the basis of equity (*ex aequo et bono*), this is not possible at the WTO.

65 VCLT Article 31(3)(c).

66 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press 1984) 139.

67 Statute of the International Court of Justice, Article 38.2. League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, Article 38.4.

68 Anastasios Gourgourinis, *Equity and Equitable Principles in the World Trade Organization Addressing Conflicts and Overlaps between the WTO and Other Regimes* (London: Routledge 2016).

69 Leon Trakman, ‘*Ex Aequo et Bono*: Demystifying an Ancient Concept’ (2008) 8 *Chicago Journal of International Law*, 621–642, 642 (reporting these criticisms).

As most investment arbitrations and the whole of WTO adjudication are based on law, it is worth examining the applicable law, the sources of such law, and whether the law can accommodate equity within itself (*infra legem*). While states are generally bound in their behavior by international law, what is the law applicable in their relations before international economic courts? What are the sources of law? Can law accommodate equity within itself? This section addresses these questions by discussing the applicable law, that is, the law governing the relations among the parties and that applies to their disputes, the sources of such law, and how principles of equity can be part of the applicable law.<sup>70</sup>

Within the WTO dispute settlement system, the sources of law are given by the covered agreements, customary law, and general principles of law, as well as judicial decisions and the teachings of the most qualified jurists as ‘subsidiary means for the determination of rules of law’.<sup>71</sup> The principal sources of WTO law are the Marrakesh Agreement Establishing the World Trade Organization, the WTO-covered agreements, and the international agreements they incorporate by reference.<sup>72</sup> WTO courts rarely use the term ‘applicable law’ because they basically apply the detailed provisions of the DSU and the covered agreements.

The question as to whether, and if so to what extent, other international agreements not referred to in a WTO agreement can be a source of international trade law is a controversial issue. Can other such treaties provide rights and obligations for states that can be invoked before international economic courts? Some scholars including Picone, Ligustro, and Francioni argue that international economic courts have incidental jurisdiction, that is, the possibility to incidentally apply other treaties.<sup>73</sup> According to this view, international economic courts have the inherent powers to briefly

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70 See generally Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation* (Cheltenham: Edward Elgar 2022); Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: the Sources of Rights and Obligations* (Leiden/Boston: Martinus Nijhoff 2012).

71 Statute of the International Court of Justice, Article 38.

72 Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: CUP 2008) 42.

73 Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione Internazionale del Commercio* (Padua: CEDAM 2002); Francesco Francioni, ‘Diritto Internazionale degli Investimenti e Tutela dei Diritti Umani: Convergenza o Conflitto?’ in Adriana Di Stefano and Rosario Sapienza (eds), *La Tutela dei Diritti Umani e il Diritto Internazionale* (Naples: Editoriale Scientifica 2012) 417–435, 425.

settle a matter incidentally (*incidenter tantum*) if addressing this matter is relevant for adjudicating the principal claims and provided that the other treaty to be applied is binding to the parties to the disputes. The value of this incidental statement would be that of an *obiter dictum*. Yet, the incidental reference to, and application of, the other treaty would contribute to the harmonious development of international law. The ICJ has made use of this incidental jurisdiction in the *Genocide* case, where it considered that its jurisdiction ‘d[id] not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court’s determination of whether or not there has been a breach of an obligation under the Genocide Convention.’<sup>74</sup> This passage suggests a role for other treaties outside the Genocide Convention beyond mere interpretative support. Similarly, Pauwelyn has argued that claims based on other international treaties cannot be brought before international economic courts, but could be invoked as a defense against an alleged breach of international economic law.<sup>75</sup> Undoubtedly, international economic law is part and parcel of international law, and its effectiveness and legitimacy depend on how it relates to other international law norms. Certainly, other international treaties can play a significant role in the interpretation of international economic law.<sup>76</sup>

Yet, one of the main functions of the WTO dispute settlement system is maintaining ‘a proper balance between the rights and obligations of Members’<sup>77</sup> under the covered agreements and ‘clarify[ing] the existing provisions of those agreements in accordance with customary rules of treaty interpretation.’<sup>78</sup> The DSU explicitly cautions the panels and the AB against judicial activism: in fact, ‘in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.’<sup>79</sup> As ‘the covered agreements are full of gaps and constructive ambiguity, there is much need for clarification of the existing provisions.’<sup>80</sup>

74 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Judgment (2015) ICJ Reports 3, para. 85.

75 Pauwelyn, *Conflict of Norms in Public International Law*, 241.

76 See Section 2.5 below.

77 DSU Article 3.3.

78 DSU Article 3.2.

79 DSU Article 19.2.

80 Van den Bossche, *The Law and Policy of the World Trade Organization*, 174.

Therefore, non-consensual sources of international law such as customary law, general principles of law, and subsidiary sources thus come into play.

The DSU explicitly refers to customary international law on treaty interpretation and makes it applicable in the context of WTO adjudication.<sup>81</sup> Questions remain as to the applicability of other rules of customary international law.<sup>82</sup> As the panel held in *Korea—Procurement*, '[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it.'<sup>83</sup> The WTO courts have frequently referred to customary international law in their jurisprudence.<sup>84</sup> As mentioned in Chapter 1, several norms requiring the protection of cultural heritage in times of war have achieved customary law status and have also been codified in widely ratified treaties.<sup>85</sup> In addition, customary norms of international law requiring the protection of cultural heritage in times of peace are also emerging and have been codified in widely ratified UNESCO conventions and human rights treaties.<sup>86</sup> Moreover, various jurisdictions have repeatedly acknowledged the customary nature of the obligations contained in such instruments.

General principles of law are also 'sources of law applicable in WTO adjudication.'<sup>87</sup> Like customary international law, they fill the gaps left by treaties.<sup>88</sup> WTO courts have often used general principles of law 'as a basis for their rulings or in support of their reasoning.'<sup>89</sup> For instance, several reports

81 DSU Article 3.2.

82 Van den Bossche, *The Law and Policy of the World Trade Organization*, 55.

83 Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, para. 7.96.

84 Pauwelyn, *Conflict of Norms in Public International Law*, 210–211 and 470.

85 Since 1996, the International Committee of the Red Cross (ICRC) has identified a number of customary norms of international humanitarian law. Among such rules, seven norms relate to cultural heritage protection: Rule 38 (Attacks Against Cultural Property); Rule 39 (Use of Cultural Property for Military Purposes); Rule 40 (Respect for Cultural Property); Rule 41 (Export and Return of Cultural Property in Occupied Territory); Rule 51 (Public and Private Property in Occupied Territory); Rule 52 (Pillage); Rule 61 (Improper Use of Other Internationally Recognized Emblems).

86 Francesco Francioni, 'Au-delà des Traités—L'Émergence d'un Nouveau Droit Coutumier pour la Protection du Patrimoine Culturel' (2007) 111 *Revue Generale de Droit International Public* 19–42.

87 Petros Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts' (2008) 102 *AJIL* 421–474, 439.

88 Van den Bossche, *The Law and Policy of the World Trade Organization*, 56.

89 *Id.*

refer to the obligation to implement the covered agreements in good faith (*pacta sunt servanda*). In *Korea—Procurement*, the panel referred to the good faith (*bona fides*) principle as a general principle of public international law that must be taken into account by WTO courts.<sup>90</sup>

If equity is not a source of international law of its own under Article 38 of the ICJ Statute, it can be considered a general principle of law requiring adjudicators to fill the gaps in the law or concretize the open-endedness of its norms.<sup>91</sup> It enables adjudicators to decide the merits of an admissible case even in the absence of suitable law, the vagueness or ambiguity of rules, or inconsistencies in the law. Recourse to equity within the law enables adjudicators to reach decisions, thus avoiding *non liquet* and contributing to the development of international law.<sup>92</sup> Most IIAs include the fair and equitable treatment standard, and equitable considerations are thus built within the structure of international investment law. In any case, the principle of equity should not be interpreted as merely protecting the interests of investors and traders. Rather, this concept requires balancing opposing interests and values.<sup>93</sup>

As Mavroidis highlights, ‘in WTO adjudication, general principles of law have been used extensively, though in most cases as interpretative elements for the sources of WTO law.’<sup>94</sup> In theory—but as yet, not in practice—general principles could be used as factors for inserting cultural concerns into the fabric of international economic law, as general principles of law already require the protection of significant cultural heritage and elements of cultural diversity. In the context of cultural heritage-related disputes, the principle of inter-generational equity might well come into play. This principle posits that every generation holds natural and cultural heritage in common with members of the past, present, and future generations. Accordingly, this principle requires generations not to consume the stock of natural and cultural resources but to use and safeguard such heritage responsibly, thus ‘meet[ing] the needs of the present without compromising the ability of future generations to meet

90 Panel Report, *Korea—Procurement*, para. 7.93.

91 Catharine Titi, ‘The Function of Equity in International Law (Oxford: OUP 2021); Marion Pannizzon, *Good Faith in the Jurisprudence of the WTO* (Oxford: Hart Publishing 2006) 23.

92 Hersch Lauterpacht, ‘Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Law’, in F. M. van Asbeck (ed.), *Symbolae Verzijl: Présentées au Prof. J.H.W. Verzijl, à l’Occasion de son LXXième Anniversaire* (The Hague: Nijhoff 1958) 196–221.

93 Peter Muchlinski, ‘Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard’ (2006) ICLQ 527–558.

94 Mavroidis, ‘No Outsourcing of Law?’, 443.

their own needs.<sup>95</sup> Policymakers can thus govern the market to preserve cultural heritage at a level that allows for cultural sustainability and intertemporal justice.<sup>96</sup>

Investment disputes are to be resolved on the basis of law unless the parties have expressly agreed otherwise.<sup>97</sup> The sources of international investment law include treaties, customary law, general principles of law, and subsidiary sources of law. While international investment agreements tend to be the principal source to be applied in investment treaty disputes, arbitral tribunals also generally refer to general principles and customary law in their jurisprudence. For instance, with regard to customary international law, the *Grand River* Tribunal could not ‘avoid noting the strong international policy and standards articulated in numerous written instruments and interpretative decisions that favor state action to promote ... [the] rights and interests of Indigenous peoples’.<sup>98</sup>

Several BITs contain a composite choice of law clause, typically including treaty rules, host state law, and customary international law. For instance, the 2012 US Model BIT<sup>99</sup> provides that in certain cases, ‘the Tribunal shall decide the issues in dispute in accordance with this treaty and applicable rules of international law.’<sup>100</sup> The USMCA similarly states that ‘the Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’<sup>101</sup> For cases brought before ICSID, the ICSID Convention provides that a tribunal will apply the law selected by the parties or, in the absence of such a choice, the law of the host country and such principles of international law as are applicable.<sup>102</sup>

Such clauses do not generally extend the jurisdiction of the arbitral tribunals. Arbitral tribunals are of limited jurisdiction and cannot adjudicate

95 World Commission on Environment and Development, *Our Common Future* (Brundtland Report) (Oxford: OUP 1987).

96 David Throsby, *Economics and Culture* (Cambridge: CUP 2001).

97 Ole Spiermann, ‘Applicable Law’, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: OUP 2008) 92.

98 *Grand River v. United States*, Award, para. 186. For comprehensive analyses of the role of Indigenous peoples in international economic law, see generally Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (Cambridge: CUP 2021) and John Burrows and Risa Schwartz, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge: CUP 2020).

99 Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment.

100 Id. Article 30(1).

101 USMCA Article 14.D.9.

102 ICSID Convention Article 42.

claims based on different treaty regimes. If they did so, their award would be beyond their legal power (*ultra vires*) and could be challenged under Article v of the New York Convention,<sup>103</sup> or, if the case were to be adjudicated at the ICSID, under Article 52(1)(c) of the ICSID Convention, since the tribunal had ‘manifestly exceeded its powers’.<sup>104</sup> In *Grand River*, the Arbitral Tribunal affirmed: ‘This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.’<sup>105</sup> To hold otherwise would indeed transform the NAFTA ‘into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under [NAFTA] Chapter 11’.<sup>106</sup>

If the jurisdictional mandate of an arbitral tribunal is clearly limited, why have treaty-makers inserted clauses referring to ‘applicable rules of international law’? Persuasively, eminent authors have argued that international law should always apply, as either national law is consistent with it, or if it is not, then international law supersedes national law.<sup>107</sup> When the constitution of the host state opts for monism granting primacy to public international law, the latter permeates the law applicable to the contract. Even in states that adopt the dualist theory and require international law to be ‘translated’ into domestic law, arbitrators apply norms of international law when they apply the national norms which convey them. As Professor Kreindler points out, ‘Thus, even where the parties have not agreed, directly or indirectly, to the application of international law “rules” or “principles”, international law may already be internally applicable as part of the domestic law chosen by the parties.’<sup>108</sup>

For instance, in *Maffezini v. Spain*, the choice of law clause in the Argentina–Spain BIT<sup>109</sup> expressly mentioned the applicability of the law of the host state.<sup>110</sup> In this case, an Argentine investor complained, *inter alia*, that the Spanish authorities had pressured the company to invest before the Environmental

<sup>103</sup> New York Convention Article v.

<sup>104</sup> ICSID Convention Article 52(1)(c).

<sup>105</sup> *Grand River v. United States*, Award, para. 71.

<sup>106</sup> *Id.* (internal reference omitted).

<sup>107</sup> See e.g. Pierre Marie Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’, in Pierre Marie Dupuy, Francesco Francioni, and Ernst Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 25.

<sup>108</sup> Richard Kreindler, ‘The Law Applicable to International Investment Disputes’, in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes* (The Hague: Kluwer Law International 2004) 413–14.

<sup>109</sup> Argentina–Spain BIT, 3 October 1991, in force 28 September 1992.

<sup>110</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 19.

Impact Assessment (EIA) process was finalized and before its implications were known. Therefore, according to the claimant, the Spanish authorities would have been responsible for the additional costs resulting from the EIA. The Arbitral Tribunal dismissed the claims concerning the EIA: ‘the environmental impact assessment procedure is basic for adequate protection of the environment and the application of appropriate environmental measures. This is true not only under Spanish ... Law but also increasingly so under international law.’<sup>111</sup>

If the host state that is party to the investment treaty dispute has ratified a relevant UNESCO Convention, the pertinent provisions of the given UNESCO Convention would become relevant. In the *Glamis Gold* case, the fact that the US is a party to the WHC was of relevance; the arbitrators took the WHC into account when considering the protection that the US afforded to Indigenous cultural heritage, citing Article 12 of the WHC. The Tribunal pointed out: ‘The Convention makes special note that the fact of a site’s non-inclusion on the register does not signify its failure to possess “outstanding universal value.”’<sup>112</sup> The Tribunal thus upheld the legitimacy of California’s regulation protecting Indigenous cultural heritage. The *Parkerings* Tribunal also referred to the WHC, to which Lithuania was a party, to establish whether there was any likeness between two competing projects.<sup>113</sup> The Tribunal considered that a world heritage site differed from other areas, because the former had outstanding and universal value while the latter did not. It thus concluded that the Municipality of Vilnius had legitimate reasons to prefer the Dutch project (that would build a parking area far from the Cathedral) to the Norwegian project (that would have built the parking area under the church) because the former prevented any damage to the world heritage site.

If the relevant treaty provision directs the arbitral tribunal to apply domestic law, some scholars have pointed out that a state could bring a counterclaim against an investor for breach of the domestic (cultural) law.<sup>114</sup> Investors’ obligations can arise out of domestic law.<sup>115</sup> Analogously, if a given investment treaty protects only investments made ‘in accordance with the laws’ of the

<sup>111</sup> Id. para. 67.

<sup>112</sup> *Glamis Gold v. United States*, Award, footnote 194.

<sup>113</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8, 11 September 2007, para. 392

<sup>114</sup> See Hege Elisabeth Veenstra-Kjos, ‘Counter-Claims by Host States in Investment Dispute Arbitration without Privity’, in Philippe Kahn and Thomas Waelde (eds), *New Aspects of International Investment Law* (Leiden: Martinus Nijhoff Publishers 2007) chapter 14.

<sup>115</sup> Yaraslau Kryvoi, ‘Counterclaims in Investor-State Arbitration’ (2012) 21 *Minnesota JIL* 216–252, 219.

host state, where the operation of an investment occurs in breach of the host state's cultural heritage laws, the host state could use this circumstance as a substantive defense.<sup>116</sup>

What seems clear is that arbitral tribunals require substantiation of cultural claims: the *Grand River* Tribunal affirmed that it was 'respectful of the cultural patterns that inform business relations among First Nation peoples' and did not question that 'the written or unwritten laws of Indigenous peoples could be the basis for establishing an enterprise for the purposes of NAFTA.'<sup>117</sup> However, it required evidence of this law: 'mere assertions of the existence of Seneca law and custom, just as mere assertions of other forms of law, are not enough.'<sup>118</sup> Similarly, when the Arbitral Tribunal examined whether a norm of customary law requires governmental authorities to consult Indigenous peoples on governmental policies significantly affecting them, it recalled the number of international law instruments mentioned by the claimants which feature such a norm.<sup>119</sup>

Another substantive point that deserves further investigation is the interplay between international economic law and peremptory norms of international law (*jus cogens*). One may legitimately wonder whether international economic courts can shy away and limit the focus of their analysis to economic matters only when peremptory norms of international law are relevant. In the infamous 1857 judgment, *Dred Scott v. Sandford*,<sup>120</sup> the US Supreme Court held that the Bill of Rights protected the right of slaveholders to their property, including slaves. The Court did not focus on the rights of the individuals affected by slavery, a crime against humanity. Far from responding to emerging societal needs of equality and freedom, on that occasion, not only did the Court miss an opportunity, but it also contributed to the unrest that eventually led to the 1860–1865 American Civil War. Analogously, by closing the doors to peremptory norms of international law or transnational public policy and focusing on economic matters only, international economic courts risk undermining the unity of international law and the cogency of human dignity, thus contributing to international conflicts.

116 Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: CUP 2012).

117 *Grand River v. United States*, Award, para. 103.

118 *Id.*

119 *Id.* para. 210.

120 *Dred Scott v. John Sandford*, 60 U.S. (19 How.) 393 (1857).

#### 2.4 *Transnational Public Policy*

Whereas public policy reflects the fundamental principles of a given society,<sup>121</sup> transnational public policy (or *ordre public international*) reflects the fundamental interests and values of the international community. Transnational public policy refers to those principles that receive an international consensus as to universal standards<sup>122</sup> and includes laws with a higher status than the ordinary rules of international law (*jus cogens*).<sup>123</sup> Rather than being an autonomous source of international law, transnational public policy expresses a type of norm of superior quality that can be endorsed in any of the typical sources of international law, be they customary, treaty, or general principles of law.

As to the content of transnational public policy, this is generally identified in the prohibition of apartheid, drug trafficking, corruption, slavery, piracy, and terrorism.<sup>124</sup> Arbitral tribunals have stressed that some caution is needed to 'check the objective existence of a particular transnational public policy rule' and have generally identified such norms by looking at international conventions, state practice, comparative law, and the jurisprudence of international courts and tribunals.<sup>125</sup>

While the relationship between *jus cogens* and transnational public policy remains to be fully explored, the two notions seem to overlap to a certain extent. According to some scholars, peremptory norms constitute the international public order: 'International *jus cogens* and international public policy are synonyms.'<sup>126</sup> Certainly, several international public policy norms have acquired *jus cogens* status and go beyond the traditional physics of international law. Not only are such norms 'of greater specific gravity than others',<sup>127</sup> but they seem to include a metaphysical component, the idea that they are so fundamental to the common good as to pre-exist and trump any contrary norm. Transnational public policy and peremptory norms insert a hierarchy

121 Martin Hunter and Guy Conde e Silva, 'Transnational Public Policy and Its Application in Investment Arbitrations' (2003) 4 *JWIT* 367–378.

122 Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?' (2004) *TDM* 1.

123 Pierre Lalive, 'Ordre Public Transnational (ou Réellement International) et Arbitrage International' (1986) *Revue de l'Arbitrage* 329–73.

124 Eric De Brabandere, 'The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration' (2020) 21 *JWIT* 847–866, 852.

125 *World Duty Free v. Republic of Kenya*, Award, para. 141.

126 Georg Schwarzenberger, 'International *Jus Cogens*?' (1964–1965) 43 *Texas LR* 455–478 at 455.

127 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413–442, 421.

in the sources of international law, prioritizing fundamental values and adopting a humanist conception of law according to which international law is at the service of human beings. Transnational public policy and *jus cogens* reflect the aspiration of the international community to ‘a greater unity’, overcoming ‘juxtaposed egoisms’ as well as political and economic differences in the pursuit of the common good.<sup>128</sup> By limiting economic freedoms, they safeguard the interests of all.<sup>129</sup> They protect human rights rather than state interests, thus limiting state autonomy.<sup>130</sup>

Within the WTO, peremptory norms are often dealt with informally: should a dispute arise, WTO Members can make use of the public morals exceptions (under GATT Article XX(a), or GATS Article XIV(a), respectively) or the security exception (under GATT Article XXI).<sup>131</sup> By contrast, older IIAs do not include such general exceptions. Only in the past decades have such GATT-style provisions become common in investment treaties.<sup>132</sup> However, this does not mean that transnational public policy has not been relevant in international investment law and arbitration. Moreover, exceptions could shrink, rather than expand, states’ discretion.<sup>133</sup>

This section investigates how transnational public policy can accommodate cultural concerns and thus constitute a tool for inserting cultural concerns in the operation of international investment law and arbitration. The discussion is also relevant for gradually expanding the concept of public morals, which WTO courts interpret as including elements of public order in the operation of international trade law.

Within international investment law and arbitration, transnational public policy always applies irrespective of whether a specific treaty provision mandates it or not. In fact, because transnational public policy aims at maintaining the integrity of the international legal order, it must always apply.<sup>134</sup> As noted by Douglas, ‘[t]he concept of international public policy vests a

128 Id. 422.

129 Harry Gould, ‘Categorical Obligation in International Law’ (2011) 3 *International Theory* 254–285 at 272 (internal reference omitted).

130 Michel Virally, ‘Réflexions sur le *Jus Cogens*’ (1966) 12 *Annuaire Français de Droit International* 5–29, at 10.

131 See sections 5.6 and 5.7 above.

132 Julian Arato, Kathleen Claussen, and J. Benton Heath, ‘The Perils of Pandemic Exceptionalism’ (2020) 114 *AJIL* 627–636, 631.

133 Céline Lévesque, ‘The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy’ in Roberto Echandi and Pierre Sauvé (eds) *Prospects in International Investment Law and Policy* (Cambridge: CUP 2013) 363–70, 366–7.

134 Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006) 492.

tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties.<sup>135</sup> If an arbitral tribunal finds a breach of international public policy, the claims will be inadmissible.<sup>136</sup> In fact, ‘no legal effect can be given to a transaction involving the transgression of a peremptory norm of international law.’<sup>137</sup> For instance, if an investment violated a *jus cogens* norm, such as a private military company committing genocide, or a business using slave labor, an arbitral tribunal would not have jurisdiction to hear a case dealing with such illegal investments.<sup>138</sup>

This section proceeds as follows. First, it highlights that some norms belonging to international cultural heritage law may present a peremptory character and thus are applicable in the context of cultural heritage-related international economic disputes as a matter of transnational public policy. Second, this section briefly examines how transnational public policy has operated in theory. Finally, the section concludes discussing how transnational public policy operates in practice.

#### 2.4.1 The Emergence of an *Ordre Public Culturel*

Some elements of international cultural heritage law have the character of *jus cogens* or may acquire it, because of the dynamic nature of *jus cogens*. In fact, new peremptory norms may arise and may modify the existing rules.<sup>139</sup> *Jus cogens* already includes self-determination, the prohibition of apartheid and discrimination, and core elements of cultural rights. Because *jus cogens* is dynamic, it can expand to include the prohibition of cultural genocide. In any event, peremptory norms relating to the protection of human rights and cultural heritage already constitute part of transnational public policy and form a distinct *ordre public culturel*.

The systematic violation of Indigenous Peoples’ cultural identity and their right to determine their economic, social, and cultural development can violate their right to self-determination<sup>140</sup> and ultimately lead to the cultural genocide

135 Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29 *ICSID Review* 155–186, at 180.

136 *Id.* 181.

137 *Id.*

138 *Id.*

139 VCLT Articles 64 and 53.

140 International Covenant on Civil and Political Rights, 16 December 1966, 6 ILM 368, 999 UNTS 171, Article 1.1; International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, 6 ILM 360, 993 UNTS 3, Article 1.1.

of an Indigenous group. Far from being marginal, cultural identity constitutes the essence of Indigenous Peoples. While cultural entitlements and the right to self-determination are conceptually different, they are mutually supportive, as Indigenous peoples may pursue alternative forms of development according to their worldview.<sup>141</sup>

Respect for the principle of self-determination 'is one of the purposes of the United Nations' and 'one of the basic principles of international law'<sup>142</sup> This principle is also commonly regarded as an *erga omnes* obligation,<sup>143</sup> if not a 'peremptory norm of general international law'.<sup>144</sup> As is known, the right to self-determination certainly belongs to customary international law, but it is also part and parcel of positive law as Articles 1 of the ICCPR and the ICESCR reaffirm the right to self-determination. Both provisions clarify that international economic cooperation is 'based upon the principle of mutual benefit ... and international law' and that 'in no case may a people be deprived of its own means of subsistence'.<sup>145</sup> While some countries were reluctant to recognize the right of Indigenous peoples to self-determination because they feared that such recognition could affect state sovereignty, in the end, the UNDRIP has recognized that Indigenous peoples have the right to self-determination.<sup>146</sup> This provision is generally interpreted as recognizing internal self-determination, that is, the right of Indigenous peoples to make meaningful choices in matters of concern to them, and to enjoy some autonomy within the existing state.<sup>147</sup> If one considers self-determination to be a norm of *jus cogens*, the fact that Indigenous peoples exercise internal self-determination does not make it a lesser right. In this regard, UNDRIP requires states to consult and cooperate in good faith with Indigenous peoples

141 Ana Filipa Vrdoljak, 'Self-Determination and Cultural Rights', in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers 2008) 53.

142 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, paras 146 and 155.

143 See e.g. *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, 1995 ICJ Reports 90, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras 155–8.

144 Orakhelashvili, *Peremptory Norms in International Law*, 51 (noting that '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance'); Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: OUP 2008) 511, 582.

145 ICCPR Article 1.2; ICESCR Article 1.2.

146 UNDRIP Article 3.

147 James Summers, *Peoples and International Law* (Leiden: Brill/Nijhoff 2013) 497.

to obtain their free, prior, and informed consent before adopting measures that may affect them. The right of Indigenous peoples to be consulted can be conceptualized as an expression of the right to self-determination and as a norm of international public policy.<sup>148</sup> The principle of self-determination requires Indigenous peoples to be ‘in control of their own destinies’.<sup>149</sup>

If arbitral tribunals failed to consider customary law norms of *jus cogens* status protecting the inherent rights of Indigenous Peoples, this would not depose favorably on the quality and overall viability of such jurisprudence. From a post-colonial perspective, the absence of concern for Indigenous peoples’ right to self-determination would risk replicating colonial patterns of dispossession. More fundamentally, such jurisprudence would be at odds with emerging jurisprudence of regional human rights courts and the quasi-jurisprudence of UN human rights treaty bodies.

Over the past thirty years, there has been a robust development of jurisprudence regarding the cultural, land, and resource rights of Indigenous peoples under international law.<sup>150</sup> Such jurisprudence generally emphasizes Indigenous peoples’ unique and enduring relationship to their land.<sup>151</sup> For Indigenous peoples, ‘the ability to reside communally on their lands ... is inextricably tied to the preservation of communal identity, culture, religion, and traditional modes of subsistence.’<sup>152</sup> As the Inter-American Court of Human Rights explained, not only does land constitute the principal means of subsistence for Indigenous peoples, but it also shapes their cultural identity:<sup>153</sup> the close ties of Indigenous peoples to the land ‘must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.’<sup>154</sup>

148 Jean-Michel Marcoux, ‘Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration’ (2020) 21 *JWIT* 809–846, 809.

149 James Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Postdeclaration Era’ in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs 2009) 184–199, 187.

150 Lillian Aponte Miranda, ‘The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-based Development’ (2012) 45 *Vanderbilt Journal of Transnational Law* 785–840, 813.

151 *Id.* 825.

152 *Id.* 814.

153 IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005, para. 135, IACtHR (ser. C) No. 125.

154 IACtHR, *Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment, 21 August 2001, para. 149, IACtHR (ser. C.) No. 79.

The jurisprudence of arbitral tribunals is gradually conforming to these broader trends. For instance, In *Bear Creek Mining Corporation v. Peru*, in his Partial Dissenting Opinion, Arbitrator Philippe Sands highlighted ‘the distinctive contributions of Indigenous peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding.’<sup>155</sup> Significantly, in *Álvarez y Marín Corporación v. Panamá*, the Arbitral Tribunal declined jurisdiction because the investors had not complied with the domestic law of the host state to safeguard Indigenous peoples’ rights.<sup>156</sup> Although the Tribunal did not refer to *jus cogens*, it noted that the Law establishing the Comarca and the Panamian Constitution aimed at protecting Indigenous Peoples’ cultural, economic, and social well-being.<sup>157</sup> It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of Indigenous peoples.<sup>158</sup>

The prohibition of racial discrimination constitutes a norm of *jus cogens*. For instance, GATT Article III requires that municipal regulation affecting trade must not discriminate across domestic and imported like products. Can a WTO member prohibit the sale of racist papers under international trade law? The best view would require considering racist and non-racist papers as different products; accordingly, any regulation distinguishing the two products would necessarily be in full conformity with GATT Article III. But even if consumers considered racist and non-racist papers to be like products, and thus regulation distinguishing such products resulted in a violation of GATT Article III, the WTO member ‘might, if challenged, invoke *jus cogens* under GATT Article XX.’<sup>159</sup> In parallel, an Arbitral Tribunal held that the domestic law of an Arab country that discriminated against and boycotted companies with business in Israel was contrary to international public policy. According to the Tribunal, such law implicated religious and racial discrimination and thus was inapplicable to the dispute on transnational public policy grounds.<sup>160</sup>

155 *Bear Creek Mining Corp. v Peru*, Partial Dissenting Opinion, 12 September 2017, para. 7 (internal references omitted).

156 *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios AP SA, Stichting Administratiekantoor Anbadi c. República de Panamá*, ICSID ARB/15/14, laudo, 12 October 2018.

157 *Id.* paras 318–319.

158 *Id.* para. 327 (*‘Las tierras comunales son consideradas elemento fundamental para la supervivencia y perpetuación de la identidad étnica de los pueblos indígenas.’*)

159 Mavroidis, ‘No Outsourcing of Law?’, 426.

160 Mostefa Trari-Tani, ‘L’Ordre Public Transnational Devant l’Arbitre International’ (2011) 25 *Arab Law Quarterly* 89–102, 96.

Some core elements of cultural rights may have achieved peremptory character. According to Simma and Kill, ‘norms relating to economic, social, and cultural rights could also constitute rules applicable in the relations among States, even if there [was] no independent treaty obligation running between the States in question ... [T]he fact that the Vienna Convention’s preamble proclaims the state parties’ universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale toward a broader conception of applicability.’<sup>161</sup> In *Bear Creek Mining Corporation v. Peru*, in his Partial Dissenting Opinion, Arbitrator Philippe Sands pointed out that ‘human rights ... are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.’<sup>162</sup>

Some advocates of Indigenous Peoples’ rights are increasingly conceptualizing the violations of such rights as ‘cultural genocide.’<sup>163</sup> However, although cultural genocide has been a persistent international legal issue, international law remains impervious to the same.<sup>164</sup> International law does not formally recognize the concept of cultural genocide, even though international lawyers have coined the term and investigated it for decades. Defined as ‘the purposeful weakening and ultimate destruction of cultural values and practices of feared out groups’,<sup>165</sup> the idea of ‘cultural genocide’ was famously elaborated by the Polish lawyer Raphael Lemkin (1900–1959) in the aftermath of WWI. Because ‘what makes up a group’s identity is its culture’, Lemkin believed that ‘the essence of genocide was cultural.’<sup>166</sup> His unpublished works examined the linkage between colonialism and genocide.<sup>167</sup> Some authors have looked

161 Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’, in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: OUP 2009) 702.

162 Id. (quoting *Urbaser S.A. v. Argentine Republic*, Award, ICSID ARB/07/26, 8 December 2016, para. 1199).

163 For discussion, see Lindsey Kingston, ‘The Destruction of Identity: Cultural Genocide and Indigenous Peoples’ (2015) 14 *Journal of Human Rights* 63–83.

164 Elisa Novic, *The Concept of Cultural Genocide—An International Law Perspective* (Oxford: OUP 2016) 9–10.

165 Lawrence Davidson, *Cultural Genocide* (New Brunswick, NJ: Rutgers University Press 2012) 18–9.

166 Leora Bilsky and Rachel Klagsbrun, ‘The Return of Cultural Genocide?’ (2018) 29 *EJIL* 373–396.

167 John Docker, ‘Are Settler-Colonies Inherently Genocidal?’ in Dirk Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York: Berghahn Books 2008) 81, 90–91, and 94.

at ‘cultural genocide as a potential precursor to physical genocide’;<sup>168</sup> others have considered it as ‘wanton acts of cultural annihilation in the wake of, even independently from, genocide’.<sup>169</sup>

Nonetheless, the concept of cultural genocide was not included in the Genocide Convention, which limits its definition of genocide to violence committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>170</sup> In the *Genocide* case,<sup>171</sup> Bosnia and Herzegovina alleged, *inter alia*, that the Serbian forces’ attempt ‘to eradicate all traces of the culture of the protected group through the destruction of historical, religious, and cultural property’ amounted to a form of genocide under the Genocide Convention.<sup>172</sup> The Court considered that there was ‘conclusive evidence of the deliberate destruction of the cultural and religious heritage of the protected group’.<sup>173</sup> However, in the Court’s view, the destruction of cultural heritage ‘d[id] not fall within the categories of acts of genocide set out in Article II of the [Genocide] Convention’.<sup>174</sup>

Reportedly, the inclusion of cultural genocide as part of the Genocide Convention was contested by States fearing prosecution for their treatment of minorities and Indigenous peoples.<sup>175</sup> Although Indigenous peoples can be comprehended under the definition of ‘national, ethnical, racial or religious groups’ that must be protected against genocide, the Genocide Convention is inapplicable whenever the intention to physically destroy the group is lacking.<sup>176</sup> Analogously, a draft provision on cultural genocide was debated during the *travaux préparatoires* of the UNDRIP, but ultimately not included in its text.<sup>177</sup> Nonetheless, the UNDRIP substantially prohibits such genocide, recognizing that

168 See Robert van Krieken, ‘Cultural Genocide Reconsidered’ (2008) 12 *Australian Indigenous LR* 76–82, 77.

169 Daniele Conversi, ‘Genocide, Ethnic Cleansing, and Nationalism’, in Gerard Delanty and Krishan Kumar (eds), *The Sage Handbook of Nations and Nationalism* (London: Sage Publications 2006) 326.

170 Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, in force 12 January 1951, 78 UNTS 277, Article 2.

171 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, para. 161.

172 *Id.* para. 320.

173 *Id.* para. 344.

174 *Id.*

175 Antonietta Di Blase and Valentina Vadi, ‘Introducing the Inherent Rights of Indigenous Peoples’, in Antonietta Di Blase and Valentina Vadi (eds), *The Inherent Rights of Indigenous Peoples in International Law* (Rome: University of Rome III 2020) 15–39, 22.

176 *Id.*

177 Novic, *The Concept of Cultural Genocide*, 9–10.

'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.'<sup>178</sup>

Finally, the prevention of illicit trafficking of cultural property is linked to the prevention of terrorism and the maintenance of international peace and security. The prohibition of terrorism and piracy are classic examples of *jus cogens* and grounds of transnational public policy. Even before the UN Security Council adopted specific resolutions linking the safeguarding of cultural heritage to the maintenance of peace and security, domestic courts have highlighted the existence of *ordre publique culturelle* relating to the prevention of illicit trafficking of antiquities and the restitution of cultural property to the state of origin.<sup>179</sup> In fact, the existence of such *ordre public culturel* has been established by referring to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, even before its ratification by the relevant parties. The municipal courts thus considered that this international Convention contained 'general principles capable of nourishing the international public order of States which had not ratified [it]'.<sup>180</sup>

For instance, the Swiss Supreme Court recognized the existence of international public order in the field of cultural property in cases concerning the restitution of cultural goods.<sup>181</sup> The regulatory framework protecting such goods against looting is deemed to express the international public order: 'When, as in this case, the request relates to the return of cultural property, the ... judge must be careful to take into account the interest of the international community ... tied to the protection of cultural property. These standards, which derive from a common inspiration, constitute ... the expression of an international public order in force or in formation ... these norms ... concretize the imperative of an effective international fight against trafficking in cultural property.'<sup>182</sup>

178 UNDRIP Article 8(1).

179 Vittorio Mainetti, 'Le Principe du Patrimoine Culturel de l'Humanité: de la République des Arts à un Ordre Public International', in Alberico Gentili: *La Salvaguardia dei Beni Culturali nel Diritto Internazionale: Atti del Convegno Dodicesima Giornata Gentiliana* (Milano: Giuffrè 2008) 581–601.

180 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series (Kluwer Law International 1987) 258–318, para. 34.

181 Lalive, 'Réflexions sur un Ordre Public Culturel', 155.

182 Bundesgericht (Federal Supreme Court) 1 April 1997, 123 Arrêts du Tribunal Fédéral Suisse (ATF) II 134 (Switz.) (holding that '*Lorsque, comme l'espèce, la demande porte sur la restitution d'un bien culturel, le juge de l'entraide doit veiller à prendre en compte l'intérêt public international ... lié à la protection de ces biens. Ces normes, qui relèvent d'une commune inspiration, constituent autant d'expressions d'un ordre public international en vigueur ou*

Courts have considered contracts violating foreign regulations prohibiting the export of national treasures to be null and void.<sup>183</sup> For instance, the German Supreme Court (*Bundesgerichtshof*) recognized that an insurance contract subject to German law was null and void because it related to the illegal export of cultural goods from Nigeria.<sup>184</sup> The court considered that this contract ran against public morals (*bonos mores*) or international public policy. In *Soleimany v. Soleimany*, a Court of Appeal in the UK ultimately refused the enforcement of an award relating to smuggled goods on public policy grounds.<sup>185</sup>

#### 2.4.2 Transnational Public Policy in Theory

Arbitrators are bound to apply relevant peremptory norms of international law whether or not they are pleaded by the parties. The question is not whether to add new claims to those articulated by the parties but to apply the law.<sup>186</sup> The applicable law and the principle of not deciding issues beyond the parties' claims (*nec ultra petita*) are two different issues. The applicable law concerns the body of law that applies to the dispute. The principle of *nec ultra petita* concerns the claims raised by the parties but does not lessen the importance of mandatory rules applicable to the dispute. As Jan Paulsson puts it, 'a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two'.<sup>187</sup> As the Permanent Court of International Justice once held, an international tribunal is 'deemed itself to know what [international law] is'.<sup>188</sup> Such an approach does not amount to arbitral law-making, but recognizes that arbitrations do not occur in a *vacuum*. Rather, they contribute to the development of international law and must conform to its basic rules.

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*en formation ... ces normes ... concrétisent l'impératif d'une lutte internationale efficace contre le trafic de biens culturels.'*)

183 Marc-André Renold, 'An Important Swiss Decision Relating to the International Transfer of Cultural Goods: The Swiss Supreme Court's Decision on the Giant Antique Mogul Gold Coins' (2006) 13 *International Journal of Cultural Property* 361–369, 365.

184 *Id.* 368.

185 *Soleimany v. Soleimany* [1999] QB 785 (CA).

186 Giuditta Cordero Moss, 'Is the Arbitral Tribunal Bound by the Parties' Factual and Legal Pleadings?' (2006) 3 *Stockholm Int'l Arb. Rev.* 1–25, 12.

187 Jan Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', *ICCA Congress Series* (The Hague: Kluwer Law 2006) 888–889.

188 PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (France v. Brazil), Judgment, 12 July 1929, 1929 PCIJ (ser. A) No. 21, p. 124.

In the *Methanex* case,<sup>189</sup> the Arbitral Tribunal asserted that ‘as a matter of international constitutional law, a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to the parties’ choice of law that is inconsistent with such principles.’<sup>190</sup>

In fact, transnational public policy imposes *positive* duties on arbitrators: ‘[a]ny tribunal owes an obligation to the international community to apply international public policy’ and ‘the faithful application of public order would acquit a tribunal of its obligations to the parties to apply the law chosen by them through compromise or otherwise, but nothing can acquit a tribunal of its mandate to apply public policy.’<sup>191</sup> In other words, arbitrators ‘have the right – and even the obligation – to themselves raise the issue of whether disputed contracts or legal provisions before them satisfy the requirements of international public policy.’<sup>192</sup> Kreindler also highlights the fact that ‘[t]he arbitrator[s] need not apply the agreed or determined governing law if doing so would cause [them] to violate international public policy.’<sup>193</sup>

Human rights norms could be conceptualized as ‘part of transnational public policy’: ‘[t]o the extent that human rights protection constitutes a core part of international or national public policy, human rights aspects must be considered by the tribunal.’<sup>194</sup> Arbitrators can raise ‘an issue of blatant violation of fundamental human rights deemed to be incompatible with transnational public policy.’<sup>195</sup> International public policy is a flexible and dynamic concept that could be used as a corrective mechanism or as a tool to balance complex and often conflicting goals.

Traditionally, public policy has played a *negative* role by preventing the recognition of arbitral awards that breached it.<sup>196</sup> Arbitral tribunals must render

189 *Methanex v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, ch. C, para. 24.

190 *Id.*, Part IV, ch. C, para. 24.

191 Orakhelashvili, *Peremptory Norms in International Law*, 493.

192 Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldmann on International Commercial Arbitration* (The Hague: Kluwer Law International 1999) 861.

193 Richard Kreindler, ‘Approaches to the Application of Transnational Public Policy by Arbitrators’ (2003) 4 *JWIT* 239–250, at 244.

194 Julian Lew, Loukas Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International 2003) 93–4.

195 Pierre-Marie Dupuy, ‘Unification rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in Ernst-Ulrich Petersmann, Francesco Francioni, and Pierre-Marie Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 60.

196 Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (The Hague: Kluwer Law International 2001) 504.

an enforceable award.<sup>197</sup> Such obligation encourages arbitral tribunals to consider transnational public policy.<sup>198</sup> In particular, if an arbitral award contravened public policy, national courts could deny the enforcement of such an award. In this context, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>199</sup> expressly provides for a limited judicial review on the merits of an award for public policy reasons.<sup>200</sup>

With regard to investment arbitration, ICSID awards are truly delocalized. Indeed, the ICSID Convention excludes any attack on the award in the national courts, and ICSID awards are final and self-executing.<sup>201</sup> However, this does not mean that arbitrators should not respect international public policy. The arbitral tribunal must observe international law under Article 42 of the ICSID Convention.<sup>202</sup> Giardina rightly points out that the fact that ICSID awards are recognized and enforced as binding on all states that are parties to the relevant agreements requires their necessary compliance with international law. Thus, respect for public international law and international public policy would be an implicit prerequisite of ICSID awards.<sup>203</sup> If an ICSID award were contrary to preemptory norms of public international law, the national court would be obliged not to execute it because of its non-compliance with the transnational public order. If a contracting state failed to abide by and comply with the award rendered, the state of the foreign investor could decide to bring an international claim on behalf of the investor before the ICJ. However, diplomatic protection would be an unlikely discretionary move on the side of the home state. Therefore, this possibility does not constitute a strong disincentive to refuse execution due to international public order concerns. In general, to avoid subsequent challenges in terms of annulment proceedings and non-enforcement of arbitral awards,

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197 See, for instance Article 42 of the 2021 International Chamber of Commerce (ICC) Arbitration Rules: ‘the Arbitral Tribunal shall act in the spirit of the rules and shall make every effort to make sure that the Award is enforceable at law.’

198 Andrea Menaker, ‘The Determinative Impact of Fraud and Corruption on Investment Arbitrations’ (2010) 25 *ICSID Review* 67–75, at 72.

199 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, in force 7 June 1959, 330 UNTS 38.

200 New York Convention, Article V.2.

201 ICSID Convention Article 54(1) (requiring Contracting States to enforce an ICSID award ‘as if it were a final judgment of a court in that State’).

202 *Id.*

203 Andrea Giardina, ‘International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse’ (2007) 5 *Law and Practice of International Courts Tribunals* 29–39.

arbitrators should take international public policy into account in the course of the arbitral proceedings.

#### 2.4.3 Transnational Public Policy in Practice

International courts and tribunals have adopted a restrictive approach to the interpretation and application of transnational public policy and *jus cogens* to avoid their political misuse. The revolutionary nature of *jus cogens* has been 'domesticated' by voluntarist views according to which international law is based on the consent of states. While the conceptual vocabulary of *jus cogens* has found its way into international law, the judicial practice remains dominated by voluntarism, especially when state prerogatives are at stake.<sup>204</sup>

Arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as arbitral tribunals have limited jurisdiction.<sup>205</sup> Analogously, when such *jus cogens* arguments have been raised by third parties, mainly non-governmental organizations (NGOs) intervening in the arbitral proceedings as *amici curiae*, arbitral tribunals have tended to dismiss such arguments as irrelevant.<sup>206</sup> The mere reference by the host states to *jus cogens* has not been enough to lead arbitral tribunals to accept such arguments. In fact, some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely alluded to the *jus cogens* arguments as advanced by the host state incidentally without deeming it necessary to take a stance on the matter.

In several arbitrations brought against Argentina in the aftermath of its financial crisis, the host state raised human rights and *jus cogens*-related arguments to justify the measures adopted to cope with the crisis. In a nutshell, the state argued that it had some duties of status higher than economic duties. For instance, in *EDF v. Argentina*,<sup>207</sup> the respondent argued that the measures adopted to cope with its financial crisis were justified by human rights concerns.<sup>208</sup> In particular, Argentina argued that fundamental human rights

<sup>204</sup> Valentina Vadi, 'Jus Cogens in International Investment Law and Arbitration' (2015) 46 *Netherlands Yearbook of International Law* 357–388, 381.

<sup>205</sup> *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

<sup>206</sup> Valentina Vadi, 'Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage' (2015) 18 *JIEL* 51–77.

<sup>207</sup> *EDF International, SAUR international, and Léon Participaciones Argentinas v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012.

<sup>208</sup> Id. para. 192 (quoting the Respondent's Rejoinder: 'it was necessary to enact the Emergency Tariff measures in order to guarantee the free enjoyment of certain basic human rights such as, *inter alia*, the right to life, health, personal integrity, education, the rights

should prevail over other treaty obligations because of their peremptory character.<sup>209</sup> While the Tribunal did not contest the existence of human rights and peremptory norms, it questioned the relevance of the contested state measures for their enjoyment.<sup>210</sup> The Tribunal held that Argentina had not demonstrated that it ‘was not able to comply with the relevant treaty provision.’<sup>211</sup> In *Suez v. Argentina*, the Tribunal rejected the argument that ‘Argentina’s human rights obligations to assure its population the right to water somehow trump[ed] its obligations under the BITS ... Argentina [was] subject to both international obligations, *i.e.* human rights and [investment] treaty obligations, and [should] respect both of them equally.’<sup>212</sup>

In some cases, the arbitral tribunals did not substantively address *jus cogens* arguments, finding that they had not been fully argued. For instance, in *Azurix v. Argentina*, an ICSID case concerning water and sewage systems, Argentina raised the issue of the compatibility of the BIT with human rights treaties. It argued that ‘a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers’ public interest must prevail over the private interest of service providers.’<sup>213</sup> The Tribunal dismissed this argument, finding that it had not been fully argued.<sup>214</sup> In *Siemens v. Argentina*, Argentina claimed that given its financial crisis, the full protection of the property rights of investors would jeopardize its compliance with human rights obligations.<sup>215</sup> The Tribunal, however, held that the argument had not been developed and that ‘without the benefit of further elaboration and substantiation by the parties, it [wa]s not an argument that, *prima facie*, b[ore] any relationship to the merits of this case.’<sup>216</sup> Analogously, in *CMS Gas v. Argentina*, despite Argentina’s arguments that given the country’s economic and social crisis, the performance of specific investment treaty obligations violate constitutionally recognized rights,<sup>217</sup> the Arbitral

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of children and political rights which were directly threatened by the socio-economic institutional collapse suffered by the Argentine Republic.’)

209 Id. para. 193 (arguing that ‘the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to *jus cogens*.’)

210 Id. paras 909–911.

211 Id. paras 912–914.

212 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 262.

213 *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 254.

214 Id. para. 261.

215 *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 75.

216 Id. para. 79.

217 Id. para. 114.

Tribunal held that ‘there [wa]s no question of affecting fundamental human rights.’<sup>218</sup>

As Reiner and Schreuer point out, ‘[t]hese awards seem to indicate the tribunals’ reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves.’<sup>219</sup> Admittedly, some of these arbitrations involved human rights, the peremptory character of which is uncertain. In some arbitrations, the host states have preferred to refer only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful in invoking *jus cogens* as the same arguments could be used against them in other contexts.

Nonetheless, one may wonder whether such an approach is overly restrictive. In fact, human rights treaties recognize ‘a set of core rights from which no derogation is permitted not even during times of public emergency.’<sup>220</sup> For example, according to the Committee on Economic, Social, and Cultural Rights, if a state did not provide its population with essential food, primary healthcare, and the most basic forms of education, it would breach its obligations under the ICESCR. As Verdross argued almost a century ago, ‘a state cannot be bound to close its schools, universities or courts, to abolish its police or to reduce its public services in such a way as to expose the population to the dangers of disorder and anarchy, in order to obtain the necessary funds for the satisfaction of foreign creditors.’<sup>221</sup>

Other tribunals have adopted a more sensitive approach to human rights issues. For instance, in *Sempra v. Argentina*, the Tribunal acknowledged that the dispute ‘raise[d] the complex relationship between investment treaties, emergency, and the human rights of both citizens and property owners.’<sup>222</sup> Regardless, it found that ‘the real issue in the instant case [wa]s whether the

218 *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 121.

219 Clara Reiner and Christoph Schreuer, ‘Human Rights and International Investment Arbitration’, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersman (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 82–96, 90.

220 Theo Van Boven, ‘Categories of Rights’, in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP 2018) 135–147, 142.

221 Alfred Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 AJIL 571–577, at 575.

222 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 332.

constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation.<sup>223</sup> It concluded that ‘the constitutional order was not on the verge of collapse’ and that ‘legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.’<sup>224</sup> Analogously, in *Continental Casualty v. Argentine Republic*, concerning an insurance business,<sup>225</sup> the Arbitral Tribunal considered that the Government’s efforts struck an appropriate balance between the protection of investor’s rights and the responsibility of the government toward the country’s population: ‘it is self-evident that not every sacrifice can properly be imposed on a country’s people in order to safeguard a certain policy that would ensure full respect toward international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much.’<sup>226</sup>

On the other hand, in several cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, the operation of *jus cogens*, in its peculiar interaction with, and articulation as, international public order, can legitimize investor-state arbitration. It can ensure that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicate how to shape or reform future practice to foster responsible and lawful investments. Adjudicators are in the best position to fulfill the promise of *jus cogens*, interpreting and applying the various formal sources of international law embodying peremptory norms.<sup>227</sup>

Public policy has been forcefully asserted in a series of international arbitrations. For example, in the 1875 *Maria Luz* arbitration, the Czar of Russia, sitting as the sole arbitrator, drew upon public policy in declaring that Japan ‘had not breached the general rules of the Law of the Nations’ in freeing the slaves carried on the Peruvian vessel *Maria Luz* and denying the subsequent demands for indemnity of the Peruvian citizens.<sup>228</sup> In an ICC arbitration,

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223 Id.

224 Id.

225 *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 192.

226 Id. para. 227.

227 Antonio Cassese, ‘For an Enhanced Role of *Jus Cogens*’, in Antonio Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford: OUP 2012) 158–171, 166.

228 *Maria Luz* Arbitration, award rendered by the Czar of Russia, 17–19 March 1875.

Mr. Lagergreen, acting as a sole arbitrator, stated that ‘it cannot be contested that there exists a general principle of law recognized by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.’<sup>229</sup>

Similarly, in *World Duty Free Company Limited v. The Republic of Kenya*,<sup>230</sup> the ICSID Tribunal referred to international public policy and did not allow claims based on bribes or on contracts obtained by corruption.<sup>231</sup> The Tribunal stated that ‘in light of domestic laws and international conventions relating to corruption, and in light of decisions taken in the matter by courts and international tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all states. Thus, claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.’<sup>232</sup> According to the Tribunal, transnational public policy protects the public.<sup>233</sup> In *Inceysa v. El Salvador*, the Tribunal concluded that it did not have jurisdiction over the claim brought before it by the investor, as the respondent had not consented to the protection of investments procured by fraud, forgery, or corruption.<sup>234</sup> In *Plama v. Bulgaria*, after finding the claimant in violation of Bulgarian and international law, the Tribunal did not grant the investor the substantive protection under the Energy Charter Treaty.<sup>235</sup> In *Phoenix Action Ltd v. the Czech Republic*, an ICSID Tribunal held that ‘nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights.’<sup>236</sup>

## 2.5 *Treaty Interpretation*

International economic law is a creature of international law to be construed in accordance with international law, the system to which it belongs. Because international economic law constitutes an important field of international law, as such, it should not frustrate the aims and objectives of the latter, which

229 ICC, International Court of Arbitration, Case No. 1110 of 1963, Y.B. Comm. Arb. 47, 61.

230 *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

231 Id. para. 157.

232 Id.

233 Id. para. 181.

234 *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 263–4.

235 *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

236 *Phoenix Action Ltd v. Czech Republic*, Case No. ARB/06/5, Award, 15 April 2009, para. 78.

include the protection of cultural heritage. As a matter of treaty interpretation, Article 3.2 of the DSU<sup>237</sup> enables panels and the AB to interpret WTO treaties in accordance with customary rules of treaty interpretation. WTO courts have interpreted this provision to be an implicit reference to Articles 31, 32, and 33 of the VCLT.<sup>238</sup> Analogous provisions appear in the text of several investment treaties, and contemporary arbitral jurisprudence is replete with references to Articles 31–33 of the VCLT.<sup>239</sup> These rules of interpretation guide parties and adjudicators to interpret the text of treaties, can contribute to the defragmentation of international law, and promote a holistic approach to the interpretation of conflicting provisions.<sup>240</sup>

Under the general rule of interpretation, as codified by Article 31 of the VCLT, ‘a Treaty shall be interpreted in good faith.’ The same Article provides that the intentions of the parties are revealed through the ordinary meaning of the terms of the treaty, in their context, and in light of the object and purpose of the treaty.<sup>241</sup> Article 32 of the VCLT provides that ‘recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’ Article 33 of the VCLT deals with the interpretation of treaties authenticated in two or more languages and may be useful when interpreting

237 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994).

238 *United States—Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, adopted 20 May 1996, WT/DS2/9, p. 17 (holding that the fundamental rule of treaty interpretation set out in Article 31(1) of the VCLT ‘has attained the status of a rule of customary or general international law’); *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 4 October 1996 (holding that Article 32 of the VCLT, dealing with supplementary means of interpretation, ‘has also attained the same status.’)

239 Vienna Convention on the Law of Treaties, adopted 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

240 See generally Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 ICLQ 361–401, 369 (explaining the key relevance of this provision for defragmenting international law); Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011); Trinh Hai Yen, *The Interpretation of Investment Treaties* (Leiden: Brill 2014) 55–61.

241 Article 31(1) VCLT.

investment treaties, which are generally written in the languages of the contracting parties.

Although Article 31 of the VCLT uses mandatory terms, it does not clarify how much weight should be given to each of its elements.<sup>242</sup> All of the relevant approaches – textual, contextual, purposive, or teleological – are not set in a hierarchical order; rather, they need to be balanced in a single combined interpretative process.<sup>243</sup> As a WTO panel put it, ‘for pragmatic reasons, the normal usage ... is to start the interpretation from the ordinary meaning of the raw text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty’s object and purpose. However, ... text, context, and object-and-purpose ... are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.’<sup>244</sup> Therefore, the use of the customary norms of treaty interpretation as restated by the VCLT does not lead to any univocal results or ‘irrebuttable interpretation’<sup>245</sup>; rather, it leaves the interpreter with ‘considerable flexibility’,<sup>246</sup> providing ‘principles of logic and order which both constrain and empower the interpreter’.<sup>247</sup>

Reference to other international law is possible even for interpreting the text of a specific provision. For example, the WTO AB used a multilateral environmental agreement (MEA) to maintain that sea turtles are an exhaustible natural resource. It did not apply the MEA provision; rather, it interpreted the text of Article XX(g) of the GATT, using the MEA as an interpretative tool. This approach enables international economic courts to construe international economic law ‘in harmony with other rules of international law of which [it] form[s] ... part, including those relating to human rights.’<sup>248</sup>

The purposive or teleological interpretation of treaties is based on the analysis of their object and purpose, which are usually included in their preambles.<sup>249</sup> Although preambles are not binding, they must be considered

242 Michael Waibel, ‘Demystifying the Art of Interpretation’ (2011) 22 EJIL 571–588, 574.

243 Panel Report, *US—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para.7.22.

244 *Id.* Compare with ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, p. 29, para. 64.

245 Richard Gardiner, *Treaty Interpretation* (Oxford: OUP 2008) 9.

246 Waibel, ‘Demystifying the Art of Interpretation’, 575.

247 Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: OUP 2009) 38.

248 *Urbaser v. Argentina*, Award, ICSID Case No. ARB/07/26, 8 December 2016, para. 1200.

249 ICJ, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2019 (I), p. 28, para. 57, and p. 38, para. 91; ICJ, *Whaling in the Antarctic (Australia v. Japan)*, Judgment, ICJ Reports 2014, p. 251, para. 56;

by adjudicators as they form part of the context of the agreement.<sup>250</sup> They can contribute to clarifying the aim and objectives of a treaty, playing an important role in the teleological interpretation of the same.

Certainly, if the preamble of a given treaty refers to sustainable development, which encapsulates a cultural dimension as seen in Chapter 1, it will be possible for international economic courts to take cultural concerns into account. The preamble of the Agreement establishing the WTO refers to the goal of raising standards of living and promoting sustainable development.<sup>251</sup> In parallel, the preamble of the TRIPS Agreement recognizes ‘the underlying public policy objectives of national systems for the protection of IP, including developmental and technological objectives.’<sup>252</sup> While most BIT preambles are unidimensional, emphasizing the need to foster FDI and promote economic development, several more recent preambles state that investment promotion must be consistent with certain policy goals, including public health, safety, and sustainable development.<sup>253</sup>

Even where the preamble makes no reference to sustainable development, scholars caution against interpreting the purpose of bilateral investment treaties as merely promoting foreign direct investments.<sup>254</sup> One-sided approaches risk politicizing investment disputes ‘and, in the long-run, losing support among states parties.’<sup>255</sup> As Berman pinpoints, ‘it would surely be wrong to take too narrow a view of “object and purpose”, for example, by claiming that the object and purpose of investment treaties is to protect the investor ... Deducing the object and purpose is specific to the particular treaty under discussion, and does not admit general postulates.’<sup>256</sup> As the *Amco* Tribunal held, ‘the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour,

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*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012 (II), p. 449, para. 68.

250 Article 31.2 VCLT.

251 Agreement Establishing the World Trade Organization, adopted 15 April 1994, entered into force 1 January 1995, 33 ILM 1144 (WTO Agreement), preamble.

252 Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement Establishing the World Trade Organization, Annex 1C, adopted 15 April 1994, entered into force 1 January 1995, 1869 UNTS 299, preamble.

253 Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties* (Aalphen aan den Rijn: Wolters Kluwer 2009) 123.

254 Michael Waibel, ‘International Investment Law and Treaty Interpretation’, in Rainer Hoffman and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Baden Baden: Nomos 2011) 40.

255 *Id.*

256 Franklin Berman, ‘Evolution or Revolution?’, in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP 2011) 668.

the investor and the host state, not forgetting that to protect the investment is to protect the general interest of development and of developing countries.<sup>257</sup> As the *Lemire* Tribunal pointed out, ‘the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of [the host state] to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.’<sup>258</sup> Analogously, in the *UPS* case, Canada referred to the preambular language of NAFTA to preserve the flexibility of the parties to safeguard the public welfare. Accordingly, the Tribunal enlightened the interpretation of the relevant investment provisions with cultural concerns.

Under Article 31(3)(c) of the VCLT, the treaty interpreter shall consider ‘any relevant rules of international law applicable in the relations between the parties.’<sup>259</sup> Accordingly, ‘Every treaty provision must be read not only in its own context, but in the wider context of general international law.’<sup>260</sup> Therefore, this provision properly expresses the principle of ‘systemic integration’ within the international legal system, indicating that treaty regimes are themselves creatures of international law.<sup>261</sup>

The expression ‘any relevant rules of international law applicable in the relations between the parties’ indicates ‘all sources of international law, including custom, general principles and, where applicable, other treaties.’<sup>262</sup> As aptly noted by Sands, for a rule of international law to be taken into account in interpreting a treaty, it must be (1) relevant, that is, related to the treaty norm being interpreted; and (2) applicable in the relations between the parties.<sup>263</sup> The WTO panels and the AB have pinpointed that they must consider only those

257 *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/01, Award on Jurisdiction, 24 September 1985, para. 23.

258 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, para. 273.

259 VCLT, Article 31(3)(c).

260 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press 1984) 139.

261 Campbell McLachlan, ‘The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279–319, 280.

262 John Gaffney, ‘Going to Pieces without Falling Apart: Waelde’s Defence of “Specialisation” in the Interpretation of Investment Treaties’, in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde: Law Beyond Conventional Thought* (London: CMP 2009) 57.

263 Philippe Sands, ‘Treaty, Custom, and the Cross-Fertilization of International Law’ (1998) 1 *Yale Human Rights & Development Law Journal* 85–106, 102.

rules of international law that apply to *all* WTO Members. While they are not required to consider treaties signed by only some WTO members, they can use such treaties as informative tools.<sup>264</sup> The International Law Commission has criticized this approach: because a precise identity in the membership of most international treaties is unlikely, any use of other treaty law would thus become unlikely in the interpretation of WTO law.<sup>265</sup>

As Sands points out, ‘the treaty being interpreted retains a primary role,’ while the rule of international law which is relevant and applicable between the parties ‘must be taken into account.’<sup>266</sup> International law does not define what taking into account means; Sands explains that ‘the formulation is stronger than “take into consideration” but weaker than “apply.”’<sup>267</sup> One may wonder whether ‘taking into account’ is analogous to ‘drawing inspiration,’ a formulation that appears in Article 60 of the African Charter,<sup>268</sup> enabling the Commission to draw inspiration from international law on human rights as well as ‘from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the ... Charter are Members.’<sup>269</sup>

In any case, the principle of systemic integration creates a presumption that international economic law is to be interpreted consistently with general international law.<sup>270</sup> This presumption has both positive and negative dimensions: on the one hand, the parties are to refer to public international law for all questions which are not resolved by the treaty; on the other hand, the parties should not act inconsistently with general international law.<sup>271</sup> Systemic thinking contributes to the unity of international law. As the Arbitral Tribunal put it in *AAPL v. Sri Lanka*,<sup>272</sup> BITs are ‘not a self-contained closed legal system’ but

264 Panel Reports, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 21 November 2006, paras 7.92–93; *Argentina—Poultry Anti-Dumping Duties*, WT/DS241/R, adopted 19 May 2003, footnote 64 to para. 7.41.

265 ILC, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 13 April 2006, para. 471.

266 Sands, ‘Treaty, Custom, and the Cross-Fertilization of International Law’, 102.

267 *Id.* 103.

268 Organization of African Unity, *African Charter on Human and Peoples’ Rights*, 27 June 1981, in force 21 October 1986, 21 ILM 58 (1982).

269 *African Charter on Human Rights and Peoples’ Rights*, Article 60.

270 See e.g. *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaims, 11 August 2015, para. 322.

271 McLachlan, ‘The Principles of Systemic Integration’, 311.

272 *Asian Agricultural Products Ltd v. Republic of Sri Lanka (AAPL v. Sri Lanka)*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

have to be ‘envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules whether of international law character or domestic law nature.’<sup>273</sup> Analogously, the Appellate Body has clarified that ‘the General Agreement is not to be read in clinical isolation from public international law.’<sup>274</sup> Furthermore, as international economic law typically enshrines ‘general, open-textured language,’ ‘practical considerations may impel the interpreter to seek guidance from general international law.’<sup>275</sup>

Therefore, both WTO adjudicative bodies and arbitral tribunals have some interpretative space to consider other international treaties when they collide with international economic law. In fact, customary rules of treaty interpretation require that international cultural heritage law serve as an interpretive context if it is relevant to the interpretation and application of international economic law. This argument is even stronger with regard to the cultural entitlements of a peremptory character.<sup>276</sup> Because international economic courts often seem reticent when referring to, let alone considering, such rights, all actors involved—treaty negotiators, arbitrators, academics, civil society, and the parties to a given dispute—should strive to foster such consideration. Only by interpreting international economic law in conformity with international law and fine-tuning its language can international economic law develop its potential to enable peaceful, just, and prosperous relations among nations and contribute to the development of international law.

Nevertheless, treaty interpretation cannot be invoked to displace the applicable law.<sup>277</sup> In *South American Silver Limited (SAs) v. Bolivia*, the Bermudan subsidiary of a Canadian company alleged that the host state expropriated the company’s ten mining concessions near the village of Malku Khota in the Bolivian province of Potosí.<sup>278</sup> Bolivia expressly required that the Tribunal ‘interpret the Treaty in light of the sources of international and internal law

273 Id. para. 21.

274 WTO Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WTO Doc WT/DS2/AB/R, 17.

275 Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: OUP 2008) 16.

276 VCLT Article 53. On *jus cogens* and international investment law, see Valentina Vadi, ‘Jus Cogens in International Investment Law and Arbitration’ (2015) 46 *Netherlands Yearbook of International Law* 357–388.

277 *Case Concerning Oil Platforms (Iran v. United States)*, Judgment, 6 November 2003, ICJ Reports 2003, 161, Separate Opinion by Judge Higgins, para. 49.

278 *South American Silver Limited v. the Plurinational State of Bolivia*, PCA Case No. 2013-15, Claimant’s Statement of Claim and Memorial, 24 September 2014, para. 9.

that guarantee the protection of the rights of the Indigenous peoples.<sup>279</sup> In this regard, it referred to customary norms of treaty interpretation as restated in the VCLT, requiring adjudicators to take into account the context of a treaty, which includes, according to Article 31(3)(c) of the same Convention, ‘any relevant rules of international law applicable in the relations between the parties.’<sup>280</sup>

The Arbitral Tribunal found that the applicable BIT was ‘the principal instrument by which it [should] resolve the dispute between the Parties.’<sup>281</sup> After noting that both parties agreed that ‘Article 31 of the Vienna Convention sets forth the rules of interpretation for the Treaty,’<sup>282</sup> it held that as a tool for treaty interpretation, systemic interpretation as restated by Article 31(3)(c) of the Vienna Convention should be applied ‘with caution.’<sup>283</sup> The Tribunal recalled Judge Bruno Simma’s warning that ‘systemic interpretation allows for harmonization through interpretation but cannot be used to modify a treaty.’<sup>284</sup> It then concluded that its jurisdiction could not ‘be extended to cover other treaties via Article 31(3)(c) of the Vienna Convention if the States have not consented to such jurisdiction.’ In other words, the Tribunal held that it could not ‘alter the applicable law through rules of treaty interpretation.’<sup>285</sup>

While some argue that little difference exists between the interpretation of a given treaty and its application, these are different, albeit interrelated, processes. While treaty interpretation aims at ‘discovering the proper meaning of treaty terms through various interpreting methods,’ treaty application aims at identifying and applying the source of law.<sup>286</sup> In other words, Article 31(3)(c) of the VCLT broadens the normative horizons of international economic judges – not their competence. Furthermore, states have agreed on specific dispute settlement mechanisms in the various fields of international law: ‘such intentions would be frustrated if a procedure created for one branch were to be

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279 *South American Silver Limited v. the Plurinational State of Bolivia*, Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, para. 192

280 *Id.* para. 193.

281 *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 208.

282 *Id.* para. 210.

283 *Id.* para. 212.

284 *Id.* para. 214.

285 *Id.* paras 215–6

286 Chang-Fa Lo, ‘The Difference between Treaty Interpretation and Treaty Application and the Possibility to Account for Non-WTO Treaties during WTO Treaty Interpretation’ (2012) 22 *Indiana Int’l & Comp. LR* 1–26, 9

extended to another branch where it has for quite particular reasons not been chosen before.<sup>287</sup>

To sum up, international economic courts have limited jurisdiction. Because of their limited mandate, they cannot adjudicate on the eventual breach of international cultural heritage law. International economic courts are not allowed to decide whether a certain governmental measure is in conformity with other international treaties. They are only permitted to decide whether the measure violates international economic law.

However, this does not mean that international cultural heritage law is and/or should be irrelevant in the context of economic disputes. While being aware of their limited jurisdiction and their specific mandate to interpret the instruments under which they are set up, international economic courts have recognized that the rules which they have the jurisdiction to apply and interpret are not detached from international law. Public international law, including international cultural heritage law, is relevant in the interpretation of international economic law. Adjudicators may analyze the specific claims in light of the relevant rules of international law applicable to the relationship between the parties. For instance, in the case *Micula and Others v. Romania*, the Arbitral Tribunal considered Article 15 of the Universal Declaration of Human Rights (UDHR)<sup>288</sup> in the process of interpreting a BIT's nationality requirements by referring to Article 31(3)(c).<sup>289</sup> In the case *Saluka Investments v. Czech Republic*, the Arbitral Tribunal took into account the customary international law principle 'that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order' by referring to Article 31(3)(c).<sup>290</sup> In *Saipem v. Bangladesh*, the Arbitral Tribunal took into account the right to a fair trial as a general principle of international law.<sup>291</sup>

The relevant rules of international law applicable in the relationship between the parties may include international cultural heritage law. Given that UNESCO has an almost universal membership and that some of its

287 Thomas W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: OUP 2009) 774.

288 Universal Declaration of Human Rights (UDHR), GA Res. 217 (III) UNGAOR 3rd Sess. UN Doc. A/810 (1948) 10 December 1948.

289 *Micula and Others v. Romania*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008, paras 86–8.

290 *Saluka Investments BV v. Czech Republic*, Partial Award, PCA UNCITRAL, 17 March 2006, paras 254–5.

291 *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 149.

conventions are very successful in terms of adhesion, this leads to the conclusion that adjudicators should take cultural concerns into account. If one deems that some elements of cultural heritage protection already belong to customary international law,<sup>292</sup> or are general principles of law, the case for such consideration is even stronger.

For instance, reference to the relevant UNESCO conventions may be made to clarify the meaning of investment treaty provisions, including the fair and equitable treatment standard and the principle of non-discrimination. In particular, when ascertaining the legitimate expectations of foreign investors, arbitral tribunals should take into account the host state's obligations under international law. The expectations of foreign investors cannot be legitimate if they disregard the host state's obligations under international cultural heritage law. Conversely, foreign investors may have legitimate expectations that the host state would comply with the relevant international law.

In parallel, the host state's obligations under international cultural heritage law may help in establishing the lawfulness of particular expropriatory measures, such obligations constituting evidence of the legitimate objectives of such measures. In *SPP v. Egypt*, the Arbitral Tribunal took Egypt's international obligations into account to ascertain the legitimacy of its actions: 'Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated in its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain.'<sup>293</sup> In other cases, the host state's obligations under international cultural heritage law may help arbitrators distinguish a legitimate regulation from an indirect expropriation. For instance, in *Glamis Gold v. United States*, the backfilling requirement was deemed to constitute a feature of a legitimate regulation rather than an indirect expropriation due to the state's right to govern cultural heritage sites.

In addition, the obligations of the host state under international cultural heritage law may help arbitrators to determine whether a given investment is comparable to another one or not, for the purpose of establishing a violation of the non-discrimination principle under the relevant investment treaty.

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292 See Francesco Francioni, 'La Protezione Internazionale dei Beni Culturali: un Diritto Consuetudinario in Formazione?', in Paolo Benvenuti and Rosario Sapienza (eds), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Milano: Giuffrè 2007) 12. But see Craig Forrest, *International Law and the Protection of Cultural Heritage* (Abingdon: Routledge 2010) 52.

293 *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para. 158.

For instance, in *Parkerings v. Lithuania*, the Arbitral Tribunal deemed that ‘the City of Vilnius did have legitimate grounds to distinguish between the two projects ... especially in terms of historical and archaeological preservation.’<sup>294</sup>

Article 31(3)(c) also allows space for dynamic or evolutive treaty interpretation. As the content of international law changes and develops continuously, and international investment treaties and the WTO-covered agreements can be considered as living instruments, any approach to interpretation should deal with this dynamism: terms and concepts used in international economic law should reflect the evolution of law.<sup>295</sup> An adjudicator’s interpretation cannot remain unaffected by subsequent developments of law; ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.’<sup>296</sup> For instance, in the *Shrimp–Turtle* case, the WTO Appellate Body interpreted the term ‘exhaustible natural resources’ in Article XX(g) of the GATT to include living natural resources ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.’<sup>297</sup>

International economic courts, however, have often adopted a reductionist or minimalist vision of their mandate. Such tribunals have rarely addressed law external to international economic law, as these norms are rarely invoked before international economic courts.<sup>298</sup> Even when other international rules are invoked, arbitral tribunals have either dismissed such norms on jurisdictional grounds or mentioned them in passing.<sup>299</sup> Even when host states have relied on other international law to justify measures with adverse effects on trade, arguing that their measures were in furtherance

294 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 Award, 11 September 2007, para. 396.

295 Wälde, ‘Interpreting Investment Treaties’, 774.

296 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, 31.

297 AB Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 152.

298 See Clara Reiner and Christoph Schreuer, ‘Human Rights and International Investment Arbitration’, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP 2009) 82.

299 See e.g. *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184. See also *Patrick Mitchell v. Dem. Rep. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 48.

of other international law commitments, they have met only little success before WTO courts.<sup>300</sup> Arbitral tribunals have nonetheless shown a growing willingness to consider other international law as a matter of treaty interpretation. They have even considered other international law by way of analogy. For instance, in *Mondev v. United States*, the NAFTA Tribunal referred to the European Convention on Human Rights (ECHR) to clarify the meaning and extent of the principle of non-retroactivity in international law.<sup>301</sup> The ECHR was inapplicable as the dispute related to the North American Free Trade Agreement, and none of the NAFTA parties had ratified the European Convention. Nonetheless, the Arbitral Tribunal considered such an instrument to interpret the applicable law. This growing appreciation of the linkage between international economic law and other international law can increase the perceived legitimacy of international economic law. As seen above, international customary norms of treaty interpretations require systemic interpretation.

### 3 De Lege Ferenda

Having analyzed how international economic courts have dealt with cultural heritage disputes, the chapter examines treaty-driven approaches to cultural heritage protection, considering the inclusion of cultural exceptions, amendments, and waivers in international economic law.

#### 3.1 Cultural Exceptions

The importance of the protection of cultural heritage to individuals, communities, nations, and the international community as a whole suggests that policy makers should consider introducing *ad hoc* provisions, even in international instruments that are not related to the protection of cultural heritage. This treaty-driven approach to promote the consideration of cultural concerns in international economic law would not only strengthen the regulatory autonomy of states in the cultural sector, but it would also help defragment international law. A text-driven approach suggests reform to bring international

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300 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 114 (2005) 44 ILM 1205, 1217.

301 *Mondev v. United States of America*, ICSID Case No. ARB/(AF)/99/2, Award, 11 October 2002, paras 139–143.

economic law better in line with cultural concerns.<sup>302</sup> It promotes the consideration of cultural heritage in international economic law, relying on the periodic (re)negotiation of IIAs as well as the periodic fine-tuning of WTO law.

Treaty drafters can expressly accommodate the protection of cultural heritage in the text of IIAs or renegotiate existing ones.<sup>303</sup> For instance, they can refer to cultural heritage in the preambles, carveouts, exceptions, and annexes of IIAs.<sup>304</sup> Preambles can strengthen the state right to regulate and power to adopt cultural policies. Cultural exceptions enable states to derogate from treaty obligations in certain circumstances without incurring liability under international law.<sup>305</sup> Interpretative statements can lead adjudicators to be less likely to find treaty inconsistencies in countries' cultural policies.

Carve-outs can target cultural policies, cultural industries or services, or cultural goods that would normally be covered by the scope of international economic law, excluding them from the scope of one or more provisions for their cultural character. Depending on their formulation, their operation is not to exclude cultural policies, cultural industries or services, or cultural goods from the entire scope of international economic law, but only from that of one or several specific provisions of the same.<sup>306</sup>

During the negotiations of the Multilateral Agreement on Investment (MAI) under the aegis of the Organization for Economic Co-operation and Development (OECD),<sup>307</sup> France and Canada applied for an exception in the area of culture for the protection of national cultural goods. Such a clause would have enabled all parties to follow cultural policies to protect cultural diversity and enterprises dealing with cultural activities. However, since the MAI was perceived as a one-sided instrument unilaterally prepared by OECD countries to ensure higher standards of protection and legal security for foreign investors, the negotiations of this instrument failed in 1998 because of the opposition of

302 Stephan W. Schill and Vladislav Djanić, 'International Investment Law and Community Interests', SIEL Working Paper No. 2016/01 (2016), 1–27, 4.

303 Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 277–286.

304 Schill and Djanić, 'International Investment Law and Community Interests', 15.

305 See generally Andrew Newcombe, 'General Exceptions in International Investment Agreements', in Marie Claire Cordonnier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (The Hague: Kluwer 2011) 355.

306 Jorge E. Viñuales, 'Seven Ways of Escaping a Rule: Of Exceptions and their Avatars in International Law', in Laurand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford: OUP 2020) chapter 5.

307 OECD Multilateral Agreement on Investment, Consolidated Text and Commentary, Draft DAFFE/MAI/NM(97)2.

civil society, and since then, countries have adopted different approaches to the issue.

For instance, the Trans-Pacific Strategic Economic Partnership Agreement (Trans-Pacific SEP), which establishes a free trade area between Brunei, Chile, Singapore, and New Zealand (Aotearoa in the Maori language), contains an exception to protect items or specific sites of historical or archaeological value.<sup>308</sup> The Trans-Pacific SEP recognizes the need to promote cultural policies aimed at protecting the cultural heritage of the countries involved, both in its tangible dimension (archaeological and historical sites) as well as in its intangible one (creative arts).<sup>309</sup> Analogously, the China–New Zealand Free Trade Agreement expressly provides that ‘For the purposes of this Agreement, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods or services or investment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to protect national works or specific sites of historical or archaeological value, or to support creative arts of national value.’<sup>310</sup> Similarly, in the Annex of the US–Lithuania BIT, Lithuania reserved ‘the right to make or maintain limited exceptions to national treatment’ with regard to ‘monuments of nature, history, archaeology, and culture as well as the surrounding protective areas’ and the land of the Curonian Spit – a landscape of dunes that is a World Heritage Site.<sup>311</sup>

With regard to Indigenous peoples, the duty to protect Indigenous peoples’ rights has led states to include specific Indigenous exceptions in multilateral environmental agreements. Such MEAs include derogations to their main principles to accommodate the needs of Indigenous peoples.<sup>312</sup> Such special mea-

308 The Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-Singapore–New Zealand, 18 July 2005, in force 28 May 2006, available at [www.mfat.govt.nz/downloads/trade-agreement/transpacific/mainagreement.pdf](http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/mainagreement.pdf) (hereinafter Trans-Pacific SEP).

309 *Id.*, Article 19(1)(3).

310 China–New Zealand Free Trade Agreement, in force 1 October 2008, Article 200(3). The text is available at [www.chinafta.govt.nz](http://www.chinafta.govt.nz).

311 Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, signed on 14 January 1998, Annex, para. 3.

312 See e.g. Convention on Conservation of Migratory Species, 23 June 1979, 19 ILM 11, Article 3.5; Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 UNTS 105, Article 7; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72, Article III(13)(b).

asures and forms of differential treatment to protect the rights of Indigenous peoples are justified under international human rights law. Therefore, there is no theoretical obstacle to inserting similar Aboriginal exemptions in the context of IIAs.

Several IIAs expressly acknowledge the rights of Indigenous peoples. For instance, Canada has inserted specific clauses protecting Indigenous rights in its trade and investment agreements,<sup>313</sup> including its model Foreign Investment Protection Agreement (FIPA).<sup>314</sup> The Trans-Pacific SEP expressly states that New Zealand can provide more favorable treatment to the Maori in fulfillment of its obligations under the Treaty of Waitangi,<sup>315</sup> 'provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services'.<sup>316</sup> In light of the constitutional concerns raised by the implementation of the Treaty of Waitangi, which is considered to be New Zealand's founding document, the parties' inclusion of an apposite cultural exception excluding New Zealand's efforts to comply with the Treaty's requirements from the dispute settlement provisions of the Trans-Pacific SEP represents a sensible approach.<sup>317</sup>

Analogously, the Energy Charter Treaty<sup>318</sup> allows the contracting parties to adopt or enforce 'any measure ... designed to benefit Investors who are Aboriginal people or socially or economically disadvantaged individuals or groups or their investments, provided that such measure (a) has no significant impact on that Contracting Party's economy; and (b) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties.'<sup>319</sup> Malaysia has

313 Canada-Peru Free Trade Agreement, 29 May 2008, Annex II, Reservations for Future Measures, Schedule of Peru.

314 See Vadi, *Cultural Heritage in International Investment Law and Arbitration*, 279–80.

315 Treaty of Waitangi (United Kingdom–New Zealand), 6 February 1840, available at [www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text](http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text).

316 Trans-Pacific SEP Article 19(5)(1).

317 Id. Article 19(5)(2).

318 Energy Charter Treaty (ECT), signed on 17 December 1994, in force 16 April 1998, 34 ILM 360 (1995).

319 ECT Article 24.

similarly excluded measures designed to promote the economic empowerment of the Bumiputras ethnic group from the scope of BITs.<sup>320</sup>

The participation of Indigenous representatives in the drafting and renegotiation of IIAs has been recommended by the Special Rapporteur on the rights of Indigenous peoples.<sup>321</sup> After finding that provisions in IIAs have ‘significant potential to undermine the protection of Indigenous peoples’ land rights and the strongly associated cultural rights,’<sup>322</sup> she recommended that states develop participatory mechanisms so that Indigenous peoples have the ability to comment and provide inputs in the negotiation of IIAs. This explicit recognition of Indigenous entitlements by IIAs can empower the state to protect Indigenous groups without fearing expensive investment claims. In parallel, investors can consider the existence of protected groups when assessing the viability of the given investment.

Within the WTO framework, Article XX of the GATT 1994 includes a list of (limited) exceptions to fundamental trade standards. In some circumstances, the AB has sought guidance from other sources of law and international organizations to interpret and apply this provision. For instance, in the *Shrimp–Turtle* case, the AB referred to MEAs to define the scope of ‘exhaustible natural resources.’<sup>323</sup> Analogously, the general exceptions listed in Article XX can be interpreted in light of international cultural heritage law and human rights instruments protecting cultural entitlements. Regrettably, the restrictive requirements of the introductory part (*chapeau*) of Article XX have limited the successful application of Article XX of GATT 1994 to trade disputes.

Concerning FTAs, two different approaches have emerged in negotiations. Adopted by Canada and the European Union in their FTAs, the first approach typically contains cultural exceptions.<sup>324</sup> Adopted in the FTAs negotiated by the United States, the second approach consists in drawing a negative list: the agreement covers all services except those carved out by the parties.

320 M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: CUP 2010) 120–1, 366–7.

321 Victoria Tauli-Corpuz, Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, Report on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, UN Doc A/70/301 (2015).

322 Id. para. 23.

323 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 130.

324 Lilian Richieri Anania, ‘Cultural Diversity and Regional Trade Agreements: The European Union Experience with Culture Cooperation Frameworks’, SIEL Working Paper (July 2012).

Since the adoption of the 2007 European Agenda for Culture in a Globalizing World,<sup>325</sup> ‘a new strategic framework for culture in the EU’s external relations has emerged. Culture is increasingly perceived as a strategic factor of political, social, and economic development.’<sup>326</sup> As a party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), the EU is committed to taking full account of the specific nature of cultural activities, goods, and services in its external relations. The objective is twofold: on the one hand, the EU aims to promote an understanding of European cultures throughout the world. Thus, the protection of cultural heritage, both tangible and intangible, is reaffirmed.<sup>327</sup> On the other hand, the EU aims to contribute to the vitality of the European economy of culture and to promote ‘external cultural policies that encourage dynamism and balance in the exchange of cultural goods and services with third countries.’<sup>328</sup> European Union’s economic partnership agreements (EPAs) have incorporated cultural concerns. Such economic agreements adopt ‘a broad and ... holistic position aiming to promote cultural exchanges through cooperation, while still safeguarding policy space in cultural matters through [the] traditional cultural exception.’<sup>329</sup> For instance, the 2008 Cariforum–EU EPA includes a Protocol on Cultural Cooperation that aims to promote cultural diversity and cooperation for the development of cultural industries and the protection of cultural heritage sites and historic monuments.<sup>330</sup> A specific provision of the EPA addresses the relationship between IP, biodiversity, traditional knowledge, and folklore.<sup>331</sup>

Before the accession of some Eastern European countries to the European Union, the European Commission had expressed concerns about the compatibility of their earlier BITs with European standards on European content

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325 The European Agenda for Culture in a Globalizing World was endorsed by the Council of the European Union in November 2007. Council of the European Union, Resolution of 16 November 2007 on a European Agenda for Culture, 2007/C 287/01, OJEU, 29 November 2011.

326 Id.

327 Council of the European Union, Council Conclusions on the Promotion of Cultural Diversity and Intercultural Dialogue in the External Relations of the Union and its Member States, Brussels, 20 November 2008, at p. 4.

328 Id.

329 Lilian Richieri Hanania, ‘Trade, Culture, and the European Union Cultural Exception,’ (2019) 25 *International Journal of Cultural Policy* 568–581, 568.

330 Protocol III on Cultural Cooperation to the Cariforum EPA available at [http://ec.europa.eu/culture/our-policy-development/doc/cultural\\_cooperation\\_protocol.pdf](http://ec.europa.eu/culture/our-policy-development/doc/cultural_cooperation_protocol.pdf).

331 Cariforum EU EPA Article 150.

in broadcasting. Notwithstanding the EU Commission's initial pressures for the abrogation of these BITs, an understanding was reached with the United States and prospective Member States. The memorandum 'expressed the US intent to amend the US BITs in order to eliminate incompatibilities between certain BIT obligations and EU law'.<sup>332</sup> For instance, the Amending Protocol to the US–Poland BIT provides a specific exemption concerning performance requirements 'in the audio-visual sector that relate to the production, distribution, and exploitation of audio-visual works, that implement quotas, or that require the purchase or use of goods produced or services provided in countries of the Council of Europe or, with respect to goods produced or services provided, a particular level or percentage of content from a source in countries of the Council of Europe'.<sup>333</sup> The same provision appears in the amending protocols to the US BITs with other EU Member States, notably the Czech Republic, Estonia, Latvia, Lithuania, the Slovak Republic, Bulgaria, and Romania.<sup>334</sup>

In parallel, Canada has always adopted a firm stance with regard to the protection of its cultural sector, considering it vital to Canadian identity and elaborating a specific exemption related to cultural goods in its trade agreements. According to Article 2005 of the Canada–United States Free Trade Agreement (CUSFTA),<sup>335</sup> the predecessor of NAFTA, cultural industries are exempt from the provisions of the Agreement, except as specifically provided for.<sup>336</sup> This provision has been recalled in the subsequent NAFTA, which replaced CUSFTA, and the United States–Mexico–Canada Agreement (USMCA), which has now replaced NAFTA.<sup>337</sup> Such cultural exception demonstrates that economic

332 Letter of Transmittal by George W. Bush to the Senate of the United States, 12 March 2004, available at [http://tcc.export.gov/%5C%5C/static/TGA.Poland\\_protocol.pdf](http://tcc.export.gov/%5C%5C/static/TGA.Poland_protocol.pdf).

333 Additional Protocol between the United States of America and the Republic of Poland to the Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations of 21 March 1990, signed in Brussels on 12 January 2004, Article 1(b). The text of the Additional Protocol is available at [http://tcc.export.gov/%5C%5C/static/TGA.Poland\\_protocol.pdf](http://tcc.export.gov/%5C%5C/static/TGA.Poland_protocol.pdf).

334 See Luke Eric Peterson, 'Bush Administration Sets Process in Motion to Amend BITs with Eastern and Central Europe', *Investment Law & Policy Weekly News Bulletin*, 16 February 2004.

335 Canada–United States Free Trade Agreement (CUSFTA) entered into force on 1 January 1989, 27 ILM (1988) 281 ff.

336 CUSFTA Article 2005.

337 NAFTA Article 2106.

liberalization can be achieved while maintaining a strong sense of cultural identity and cultural sovereignty.<sup>338</sup>

In contrast, the United States 'has used FTA negotiations essentially to achieve cultural liberalization',<sup>339</sup> using a 'negative list' approach whereby all services and investments not specifically excluded from the agreements are covered by liberalization commitments. Such an approach can constrain the ability of states to adopt cultural policies. For instance, during the negotiations of the Australia–United States Free Trade Agreement (AUSFTA),<sup>340</sup> although the United States requested to increase foreign market access, Australia insisted that local content requirements in audiovisual and broadcasting media were necessary to preserve Australian culture. The 'non-conforming measures' are now listed in Annex 1 of the AUSFTA.<sup>341</sup> However, any modification of such measures must not diminish their conformity to liberalization principles. Analogously, in the US–Chile FTA, while Chile retains the right to employ a screen quota,<sup>342</sup> cultural policies are subject to significant restraint. The US–Singapore FTA similarly contains a carve-out provision concerning national content broadcasting and distribution and publication of printed media.<sup>343</sup> Notwithstanding such carve-out provisions, a negative list approach tends to promote the liberalization of the market of cultural goods and services.<sup>344</sup>

The merit of introducing a cultural clause in BITs is further demonstrated by *United Parcel Service of America, Inc. v. Government of Canada*,<sup>345</sup> which involved debate over the applicability of the cultural industries clause in a NAFTA claim. United Parcel Service of America (UPS), a US company providing courier and package delivery services both throughout Canada and worldwide, claimed that Canada's Publications Assistance Program (PAP) – a policy

338 The United States–Mexico–Canada Agreement (USMCA) entered into force on 1 July 2020.

339 Gilbert Gagné, 'Trade and Culture: the United States' (2019) 25 *International Journal of Cultural Policy* 615–628.

340 Australia–US Free Trade Agreement (AUSFTA) in force 1 January 2005.

341 AUSFTA Annex 1, p. 14.

342 United States–Chile Free Trade Agreement, in force 1 January 2004.

343 US–Singapore FTA, in force 1 January 2014, Annex 8A.

344 Laurence Mayer-Robitaille, 'L'Impact des Accords de Libre-Échange Américains sur le Statut Juridique des Biens et Services Culturels' (2004) 50 *Annuaire Français de Droit International* 715–730, 727.

345 *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007, 46 ILM 922 (2007).

designed to promote the wide distribution of Canadian periodicals – was discriminatory to foreign investors<sup>346</sup> as it ‘provide[d] financial assistance to the Canadian magazine industry but only on the condition that any magazines benefitting from the financial assistance [we]re distributed through Canada Post [an institution of the Government of Canada], and not through companies such as UPS Canada.’<sup>347</sup> The Tribunal upheld Canada’s argument that PAP was exempted from review under NAFTA by virtue of the cultural industries exception.<sup>348</sup> Cases like *UPS v Canada*<sup>349</sup> demonstrate that the existence of a cultural exception can facilitate the consideration of cultural concerns in international economic disputes.

However, in the absence of a cultural exception, it seems more difficult to integrate cultural concerns into the fabric of international economic law.<sup>350</sup> Finding the proper balance between private economic interests and common cultural concerns is the key challenge that international economic law faces ‘in the interest of its own legitimacy.’<sup>351</sup> However, the lack of careful drafting in investment treaties should not undermine the regulatory power of the host state to adopt and implement cultural policies and even affirmative actions aimed at promoting economic, cultural, and social opportunities for disadvantaged groups. Such programs should not be seen as running foul of the bans on discrimination and performance requirements included in investment treaties.

The idea that affirmative action can be needed for achieving substantive equality among communities was first formulated by the Permanent Court of International Justice (PCIJ) in its Advisory Opinions on German Settlers in Poland<sup>352</sup> and Greek Minority Schools in Albania respectively<sup>353</sup> and has

346 Id. paras 156–60.

347 Id. para. 80.

348 NAFTA Annex 2106.

349 *UPS v Canada*, Award.

350 WTO Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R, 15 March 1997; WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997.

351 Karl P Sauvant and José E Alvarez, ‘Introduction—International Investment Law in Transition’, in José E. Alvarez and Karl P. Sauvant (eds), *The Evolving International Law Regime* (Oxford: OUP 2011) xlii.

352 PCIJ, *Settlers of German Origin in Poland*, Advisory Opinion 6, 10 September 1923, (1923) PCIJ. (ser. B) No. 6.

353 PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, (1935) PCIJ Ser. AB No. 64.

been further developed by human rights bodies.<sup>354</sup> In the words of the PCIJ, 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.'<sup>355</sup> Already three decades ago, affirmative action has been considered to be required by the principle of equality 'to diminish or eliminate conditions which cause or help to perpetuate discrimination', and to be 'a case of legitimate differentiation'.<sup>356</sup>

Affirmative action may be needed to protect the cultural expressions of minorities or Indigenous peoples or those cultural expressions which are at risk of extinction or which need urgent protection. For instance, the Convention on Cultural Diversity (CCD) expressly entitles states parties to adopt measures to protect cultural expressions 'at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding'.<sup>357</sup> Such conditions would enable states to adopt special measures, and this would not amount to discrimination against other cultural communities.<sup>358</sup>

Nonetheless, the compatibility between affirmative measures adopted by the host state and its international investment law obligations remains untested. When South Africa adopted an ambitious social and economic program to advance the standing of historically disadvantaged persons in the aftermath of the apartheid regime, this program generated much controversy among foreign investors and was challenged before an international arbitral tribunal.<sup>359</sup> The Mineral and Petroleum Resources Development Act (MPRDA) vested all mineral and petroleum rights with the South African government. It then required that companies apply for converting their former property rights into new-order rights, that is, licenses for mineral exploitation from the South African government.<sup>360</sup> Finally, it required corporations to sell 26 percent of their

354 Athanasios Yupsanis, 'The Concept and Categories of Cultural Rights in International Law: Their Broad Sense and the Relevant Clauses of the Human Rights Treaties' (2009–2010) 37 *Syracuse JIL & Commerce* 241.

355 PCIJ, *Minority Schools in Albania*, p. 19.

356 Human Rights' Committee, CCPR General Comment No. 18: Non-discrimination, adopted 10 November 1989, para. 10.

357 CCD Article 8.

358 Alexandras Kolliopoulos, 'La Convention de l'UNESCO sur la Protection et la Promotion de la Diversité des Expressions Culturelles' (2005) 51 *Annuaire Français de Droit International* 487–511, 498.

359 *Piero Foresti, Laura De Carli, and Others v. Republic of South Africa*, ICSID Case No. ARB (AF)/07/1, Award, 4 August 2010.

360 *Id.* para. 59.

shareholding to disadvantaged individuals.<sup>361</sup> Holding large investments in the natural stone business in South Africa, the investors claimed that the MPRDA extinguished their property rights, thus amounting to indirect expropriation in breach of the relevant provisions in the Italy–South Africa BIT and the Luxembourg–South Africa BIT.<sup>362</sup> They also alleged that they were denied fair and equitable treatment because of affirmative action requirements for the hiring of historically disadvantaged managers.<sup>363</sup> South Africa contended that the MPRDA aimed at countering ‘negative social effects caused by apartheid’,<sup>364</sup> and that it did not amount to indirect expropriation or a breach of fair and equitable treatment.<sup>365</sup> Although the case was settled, and what is publicly available does not give a clear picture of how it would have been adjudicated by the Arbitral Tribunal, this case demonstrates the merit of introducing a specific clause or exception in the context of investment treaties to create a shield for policies of particular cultural or social relevance in accordance with international human rights law.

As a matter of dispute avoidance, a cultural clause would prevent such disputes. In this sense, South African BITs now expressly allow the application of government measures designed to promote equality.<sup>366</sup> Such clauses clarify the willingness of the parties to fulfill the obligations of the BIT and to maintain a margin of maneuver for protecting the rights of disadvantaged groups. Exceptions protecting morals and/or public order can also be interpreted to include selected cultural concerns.

Yet, most of the existing IIAs do not contain any explicit reference to cultural heritage. Moreover, IIAs generally include ‘survival clauses that guarantee protection under the treaty ... for a substantial period after the treaty has elapsed.’<sup>367</sup> Therefore, ‘it is unrealistic to expect that treaty drafting can solve the conflict between [international investment law] and other community

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361 *Id.* para. 56.

362 *Id.* paras 58–9.

363 *Id.* para. 78.

364 *Id.* para. 69.

365 *Id.* paras 74–5 and 78.

366 See e.g. Agreement Between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments, 14 December 1998, Article 3(3)(c) (providing that: ‘[the guarantees of non-discrimination for foreign investors] shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the Former Party by virtue of ... any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.’)

367 Schill and Djanic, ‘International Investment Law and Community Interests’, 16.

interests on its own.<sup>368</sup> While countries gradually rebalance their IIAs,<sup>369</sup> it seems crucial to consider other mechanisms to promote the consideration of cultural heritage in international economic law.

### 3.2 Counterclaims

The increasing impact of FDI on the social sphere of the host state 'has raised the question of whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to a remedial process for individuals and communities adversely affected by the investment in the host state.'<sup>370</sup>

A way to defragment the fragmentation of international law and to include cultural concerns in the operation of investor–state arbitration is by inserting legality requirements in treaties and raising counterclaims for eventual violations of domestic law protecting cultural entitlements. States can build some safeguards within international economic law by requiring compliance with domestic law. For instance, Article XX(d) of the GATT lists 'Measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT' among the policies that may exempt a measure from being considered a GATT violation. Analogously, states can clarify that the relevant investment treaty protects only those investments that comply with domestic law. Such a clause can enable an adaptation of the treaty to the cultural needs of the state.

Recent IIAs tend to include legality requirements, that is, obligations for foreign investors to conform to, and respect, the domestic laws of the host state.<sup>371</sup> For instance, Article 15.3 of the 2012 Southern African Development Community Model BIT prohibits investors from operating their investment 'in a manner inconsistent with international, environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are the higher'. Similarly, under Article 11 of the 2016 Indian Model BIT, 'the parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines, and policies of a

368 Id.

369 Kenneth Vandeveld, 'Rebalancing Through Exceptions' (2013) 17 *Lewis & Clark LR* 449, 451.

370 Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law' (2009) 20 *EJIL* 729–747.

371 Eric De Brabandere, 'Human Rights and International Investment Law', in Markus Krajewski and Rhea T. Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Cheltenham: Edward Elgar 2019) 619–645.

Party concerning the establishment, acquisition, management, operation, and disposition of investments.’

Such provisions empower states to adopt special measures to protect cultural heritage. Such clauses require foreign investors to comply with existing cultural heritage law as a condition for claiming rights under the treaty. In this manner, the mechanism that gives international economic law so much power—dispute resolution—is infused with the need to protect cultural heritage.

States have also increasingly tried to assert counterclaims against investors, even though their efforts have tended not to be successful.<sup>372</sup> While most treaties do not have broad enough dispute resolution clauses to encompass counterclaims, ‘drafting treaties to permit closely related counterclaims would help to rebalance investment law.’<sup>373</sup>

Some investor–state dispute settlement provisions confer on tribunals the power to hear ‘any dispute between an investor of one contracting party and the other contracting party in connection with an investment.’<sup>374</sup> Other investment treaties provide that the law applicable in investor–state arbitration is the domestic law. If domestic law is the applicable law, ‘international law plays a supplemental and corrective function in relation to domestic law.’<sup>375</sup> Not only does international law ‘fill the gaps in the host state’s laws,’ but in case of conflict with the latter, it prevails.<sup>376</sup> In any case, even if the applicable law was not domestic law, investors remain under an obligation to abide by the domestic laws of the state in which they operate, because of the international law principle of territorial sovereignty. These and similar textual hooks seem to enable counterclaims. The ICSID Convention also expressly contemplates the possibility of counterclaims ‘provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’<sup>377</sup>

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372 Andrea Bjorklund, ‘The Role of Counterclaims in Rebalancing Investment Law’ (2013) 17 *Lewis & Clark LR* 461–480, 464.

373 *Id.* 461.

374 India–Netherlands Agreement for the Promotion and Protection of Investments, 6 November 1995, Article 9.1.

375 Kryvoi, Yaraslau, ‘Counterclaims in Investor-State Arbitration’ (2012) 21 *Minnesota JIL* 216–252.

376 *Id.*

377 ICSID Convention, Article 46 (stating that ‘[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute, provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the centre.’)

In practice, arbitral tribunals have adopted diverging approaches regarding the possibility of counterclaims.<sup>378</sup> Most tribunals have declined jurisdiction to hear counterclaims, focusing on whether counterclaims were within the scope of the consent of the parties.<sup>379</sup> While most tribunals remain hesitant to hear counterclaims, recent arbitral tribunals have been more willing to hear such claims.<sup>380</sup> If consent to jurisdiction was explicit,<sup>381</sup> or if the applicable law was domestic,<sup>382</sup> investment tribunals could allow states to raise breaches of cultural policies in their counterclaims against investors. Thus, investor–state arbitration could prompt investors to comply with domestic (and international) cultural heritage law. If investors knew they could be held liable for harm to cultural heritage in the event of a dispute, they would be more likely to develop investment projects that safeguard or at least respect cultural heritage and cultural entitlements.

### 3.3 Amici Curiae

International economic courts may not be the most appropriate tribunals for adjudicating cultural heritage-related disputes. In most cases, states have defended key economic and cultural interests before international economic courts. For instance, in the *seal products* dispute before the WTO panel and Appellate Body, Canada forcefully defended its coastal communities' economic and cultural interests in practicing seal hunting and commercializing seal products that had been affected by the EU ban on seal products.<sup>383</sup> In the *Glamis Gold* arbitration, concerning a gold mine in California, the United

378 Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law', 473.

379 Jean Kalicki, 'Counterclaims by States in Investment Arbitration', *Investment Treaty News*, 14 January 2013, 5.

380 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, para. 275 (holding Burlington liable for violating Ecuador's domestic law implementing international standards); *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1192 (holding that a bilateral investment treaty '[is] not a set of rules defined in isolation without consideration given to rules of international law.')

381 *Burlington v. Ecuador*, Decision on Counterclaims, at para. 60 (affirming jurisdiction on counterclaims, as the claimant did not object to the Tribunal's jurisdiction).

382 *Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2004, para. 155 (allowing Indonesia to bring a counterclaim to seek compensation of the investor's failure to comply with domestic banking law.)

383 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, WT/DS400/R and WT/DS401/R, 25 November 2013; *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report, WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014.

States vigorously and successfully defended its cultural interest in protecting Indigenous sacred sites.<sup>384</sup> However, in other cases, states and given local communities may have diverging interests. While states may pursue intensive developmental policies, local communities affected by such plans might prefer a more sustainable approach to developmental objectives.<sup>385</sup>

In this regard, international economic courts constitute an uneven playing field: while foreign investors and trading nations have the right to act or be heard (*locus standi*) before these tribunals, local communities and Indigenous peoples do not have direct access to these dispute settlement mechanisms. Rather, their arguments need to be espoused by their home government. Nonetheless, states are not always willing to adequately represent the cultural interests of local communities and Indigenous peoples.<sup>386</sup> In fact, the cultural entitlements of local communities and Indigenous peoples often compete with the economic development plans of both investors and states. Therefore, despite the formal premise of equality between the parties, there are structural power asymmetries between different stakeholders in cultural heritage-related international economic disputes.<sup>387</sup>

To overcome this imbalance, local communities, groups of Indigenous peoples, NGOs, academics, and even UNESCO, and other UN bodies who are not a party to a given dispute but have an interest in the outcome of the same can seek permission to intervene in the proceedings and present friend-of-the-court (*amicus curiae*) briefs reflecting their interests. *Amicus curiae* submissions can assist international economic courts in the determination of factual or legal issues related to the dispute by bringing a perspective that is different from that of the disputing parties. They can be particularly useful in cultural heritage-related disputes by adding new content or defending positions not adequately represented in the proceedings.

International economic courts can seek, accept, and consider *amicus curiae* briefs because such briefs can assist them in establishing facts and the

384 *Glamis Gold, Ltd v. United States of America*, Award, 8 June 2009, [2009] 48 ILM 1039.

385 Yu Kanosue, 'When Land is Taken Away: States Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities' (2015) 15 *Human Rights LR* 643–667, at 657.

386 William Shipley, 'What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration' (2014) 11 *TDM* 1.

387 Valentina Vadi, 'Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration' (2018) *George Washington International LR* 101–155.

applicable rule of law and its correct legal interpretation (*jura novit curia*).<sup>388</sup> The principle *jura novit curia* certainly belongs to general international law.<sup>389</sup> Although international economic law does not specifically provide for this principle, the WTO courts have consistently endorsed it.<sup>390</sup> In parallel, several arbitral tribunals and ICSID Annulment Committees have held that this principle applies to investment treaty arbitration.<sup>391</sup>

Therefore, in light of their inherent powers to seek information and technical guidance from any individual or body they may consider appropriate, international economic courts can seek information or grant requests to submit *amicus curiae* briefs if the friends of the court can demonstrate that they could assist tribunals without unduly delaying the proceedings.<sup>392</sup> International economic courts usually ensure that the participation of *amici curiae* does not disrupt the proceedings or affect the due process of law or unduly burden either party.

UNESCO has never yet submitted any *amicus curiae* to arbitral tribunals or WTO courts. However, this does not mean that international economic courts could not seek information from this organization should they deem it appropriate or accept a request to submit an *amicus curiae* brief from the same organization in the future. UNESCO has submitted an *amicus curiae* brief to the International Criminal Court, and there is no reason why it would not submit similar briefs to the attention of international economic courts in the future.<sup>393</sup> Such briefs could provide adjudicators with an excellent and

388 Stephan W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of Arbitrator' (2010) 23 *Leiden JIL* (2010), 401–30, 422.

389 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* 1986 ICJ Reports 14, para. 29 (holding that 'it [is] the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rule of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court').

390 Panel Report, *US—Section 301 Trade Act*, paras 7.15–7.16; Appellate Body Report, *EC—Tariffs Preferences*, WT/DS246/AB/R, 20 April 2004, para. 105.

391 See e.g. *British Petroleum Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic*, Award, 10 October 1973, 53 ILR 297 (1979) (finding that an arbitral tribunal is 'both entitled and compelled to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant.');

*Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award, 22 September 2005, SCC Case No. 093/2004 pp. 9–10.

392 Luke Bastin 'Amici Curiae in Investor–State Arbitrations: Two Recent Decisions' (2013) 20 *Australian International Law Journal* 95–104, 101.

393 International Criminal Court, UNESCO, *Amicus Curiae Observations, submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, in the Case of Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, 2 December 2016.

updated illustration of international cultural heritage law and related obligations. As destroying cultural heritage can ‘disrupt the social fabric of societies’,<sup>394</sup> requesting or allowing UNESCO intervention as *amicus curiae* in the context of proceedings could facilitate the prevention of irreparable cultural harm, consolidate institutional cooperation, and contribute to the harmonious development of international law.

Analogously, requests to submit *amicus curiae* briefs could be made to or received from other UN bodies such as the Special Rapporteur on the Rights of Indigenous Peoples, an independent expert appointed by the UN Human Rights Council to monitor and promote the full realization of Indigenous peoples’ rights worldwide. The Special Rapporteur on the Rights of Indigenous Peoples has already submitted *amicus curiae* briefs before international courts and tribunals, and there is scope to envisage similar participation in Indigenous heritage-related international economic disputes.<sup>395</sup>

Indigenous peoples have increasingly participated in investment arbitrations through *amici curiae*. They submitted their first *amicus curiae* brief to an international economic court in the *Softwood Lumber* case, a long-lasting trade dispute between the US and Canada. In this case, the US complained that the price at which Canada sold lumber to the US was artificially low and amounted to illegal dumping. In their *amicus curiae* brief, Indigenous tribes rejected Canada’s argument that its comparative advantage came from the fact that ‘Canada ha[d] more trees’. Rather, the *amici* argued that ‘in reality [such advantage] c[ame] from the fact that it g[ave] the forests over to the companies who pa[id] only a small extraction fee and no-one pa[id] a dime to the Aboriginal co-owners of the forests or even to the people of Canada.’<sup>396</sup> The use of *amicus curiae* briefs may be ‘a new and effective way of framing arguments in seeking the recognition and protection of Indigenous rights.’<sup>397</sup> Nonetheless, the panel did not comment on the arguments presented in the *amicus curiae* brief.

Other *amicus curiae* submissions followed in subsequent arbitrations. In the *Glamis Gold* case, the Tribunal granted the Quechan Indian Nation leave to

394 Id. para. 1.

395 Inter-American Commission of Human Rights, *Amicus Curiae*, Submission by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, in the case of *Comunidades y Rondas Campesinas de Cajamarca y sus líderes v. Peru*, 15 March 2022.

396 Megan Davis, ‘New Developments in International Advocacy: *Amicus Curiae* and the World Trade Organisation’ (2003) 5 *Indigenous Law Bulletin* 14.

397 Id.

file a non-party submission.<sup>398</sup> However, in reaching its decision, the Tribunal did not refer to any of the arguments advanced by their brief.<sup>399</sup> In the *Grand River* case, the Tribunal received a letter from the National Chief of the Assembly of First Nations, endorsing the UNDRIP and customary international law, and calling for Indigenous rights to be ‘taken into account whenever a NAFTA arbitration involves First Nations investors or investments.’ The Tribunal did not explicitly qualify the Chief’s letter as an *amicus curiae* submission but the arbitrators ‘read and considered’ it.<sup>400</sup>

More recently, in *Bear Creek Mining v. Peru*,<sup>401</sup> concerning the development of a silver mining project, the Tribunal granted the permission to submit an *amicus curiae* brief to an NGO which promoted the human rights of the Aymara and Quechua Indigenous peoples.<sup>402</sup> The Tribunal considered that its expertise and ‘local knowledge of the facts m[ight] add a new perspective that differ[ed] from that of the Parties.’<sup>403</sup> The *amicus curiae* brief contributed to the factual and legal architecture of the case.

On the factual level, it ‘present[ed] the concerns of the population with regard to the social, cultural, and environmental impact that would occur if the ... mining project were developed.’<sup>404</sup> As the brief explained, the project was taking place in a poor and rural area whose peasant communities ‘ethnically and culturally belonged to the Aymara people.’<sup>405</sup> The brief highlighted the ‘deep cultural and social ties’ of the Aymara people with their land.<sup>406</sup> In fact, their principal economic activities depended on the land, namely agriculture, fishing, and livestock farming. Moreover, for the Aymara, land was ‘not only a geographical space but represents a spiritual bond.’<sup>407</sup> Therefore, the Aymara had ‘concerns regarding changes to the natural landscape, the integrity

398 *Glamis Gold Ltd v. United States*, UNCITRAL (NAFTA) Award, 8 June 2009, para. 286.

399 Valentina Vadi, ‘Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration’, in Kate Miles (ed.), *Research Handbook on Environment and International Investment Law* (Cheltenham: Edward Elgar 2019) 464–479, 474.

400 See *Grand River Enterprise Six Nations Ltd. et al. v. United States of America*, Award, 12 January 2011, para. 60.

401 *Bear Creek Mining Corp. v. Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017, para. 663.

402 *Bear Creek Mining Corp. v. Peru*, Procedural Order No. 5, 21 July 2016.

403 *Id.* para. 40.

404 *Bear Creek Mining Corporation v. Republic of Peru*, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment et al., 9 June 2016, at 2.

405 *Id.* at 3.

406 *Id.* at 7.

407 *Id.* at 7.

of their territories, and the negative effects on their sanctuaries and culture.<sup>408</sup> The *amici* contended that the company ‘did not do what was necessary to understand ... the Aymara culture ... [T]he company acted as if it were sufficient to promise benefits to some of the ... communities in the areas surrounding the project ... without needing to work closely with [all of the relevant] communities.’<sup>409</sup> Therefore, some communities opposed the project, and the company ‘did not obtain the social license to operate.’<sup>410</sup>

At the legal level, the *amicus curiae* brief referred to international human rights law and corporate social responsibility.<sup>411</sup> In particular, it referred to ‘the right of Indigenous peoples to free and informed prior consultation, the responsibility of the company to respect human rights and conduct itself with due diligence with the aim of obtaining local consent and social license to operate.’<sup>412</sup> The Tribunal considered the *amicus curiae* submission in the final award.

Nonetheless, international economic courts are not legally obligated to accept let alone to consider such briefs; rather, they have the power to do so should they deem it appropriate: ‘it is particularly within the province and authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of the information or advice received, and to decide what weight to ascribe to that information, or to conclude that no weight at all should be given to what has been received.’<sup>413</sup> The Appellate Body has advocated the power not to accept *amicus curiae* submissions or not to address, in its reports, the legal arguments made in such briefs<sup>414</sup>: ‘Acceptance of any *amicus curiae* brief is a matter of discretion.’<sup>415</sup> Arbitral tribunals have adopted a similar stance.

In some cases, arbitral tribunals have denied the participation of Indigenous non-disputing parties.<sup>416</sup> For instance, in *Bernhard von Pezold and Others v. the Republic of Zimbabwe*,<sup>417</sup> the claimants alleged unlawful expropriation

408 *Bear Creek Mining Corporation v. Republic of Perú*, Award, para. 226.

409 *Id.* para. 218.

410 *Id.*

411 *Bear Creek Mining Corporation v. Republic of Peru*, *Amicus Curiae* Brief Submitted by the Association of Human Rights and the Environment et al., at 14.

412 *Id.* at 2.

413 Appellate Body report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 104.

414 Appellate Body report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paras 51–2.

415 Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, para. 167.

416 *Bernhard von Pezold and Others v. Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 49.

417 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No ARB/10/15.

of their farms in Zimbabwe, which were compulsorily acquired by the government as part of its land reform program. An NGO and four Indigenous communities requested permission to file a written submission as *amici curiae* to the Arbitral Tribunal.<sup>418</sup> As the farms were allegedly located on their ancestral territories, the Indigenous communities submitted that ‘the outcome of the ... arbitral proceedings w[ould] determine not only the future rights and obligations of the disputing parties with regard to these lands, but m[ight] also potentially impact on the Indigenous communities’ ... rights.’<sup>419</sup>

The petitioners argued that ‘international human rights law on Indigenous peoples applies to these arbitrations in parallel to the relevant BITS and the ICSID Convention.’<sup>420</sup> According to the petitioners, the ‘Arbitral Tribunals’ mandate derives from powers delegated to it by Contracting Parties with concrete human rights obligations under international law.<sup>421</sup>

The claimants objected to the submissions, alleging the petitioners’ lack of independence. They noted that while their titles had ‘never been subject to, or conditional on, the claims of the Indigenous communities,’ they had ‘always acknowledged that some parts of the Border Estate [we]re of particular cultural significance to those communities,’ and ‘therefore granted access to those parts of the Estate to the communities.’<sup>422</sup> The claimants also argued that ‘reference to “international law” in the applicable BITS does not mean that the whole body of substantive international law is applicable.’<sup>423</sup> For its part, the Respondent had no objection to the NGO being allowed to make submissions ‘provided they ... d[id] not impinge on or amount[ed] to a challenge to the sovereignty and territorial integrity of the Republic of Zimbabwe.’<sup>424</sup>

The Tribunal rejected the petition.<sup>425</sup> The Tribunal acknowledged that the Indigenous tribes had ‘some interest in the land over which the Claimants assert[ed] full legal title,’ and that ‘the determinations of the Arbitral Tribunal in these proceedings w[ould] have an impact on the interests of the Indigenous communities.’<sup>426</sup> Yet, it held that the ‘apparent lack of independence or neutrality

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418 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2, 26 June 2012.

419 *Id.* paras 18–21.

420 *Id.* para. 25.

421 *Id.* para. 58.

422 *Id.* para. 32.

423 *Id.* para. 39.

424 *Id.* para. 5.

425 *Bernhard von Pezold v. Zimbabwe*, Award, para. 64.

426 *Id.* para. 62.

of the petitioners [wa]s a sufficient ground for denying the application.<sup>427</sup> In fact, the Tribunal considered that by requiring that the *amicus curiae* briefs bring a perspective ‘different from that of the parties,’ Article 37(2)(a) of the ICSID Rules implied a requirement of independence from the same parties.<sup>428</sup>

Finally, the Tribunal agreed with the Claimants that the applicable law ‘d[id] not incorporate the universe of international law into the BITs or into disputes arising under the BITs.’<sup>429</sup> Since neither Party put the identity and/or treatment of the Indigenous communities under international law in issue in the proceedings, the Tribunal considered that the matter fell outside the scope of the dispute as it was constituted.<sup>430</sup> While the proposed submission purported to focus on the rights of Indigenous peoples under international law, the ICSID dispute concerned measures adopted by Zimbabwe that, according to the claimants, infringed provisions of the applicable BITs.<sup>431</sup> For the Tribunal, the former was not within the scope of the latter.

Proponents of *amicus curiae* briefs consider them a means of enhancing the legitimacy and effectiveness of decision-making. Such briefs can harbinger the introduction of public values into international economic governance.<sup>432</sup> They can illuminate the stance of historically marginalized communities and enable their voices to be heard in the implementation of international economic law. They can thus build bridges across different treaty regimes. *Amicus curiae* briefs can contribute to the factual and legal architecture of a case. Finally, they can enhance the perceived openness of international economic governance to non-state actors.

Yet, opponents of non-state actors’ involvement contend that it undermines efficient decision-making by repoliticizing disputes and enabling the undue influence of special interests over trade and investment.<sup>433</sup> For instance, an excessive emphasis on the conservation of natural and cultural heritage can constitute an act of ‘green colonialism,’ whereby outside groups show interest in land preservation and suggest the adoption of environmental and cultural policies that affect the land rights of Indigenous peoples.

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427 Id. para. 56.

428 *Bernhard von Pezold v. Zimbabwe*, Award, para. 49.

429 Id. para. 57.

430 Id. paras 57 and 60.

431 Id. para. 60.

432 Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Baden-Baden: Nomos 2018) 27.

433 Id. 28 (reporting these criticisms).

*Amicus curiae* briefs are not particularly controversial in investor–state arbitration as several arbitration rules provide for the admissibility of their submissions if certain basic conditions are met. More controversial has been the admissibility of such briefs before the WTO DSM, as some WTO members, especially developing countries, contended that the need to consider and react to *amicus curiae* briefs would ‘bend the WTO dispute settlement procedures in favor of members with more legal resources.’<sup>434</sup>

In any case, *amicus curiae* briefs do not constitute an ideal participatory mechanism as international economic courts are not required to accept such submissions; rather, they can accept them, provided that certain conditions are met, including timeliness, brevity, and independence. Moreover, even when such courts decide to accept *amicus curiae* briefs, they may impose restrictive word limits and short timeframes to present arguments.<sup>435</sup> More importantly, by serving as *amici curiae*, local communities and Indigenous peoples do not become parties to the proceedings; rather, they have limited rights in the course of the same and cannot file an appeal or an annulment claim. They cannot ask for final or interlocutory remedies to preserve cultural entitlements before international economic courts. Finally, international economic courts are not obligated to discuss arguments presented in *amicus curiae* briefs in their decisions.<sup>436</sup>

In conclusion, international economic courts should be sympathetic to *amicus curiae* briefs, in particular to those presented by affected Indigenous and local communities, accepting them as a matter of course in disputes that can affect their interests. This would enable Indigenous and local communities to have a say in proceedings that can affect them, illuminate their perspectives, and bring their arguments to the forefront of legal debates. Even though participation as *amici curiae* does not amount to a right, and international economic law includes other defragmenting techniques,<sup>437</sup> this tool can contribute to the harmonious development of international law. By giving voice to the voiceless, even if some *amicus curiae* briefs did not ultimately influence the proceedings in the short term, they could influence further debate and potentially have a long-term impact on the development of international law.

434 Van den Bossche, *The Law and Policy of the World Trade Organization*, 195.

435 *EC—Asbestos*, Appellate Body report, paras 51–2.

436 See e.g. *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, Appellate Body report, WT/DS406/AB/R, 4 April 2012, para. 10.

437 See Petros Mavroidis, ‘*Amicus Curiae* Briefs Before the WTO: Much Ado About Nothing’, in Armin von Bogdandy, Petros C. Mavroidis, and Yves Meny (eds), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer: Leiden 2002) 317–329.

### 3.4 *Authoritative Interpretations, Waivers and Amendments*

International economic law is not written in stone and continually evolves through the periodic renegotiation of IIAs and the multilateral negotiation rounds at the WTO. Authoritative interpretations, waivers, and amendments can further contribute to the evolution of international economic law and its fine-tuning with other international law instruments. Such legal tools enable international economic law to openly endorse the fluidity of time and successfully manage change. In an ever-changing world, some change is also needed within the international legal order to ensure stability and justice. While treaties govern international relations and enable stability, certainty, predictability, and the functioning of the international legal system, a certain degree of flexibility is needed in some circumstances to maintain a balance between the rights and obligations within any given treaty. These legal tools can enable international economic law to respond to the challenges ahead – including cultural heritage-related disputes. Moreover, these three different, albeit related, legal tools can open international economic governance to ‘the coordination and reconciliation of competing norms and interests’.<sup>438</sup>

While the Ministerial Conference and the General Council acting on its behalf have ‘no general law-making competence’, they can adopt authoritative interpretations,<sup>439</sup> waivers,<sup>440</sup> and amendments.<sup>441</sup> Concerning authoritative interpretations, the Ministerial Conference and the General Council can interpret the WTO agreements without being bound by prior decisions of WTO courts. To date, the WTO has not yet explicitly used authoritative interpretations.<sup>442</sup> Instead, parties to investment treaties have used this legal tool to clarify vague treaty provisions and fill in interpretive gaps.<sup>443</sup> Through authoritative interpretations, states ‘formally possess the ability to specify what the law is or should be when they ... disagree with interpretations developed by [international economic courts], as well as in situations where ... rules are unclear or

438 Isabelle Feichtner, ‘The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests’ (2009) 20 EJIL 7–28.

439 WTO Agreement Article IX:2.

440 Id. Article IX:3–4.

441 Id. Article XI.

442 Some authors, however, have interpreted the Doha Declaration on the TRIPS Agreement and Public Health as an authoritative interpretation. See Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford: OUP 2007) 281.

443 See e.g. NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

permit multiple interpretations.<sup>444</sup> Such interpretations are binding on state parties and can reconcile conflicting treaty provisions, prevent disputes, and ultimately contribute to the harmonious development of international law.<sup>445</sup> Such interpretations could be added to IIAs and be adopted at the WTO to foster the consideration of cultural concerns in key areas of international economic governance, for instance, concerning traditional knowledge and cultural expressions.

The WTO frequently grants waivers to respond to changing circumstances.<sup>446</sup> In exceptional cases, waivers permit a Member to depart from an existing WTO obligation for a limited time. Waivers are 'exceptional in nature' and subject to strict terms and conditions.<sup>447</sup> Waivers are reviewed annually and, based on such review, they may be extended, modified, or terminated. Therefore, waivers cannot be taken as 'a subsequent agreement in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties'.<sup>448</sup> Nonetheless, the WTO members have sometimes used waivers in situations where a multilateral interpretation would have been more appropriate.

For example, the General Council issued a waiver enabling several WTO members to ban trade in conflict diamonds under the Kimberley Process Certification Scheme (KPCS).<sup>449</sup> Endorsed in General Assembly and Security Council resolutions, this scheme aims at barring trade in conflict diamonds, that is, diamonds used by rebel movements to fund armed conflict aimed at overthrowing legitimate governments.<sup>450</sup> Under the scheme, only certified

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444 Cosette Creamer and Zuzanna Godzimirska, 'Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations' (2016) 48 *New York University Journal of International Law & Politics* 413–462, 421.

445 Tarcisio Gazzini, 'Can Authoritative Interpretation under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?' (2008) 57 *ICLQ* 169–81.

446 Isabel Feichtner, 'Subsidiarity in the World Trade Organization: The Promise of Waivers' (2016) 79 *Law and Contemporary Problems* 75–97; Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge: CUP 2011).

447 Creamer and Godzimirska, 'Engagement within the World Trade Organization', 421.

448 Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2, 26 November 2008, para. 382.

449 WTO General Council, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Decision of 15 May 2003*, 27 May 2003, WTO Doc WT/L/518. The waiver has been extended since then. WTO, *Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, Waiver Decision, 26 July 2018, WT/L/1039 (extending the waiver as of 1 January 2019 through 31 December 2024).

450 See e.g. UNSC Res 1459, 28 January 2003, UN Doc S/RES/1459 and UNGA Res 57/302, 30 April 2002, UN Doc A/RES/57/302.

non-conflict diamonds may be traded between Kimberley participants. In addition, all trade between participants and non-participants is banned. The scheme contributes to maintaining peace and security and preventing human rights violations by preventing rebels from financing their weapons through the diamond trade. The waiver shields the measures adopted under the KPCS from claims of illegality under WTO law.<sup>451</sup> In fact, it exempts such measures from the MFN treatment obligation and the prohibition of quantitative restrictions.

While the waiver was welcomed as a successful way to compose diverging interests, namely international peace and security on the one hand and free trade on the other, Pauwelyn has convincingly highlighted the fact that international trade law itself already had all of the relevant flexibilities to reconcile the conflicting interests. Therefore, for Pauwelyn, waivers 'risk ... sending out the wrong signals, confirming a WTO superiority complex.'<sup>452</sup> Nonetheless, they have the merit of reaffirming the importance of non-economic values within international economic law. Moreover, waivers could be envisaged to shield urgent measures adopted by states to safeguard their intangible cultural heritage and cultural practices.

More recently, India and South Africa proposed a waiver to ensure that, during the COVID-19 pandemic, IP protection could not prevent timely, universal, and affordable access to, and development of, related health products including vaccines.<sup>453</sup> Many countries backed the proposal arguing that it would help save lives by allowing developing countries to produce their COVID-19 vaccines at a low cost. At the 12th WTO Ministerial Conference in Geneva, Member States agreed on a deal that temporarily removed IP barriers around patents for COVID-19 vaccines.<sup>454</sup> While this agreement did not waive IP on all essential COVID-19 medical tools and did not apply to all countries, it contributed to the global fight against the pandemic.

States also have the power to amend treaties adding to, altering, or diminishing existing rights and obligations. The procedures for amending the various WTO agreements are complex and differ according to the agreement and

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451 Joost Pauwelyn, 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for Conflict Diamonds' (2003) 24 *Michigan JIL* 1177–1206.

452 *Id.* 1177.

453 WTO, Council for Trade-related Aspects of Intellectual Property Rights, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment, and Treatment of COVID-19, 25 May 2021, IP/C/W/669/Rev.1 (detailing the proposal).

454 WTO, 12th Ministerial Conference, *Ministerial Decision on the TRIPS Agreement*, 17 June 2022, WT/MIN(22)/W/15/Rev.2.

provision at issue.<sup>455</sup> In practice, ‘the amendment procedure does not make for an efficient mechanism’ of reform, as the process is lengthy.<sup>456</sup> For instance, the first treaty amendment agreed upon by WTO Members—the Protocol Amending the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) adopted in 2005—entered into force in 2017 after two-thirds of the WTO Members deposited an instrument of acceptance with the Director General. Pursuant to the amendment decision, Article 31*bis* and an Annex were added to the TRIPS Agreement. The amendment aims to facilitate access to medicines, enabling members to export medicines produced under compulsory licenses to certain eligible countries.

Treaty texts could be amended to insert cultural concerns explicitly within the tapestry of international economic law, acknowledging the states’ rights and duties to adopt affirmative measures to protect the cultural heritage of minorities and Indigenous peoples, admitting the possibility of considering cultural products as different from other goods, or modifying the text of the general exceptions to include a specific provisions for cultural products.

### 3.5 *Institutional Cooperation*

Neither the World Trade Organization nor the World Bank are the primary international institutions responsible for addressing cultural matters. This task is the province of UNESCO. The United Nations established this specialized agency in 1946 to foster intercultural dialogue and build peace through international cooperation in education, sciences, and culture. Although the WTO and the World Bank are not UN agencies, they have maintained strong relations with the UN and its agencies since their establishment. These organizations have almost the same membership: only a handful of UN member countries are not members of the WTO and the World Bank.

The WTO–UN relations are governed by specific 1995 Arrangements.<sup>457</sup> The WTO Director General participates in the Chief Executive Board which is the organ of coordination within the UN system. In parallel, the United Nations and the World Bank Group signed a Strategic Partnership Framework

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455 WTO Agreement Article X:1–2.

456 Creamer and Godzimirska, ‘Engagement within the World Trade Organization’, 421.

457 Arrangements for Effective Cooperation with other Intergovernmental Organizations–Relations Between the WTO and the United Nations, signed on 15 November 1995.

to consolidate their cooperation in helping countries implement the 2030 Agenda for Sustainable Development.<sup>458</sup>

During the GATT era, institutional cooperation led to win-win outcomes from both trade and cultural perspectives. For instance, UNESCO and the GATT Contracting Parties collaborated on matters of cultural trade, conceptualizing trade as a useful tool to promote access to knowledge and education. The Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials aimed to dismantle customs barriers to cultural goods.<sup>459</sup> Covering books and audiovisual material of an educational, scientific, and cultural nature, the Florence Agreement offers a unique example of inter-institutional collaboration on matters of cultural trade.

Institutional cooperation and coordination between the WTO, the World Bank, and UNESCO can moderate the effects of possible conflicts of norms. Indeed, Article v of the WTO Agreement directs the General Council to 'make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.'<sup>460</sup> These organizations could mutually provide observer status, with each institution allowing the other to witness its deliberations and, in some cases, to have a voice in them. While the World Bank has observer status at the WTO General Council, the WTO has observer status at the World Bank and UNESCO.

Memoranda of understanding could set out the terms by which the World Bank, the WTO, and UNESCO might cooperate in areas of common interest. These organizations could also conduct joint research and analysis, for instance by organizing regular workshops on matters of common interest and publishing the outcomes of the proceedings.<sup>461</sup> In this regard, the WTO Secretariat has developed several publications in collaboration with other counterparts on issues of mutual interest, and already cooperates with UNESCO in matters related to IP and services. Cultural heritage is also increasingly discussed at the WTO annual Public Forum.<sup>462</sup>

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458 The United Nations–World Bank Group Strategic Partnership Framework for the 2030 Agenda, Brief, 23 May 2018.

459 Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials, New York, 22 November 1950, in force, 11 May 1952.

460 WTO Agreement, Article v.

461 For instance, *WIPO–WTO Colloquium Papers* are a peer-reviewed academic journal, published jointly by the World Intellectual Property Organization and the WTO each year since 2010 to examine intellectual property-related topics that are of common concern to the two organizations.

462 WTO, Public Forum 2016, Session 46, Held on 28 September 2016, *Trade and Inclusive Access to Knowledge*.

International economic courts could consult cultural experts when adjudicating cultural heritage-related cases.<sup>463</sup> This type of consultation has already been used: for instance, panels have consulted with officials of the World Health Organization (WHO) when adjudicating cases relating to public health.<sup>464</sup> For instance, in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (EC—GMOs)*, the Panel sought and received information from several international organizations.<sup>465</sup> Institutional cooperation can certainly be improved by building more explicit legal bridges between UNESCO and the WTO.

In conclusion, the WTO, the World Bank, and UNESCO have already established some institutional relations with each other. This culture of cooperation needs to be enhanced to make international economic law more permeable to cultural concerns to respond to current challenges and evolve in conformity with other international law instruments.

#### 4 Conclusions

The development of international economic law poses a challenge for international lawyers, as it raises the question of whether or not international economic law is clinically isolated from public international law. The question is clearly linked to the debated topic of whether public international law is a fragmented system or not. Adopting a unitary approach, this chapter advocates the importance of achieving coherence among the different sources of international law when adjudicating cultural heritage-related disputes. This chapter has investigated several legal tools that both *de lege lata* and *de lege ferenda* may help adjudicators and policy-makers to reconcile the different interests at stake.

463 See Christopher Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO' (2006) 9 *JIEL* 553–574, 571.

464 *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Panel Report, 7 November 1990, BISD 37S/200, para.5; *Australia—Certain Measures concerning Trade-marks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Reports of the Panels, WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R, 28 June 2018, paras 1.58–1.62. But see *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, Appellate Body Report, WT/DS406/AB/R, 4 April 2012, para. 11 (noting that 'the Division did not deem it necessary to request assistance from the WHO.')

465 *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (EC—GMOs)*, Panel Report, WT/DS291/R, 29 September 2006, para. 7.31.

*De lege lata*, investment treaties and the WTO-covered agreements should not be considered self-contained regimes but important components of public international law. Thus, international economic law has to be consistent with international law. In parallel, international economic courts can consider cultural entitlements within the current framework of international economic law. Arbitral tribunals, WTO panels, and the AB are of limited jurisdiction and cannot hold states liable for breach of their cultural obligations unless they receive the mandate to do so. Rather, they can only determine whether the protections in the relevant investment treaty or WTO-covered agreements have been breached.

However, this does not mean that cultural heritage should be irrelevant in the context of trade and investment disputes. In many circumstances, international law is the law applicable to the given disputes according to the arbitral clause or the relevant treaty provision. Even in those cases where the applicable law is the law of the host state, it is worth recalling that national legal systems are permeated by international law, be they monist or dualist systems. Therefore, when arbitrators apply national provisions that reflect international law norms, the boundaries between the international and the national planes become blurred. Where peremptory norms of international law matter in the context of adjudication, adjudicators must consider these fundamental norms. In particular, arbitral tribunals, WTO panels, and the AB can and should interpret international economic law in conformity with *jus cogens* and state obligations under the United Nations Charter. International economic law must also be interpreted in light of customary rules of treaty interpretation, thus considering 'any relevant rules of international law applicable in the relations between the parties.'<sup>466</sup> Traditional tools of treaty interpretation may contribute to reconciling trade, foreign investment, and cultural heritage, as well as to gradually humanizing of international economic law.

*De lege ferenda*, treaty-driven approaches to cultural heritage protection can be envisaged. Such text-driven approaches rely on the periodical renegotiation of international agreements. Since international investment treaties are renegotiated from time to time, there is scope for inserting *ad hoc* clauses such as cultural exceptions within these treaties. Analogously, the WTO-covered agreements are not written in stone; rather, rounds of negotiations regularly take place, and WTO members have adopted interpretative statements, waivers, and even amendments to better accommodate non-trade concerns into the fabric of the WTO.

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<sup>466</sup> VCLT Article 31.3.c.

# Conclusions

I am human and nothing human is alien to me.<sup>1</sup>



Cultural heritage can be an engine of growth and welfare, being central in wealth creation and people's lives, and enriching their existence in both material and immaterial sense. Cultural heritage is real wealth, something humans value in life, reflecting the diversity of cultures to which all peoples contribute and enriching the fabric of the international community as a whole. It is a legacy for everyone as it reveals the past and yields a sense of identity for present and future generations. The effective protection of cultural heritage can benefit all humanity. Governing cultural resources in their diversified forms, international cultural heritage law includes extremely diverse components and constitutes a good example of legal pluralism. The almost universal ratification of UNESCO instruments indicates that the international community perceives the protection of cultural heritage as an important public interest.

In parallel, international economic law has become a sophisticated field of international law. International economic activities and their regulation are social phenomena and have pervasive effects on everyday life.<sup>2</sup> As traders and investors 'cross boundaries,' 'settle in new communities,' and commercialize their products and services, international trade and foreign direct investments are 'part and parcel of social life.'<sup>3</sup> By regulating global economic interactions, international economic law has a pervasive character, having an impact on the life of local communities worldwide.

International economic law broadly protects investors' and trading nations' rights to encourage foreign direct investment and free trade. A potential tension exists when a state adopts cultural policies interfering with foreign investments and free trade, as this may breach international investment and

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1 Terence, *Heauton Timorumenos*, Act 1, scene 1, line 25, in Terence, *The Comedies* Peter Brown (trans.) (Oxford: OUP 2010)

2 Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed.) *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge 2013) 3.

3 *Id.* 9.

trade law provisions. Therefore, foreign investors and trading nations can seek compensation for the impact of such regulation on their economic interests. Because international cultural heritage law does not include compulsory dispute settlement mechanisms, cultural heritage-related disputes have gravitated toward international economic courts.

The linkage between trade, investment, and heritage poses challenges and opportunities for international cultural heritage law, international economic law, and general international law. From the perspective of international cultural heritage law, the magnetism of the WTO DSM and arbitral tribunals has put cultural governance to a test. On the one hand, it shows its lack of dedicated heritage courts and tribunals. Concerns remain with regard to the effectiveness of cultural governance, as international economic courts have a limited mandate and cannot adjudicate the eventual violation of international cultural heritage law unless they receive the mandate to do so. There is a risk that arbitral tribunals and WTO courts dilute or neglect significant cultural aspects, eventually emphasizing economic interests. These tribunals may not constitute the most suitable courts for settling cultural heritage-related disputes. The institutional structure of international economic courts, their processes, and the outcomes they sanction are far from what would be required of a body to which cultural heritage authority could be entrusted.

On the other hand, the review of domestic regulations by international economic courts can improve good cultural governance and the transparent pursuit of legitimate cultural policies. The WTO DSM and arbitral tribunals impose schemes of good governance by requiring the respect of international economic law provisions and by adopting general principles of law, such as due process. Such review can be in line with good cultural governance as demanded by the relevant UNESCO instruments, in that unrestricted state sovereignty may—and in some cases does—jeopardize the protection of cultural heritage and/or individual entitlements. In fact, requirements such as due process, transparency, and reasonableness can contribute, albeit indirectly, to the protection of cultural heritage and ensure an appropriate balance between public and private interests. Although these requirements are not *per se* specific to the cultural field but are equally applicable in adjudications relating to other interests like environmental protection, their application to the cultural sector helps shape cultural heritage law.

From the perspective of international economic law, international economic courts may face difficulties in finding an appropriate balance between the different interests concerned. They may not have specific expertise on international cultural heritage law, nor do they generally have the mandate to interpret and apply such a field of law. They are tribunals of limited jurisdiction

and cannot adjudicate on eventual infringements of cultural entitlements. They generally lack the jurisdiction to hold states liable for breach of their obligations under international cultural heritage law unless states enable them to do so by including broad jurisdiction clauses in their international investment treaties.<sup>4</sup> Rather, they can only determine whether norms of international economic law have been breached.

This does not mean, however, that international economic courts should not consider cultural entitlements. Rather, the collision between international economic law and other fields of international law can be solved through international economic law itself, albeit to a limited extent. This book identifies two main avenues for integrating cultural concerns into the fabric of international economic law and facilitating the consideration of cultural heritage in international economic disputes.

On the one hand, *de lege ferenda*, since international investment treaties are renegotiated periodically, there is scope for inserting *ad hoc* clauses within these treaties to protect cultural heritage. This process is already underway, as states have inserted references to important values in treaty preambles, exceptions, carve-outs, and annexes. Such provisions protect paramount interests and facilitate tribunals' duty to consider international law when interpreting and applying international investment provisions. Analogously, international trade law is not written in stone; rather, rounds of negotiations regularly take place. Moreover, amendments, waivers, and authoritative interpretations are legal instruments to reconcile conflicting norms and interests.

On the other hand, *de lege lata*, international economic courts can consider cultural entitlements within the current legal framework. The very text of international economic law instruments refers to non-economic values. For instance, international investment agreements have multiple goals usually expressed in their preambles.<sup>5</sup> Analogously, the preamble of the WTO Agreement stresses the importance of 'raising standards of living' and 'sustainable development.'<sup>6</sup> Therefore, such objectives should not be exclusively identified with the increase of foreign investments or trade liberalization.<sup>7</sup> Moreover, according to customary

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4 See e.g. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

5 Brigitte Stern, 'The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate' in José E. Alvarez and Karl P. Sauvant (eds), *The Evolving International Investment Regime* (New York: OUP 2011) 192.

6 Marrakesh Agreement Establishing the World Trade Organization, Preamble.

7 Thomas Cottier, 'Poverty, Redistribution, and International Trade Regulation' in Krista Nadakavukaren Schefer (ed.), *Poverty and the International Legal System* (Cambridge: CUP 2013) 48.

law standards of treaty interpretation as restated by the vclt, adjudicators can interpret international economic law by taking into account other international law commitments of states. Finally, the preamble of the vclt requires international adjudicators to settle disputes ‘in conformity with the principles of justice and international law.’<sup>8</sup>

International economic courts should be sympathetic to *amicus curiae* briefs, particularly those presented by affected Indigenous and local communities, as well as international organizations, accepting them as a matter of course in disputes that can affect their interests. This would enable Indigenous and local communities to have a say in proceedings that can affect them, even though participation as *amici curiae* does not amount to a right. It would also strengthen institutional cooperation between the wto, the World Bank, and other international organizations.

From the perspective of general international law, the debate on the unity or fragmentation of international law has fostered an increasing awareness that there are no self-contained regimes in international law. International economic law and international cultural heritage law are branches of international law, rooted in, and expressing the aspirations of the international community as a whole. The Appellate Body clarified that GATT should not be read in isolation from public international law.<sup>9</sup> The same is undoubtedly true of international investment law.<sup>10</sup> Rather, customary rules of treaty interpretation, as restated by the vclt, can bridge the gap between different legal spaces. According to the principles of systemic interpretation, as restated by Article 31(3)(c) of the vclt, together with the context, international courts should consider any relevant rule of international law applicable in the relationship between the parties. Other interpretive criteria, such as the *lex posterior* and *lex specialis* rules, can also offer additional tools for connecting different subsystems of international law. However, the mechanical use of these criteria should be avoided, as different branches of international law have different aims and objectives and do not entirely overlap. International economic courts are not

8 vclt, preamble.

9 *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (1996), adopted 20 May 1996, at 17. See also *Korea—Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R (2000), at para. 7.96 (establishing that ‘[c]ustomary international law applies generally to the economic relations between the wto Members. Such international law applies to the extent that the wto treaty agreements do not “contract out” from it.’)

10 James Crawford, ‘International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration’, in Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Baden/Baden: Nomos 2011) 22.

courts of general jurisdiction and cannot adjudicate on the eventual breach of international cultural heritage law. However, they may analyze the specific investment and trade claims in the light of the relevant rules of international law applicable in the relationship between the parties. The fact that UNESCO has an almost universal membership and that the relevant UNESCO conventions are widely ratified leads to the conclusion that adjudicators will have to consider cultural concerns. If one deems that the protection of cultural heritage in times of peace already belongs to customary international law or general principles of law, the case for such consideration is even stronger.

This book has surveyed several heritage-related disputes, showing that international economic law has not developed any institutional machinery for the protection of cultural heritage through dispute settlement. After all, international economic law is not intended to protect cultural heritage. However, in recent years a jurisprudential trend has emerged that considers cultural heritage. Arbitral tribunals have paid increasing attention to cultural concerns, holding that they can constitute a legitimate distinction rather than discrimination, or considering cultural elements in their interpretation of international economic law. Arbitral tribunals have increasingly held that only lawful investments are protected under international investment law. Moreover, they have often referred to international law principles and cases in their reasoning. They have not limited themselves to purely economic standards of valuation. The fact that economic standards of valuation are not the only ones that are taken into consideration by arbitral tribunals is distinctive. By neglecting broader cultural concerns, an inward-looking approach may weaken the effectiveness and legitimacy of international economic courts and result in a 'superiority complex' and isolationism.<sup>11</sup> The pathways of distinct subsets of international law are increasingly intersecting. In this manner, arbitral tribunals contribute to the emergence of general principles of law requiring the protection of cultural heritage in times of peace and sustainable development.

Such principles reaffirm that states can legitimately govern and delimit private economic interests to protect cultural heritage. Protecting cultural heritage is a legitimate public policy objective. They also require striking a suitable balance between public and private interests. On the one hand, international cultural heritage law requires the protection of cultural heritage in respect of human rights and fundamental freedoms; on the other hand, international economic law protects the economic interests of foreign investors and traders to promote (sustainable) development. This jurisprudence can reverberate beyond the four corners of international investment law, influencing other international

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11 Joost Pauwelyn, 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for Conflict Diamonds' (2003) 24 *Michigan JIL* 1177–207.

courts and tribunals and even rule-makers. More importantly, this jurisprudence can contribute to the development of common legal principles requiring the protection of cultural heritage in times of peace, sustainable development, and the respect of principles such as legality, fairness, and good faith in cultural governance.

By contrast, WTO panels and the AB have shown a separatist approach, privileging economic theory over legal thinking in adjudicating heritage-related disputes. While such disputes deal with areas at the crossroads between economics and culture, the legal dimension of these disputes cannot be neglected or dismissed in favor of purely economic considerations. Indeed, the hermeneutical pathways adopted by WTO panels and the AB diverge from those adopted by other international courts and tribunals, including arbitral tribunals. Only by ending its splendid isolation can the WTO contribute to the development of international law and promote just, peaceful, and prosperous relations among nations.

This analysis contributes to the current discourse on global governance in three ways. First, it highlights that international economic law has been increasingly humanized and that there is room for further humanization. When arbitrators juxtapose the interests of investors and cultural concerns, not only do they contextualize international investment law in the broader framework of international law, but they also highlight the human dimension of investment law and, albeit indirectly, of international cultural heritage law. In parallel, cultural heritage-related disputes highlight the need to let both international investment law and international cultural heritage law better reflect the interests and values of a wide range of actors, including Indigenous peoples, minorities, and local communities.

Exploring the human dimension of international economic law requires scholars not only to focus on macroeconomic notions of growth and economic theory, but also to consider the impact that international economic activities and their regulation have on the commonweal.

Second, this analysis strengthens the growing cognizance of the importance of effective protection and promotion of cultural heritage and diversity for sustainable development and peaceful relations among nations. In fact, balancing economic and cultural interests and values 'requires that we no longer naturally exclude the latter from our conceptions of international economic law, and that we revalue the values inherent to international economic law.'<sup>12</sup>

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12 Cecilia Flores Elizondo, 'Reflexive International Economic Law – Balancing Economic and Social Goals in the Construction of Law' in Amanda Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law* (Abingdon: Routledge 2013) 127–8.

Third and finally, considering adjudication as a tool of global governance, international economic courts constitute an enchanted citadel where human dignity and cultural values can easily slide into oblivion unless adjudicators remember the fundamental values of international law. Economic thinking does not necessarily orient human behavior: so too, it should not be the guiding light in adjudicating cultural heritage-related disputes. International law provides various legal tools to break the spell of traditional interpretive orientations that privileged economic theory over other values. Only by acknowledging the rich cultural diversity and fundamental values of the international community can international economic courts fulfill their mandate to adjudicate disputes in conformity with justice and international law.<sup>13</sup>

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13 VCLT, preamble.

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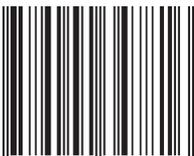
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Can cultural heritage be adequately protected vis-à-vis economic globalization? This book investigates whether and how international economic law governs cultural phenomena by mapping the relevant legal framework, discussing the relevant disputes concerning cultural elements adjudicated before international economic 'courts' (namely the World Trade Organization adjudicative bodies and investment treaty arbitral tribunals), and proposing legal methods to reconcile cultural and economic interests. It thus provides a comprehensive evaluation of possible solutions, including evolution of the law through treaty interpretation and reforms, to improve the balance between economic governance and cultural policy objectives.

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