

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.¹



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.’² 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.’³ 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.⁴

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’⁵ 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.'⁶ 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.⁷

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.⁸ Globalization has been a powerful mechanism for spreading new ideas, cultural products, and processes and providing the funds to recover and preserve cultural heritage.⁹ 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.¹⁰ 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.'¹¹

Nowadays, asymmetry in flows and exchanges of cultural goods can lead to cultural hegemony—domination maintained through cultural means.¹² Some

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].’¹³ The subsequent loss of cultural identity would leave ‘a corrosive absence at the center of human life.’¹⁴ 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.’¹⁵ 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.¹⁶ 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

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.¹⁷ 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.¹⁸

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.¹⁹ 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.'²⁰ 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?

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.²¹ In the past decades, due to the proliferation of international law instruments and supranational institutions in a number of fields, sovereignty has evolved.²² 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.²³

Nowadays, as states have increasingly delegated governmental agency to international institutions in various fields, sovereignty has been articulated in manifold ways and different places.²⁴ 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.²⁵ 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.²⁶ In the past century, the term was used 'in contexts of subaltern resistance and in situations of oppression and marginalization.'²⁷ Cultural entitlements surfaced in international treaties protecting minorities in the aftermath of World War I (wwi).²⁸ Such treaties 'helped deconstruct the sovereign State by legitimizing the claim to an international status of culturally distinct groups.'²⁹ International human rights law has confirmed this status with Article 27 of the Covenant on Civil and Political Rights.³⁰ Nowadays, however, as cultural rights have been recognized and mainstreamed in international law, cultural entitlements

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.³¹ 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.'³² 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.'³³ 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

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.³⁴ In fact, ‘the very success of globalization provides much of the impetus to protect and reinforce the role of states as ... primary value providers.’³⁵

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.³⁶

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

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.’³⁷ 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.³⁸

Nonetheless, it was in the 1930s that autarkic thought achieved its greatest clout across the globe.³⁹ 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.⁴⁰ 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.⁴¹ In Britain, France, Germany, and Italy, movies ‘played a key role in engaging national publics with imperial agendas’ and supporting wars and occupations.⁴² Screen quotas prioritized the exhibition of local films.⁴³ 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.⁴⁴ 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.⁴⁵ The provision enabled countries to support their film industries after the devastation of war.⁴⁶ 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.⁴⁷ 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.'⁴⁸ In parallel, under Article XX of the GATT, states can adopt measures to protect public morals and national treasures of artistic value.⁴⁹ While Article IV and Article XX of the GATT do not constitute 'a culture exception' from the GATT regime,⁵⁰ they demonstrate that

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.⁵¹ 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.⁵² 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.⁵³ 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).⁵⁴

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.’⁵⁵ 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.’⁵⁶ Accordingly, ‘state regulation of entertainment media is cultural policy, an essential means of preserving a nation’s identity, culture, and way of life.’⁵⁷ Such cultural policies can counter cultural imperialism.

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.⁵⁸ Accordingly, policies adopted to preserve local culture constitute ‘backdoor protectionism’, favoring local business and labor under the guise of cultural policy.⁵⁹ Economists highlight the fact that in some cases cultural policies may efficiently increase economic welfare and effectively protect domestic culture.⁶⁰ In other cases, however, such measures impede trade, affect foreign investments, and can be counterproductive for the states adopting them.⁶¹ 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.’⁶² 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.⁶³ 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.⁶⁴ 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.’⁶⁵

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.⁶⁶ NAFTA Article 2106 simply incorporated the cultural exception of CUSFTA—including the retaliation provision.⁶⁷ The USMCA maintains Canada’s cultural industries exception.⁶⁸

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.⁶⁹ 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.’⁷⁰ 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.’⁷¹ At the same time, the CCD clarifies the fact that it only safeguards cultural diversity that does not infringe human rights and fundamental freedoms.⁷²

The CCD aims to safeguard cultures from the threat of homogenization that accompanies the pervasive importation of cultural products, such as books,

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.⁷³ 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.⁷⁴ Such a dialogue should not be narrowed down to a monologue, in which only one position and one opinion prevails.⁷⁵ Rather, the idea of dialogue among civilizations presupposes the existence of distinct albeit interacting cultures.⁷⁶ It derives from the awareness that ‘creation draws on the roots of cultural tradition, but flourishes in contact with other cultures.’⁷⁷ Such intercultural dialogue helps to create an environment conducive to sustainable development and peaceful relations among nations.⁷⁸

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.⁷⁹

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.⁸⁰ In addition, the parties ‘undertake to promote the objectives and principles of this Convention in other international forums.’⁸¹ 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.’⁸²

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.⁸³

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.⁸⁴ Romania withdrew a World Heritage Site nomination due to an ongoing investment arbitration.⁸⁵ 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.⁸⁶ 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.'⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.'⁹⁰

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',⁹¹ or 'the principles of dignity, liberty, equality, and fraternity between human beings.'⁹²

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.⁹³ 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.⁹⁴

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.⁹⁵ Construction and similar economic activities can be delayed, precluded, or canceled for preserving potentially affected world heritage sites.⁹⁶ 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.⁹⁷ As there is no hierarchical relationship between different treaties, governance in this area is left to the adjudicators.⁹⁸

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.⁹⁹ 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

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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² For instance, states can prohibit mining or oil and gas development for safeguarding world heritage sites.¹⁰³ 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.¹⁰⁴

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 authority¹⁰⁵ 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

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.¹⁰⁶ 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.¹⁰⁷

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?¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ 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.'¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ 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.¹¹⁵

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.

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.